(1998) 11 GAU CK 0050

In the Gauhati High Court

Case No : Civil Rule No. 3372 of 1998

Kamakhya Industries Ltd. and Another APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 11-11-1998

Acts Referred:

Assam Finance (Sales Tax) Act, 1956 — Section 11, 20, 9(2), 9(3)
Assam General Sales Tax Act, 1993 — Section 36, 36(1), 36(3), 74
Assam Sales Tax Act, 1947 — Section 19A
Central Sales Tax Act, 1956 — Section 14

Citation : (1998) 3 GLR 414

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : G.K. Joshi, R.K. Joshi and U. Chakraborty, for the Appellant; K.H. Choudhury, for the Respondent

Judgement

J.N. Sarma, J.—This writ application has been filed challenging the legality and validity of the order dated 18.3.97 (Annexure-X) passed by the Respondent No. 5. The brief facts are as follows:

The Petitioner is a Public Limited Company incorporated under the Companies Act, 1956 with its registered office at Guwahati and it engages in the business of manufacture of different articles in its factory at Narangi, Guwahati.

The Petitioner No. 1 is a registered dealer with the Superintendent of Taxes, Unit B under the Assam Finance (Sales Tax) Act, 1956 since repealed with effect from 1.7.93 and the Assam General Sales Tax Act, 1993 brought into force with effect from 1.7.91. The assessment of turnover of the Petitioner Company under the Act of 1956 for the year ending 31.3.88 and 30.9.88 was completed, by the Respondent No. 2 u/s 9(3) of the Act of 1956 and vide its orders of assessment dated 15.5.90 was passed after examination of the Books of account. The turnover of aluminum wire for the period ending 31.3.88 and 30.9.88 respectively was assessed to tax at 4% as declared goods by the Respondent No.

2 as shown in the returns. On 1.8.91, the Respondent No. 2 initiated proceedings for re-opening of the above two periods u/s 11 of the Act of 1956 at the instance of audit objection on the ground that tax on aluminum wire at 4% was erroneous and the same should have been taxed at 12% as electrical goods. Accordingly, turnover of aluminum wire was assessed to tax at 12% in the re-assessment orders dated 1.8.91 passed by the Respondent No. 2 (Annexure-II) to the writ application. Being aggrieved by the above two re-assessments, the Company challenged the same before the Respondent No. 3, Deputy Commissioner of Taxes (Appeals) by filing appeals before him. It was contended on behalf of the Company that bare/naked aluminum wire was sold to a private firm and the same could not be treated as electrical Goods inviting Liability of tax at the rate of 12%. On 1.3.93 the Respondent No. (sic)appellate authority disposed of the appeals filed against two re-assessments by common order and set aside the orders of re-assessment. That order is quoted below as that will be required for the appreciation of the contentions raised in the writ petition.

ORDER

Dated Guwahati, the 1.3.93.

M/s. Kamakhya Industries Ltd. 14B, Mahabir Market, Fancy Bazar, Guwahati filed two appeals under the A.F. (Sales Tax) Act, 1956 (for short the ''Act'') against the orders of re-assessment passed by the Supdt. of Taxes, Guwahati unit-B for P.E. 31.3.88 and 30.9.88. As the grounds of both the appeals are similar, these are disposed off by a common order.

Factural matrix of the case are summed up thus:

M/s. Kamakhya Industries Ltd. 14B. Mahabir Market, Fancy Bazar, Guwahati deals in electrical goods, aluminium wires etc. and is registered under the Act in Guwahati unit office-B. For return periods ending 31.3.88 and 30.9.88 the Appellant filed returns of his turnovers with the payment of admitted tax and was assessed accordingly u/s 9(3) of the Act. Subsequently the orders of assessment were revised at the instance of audit note wherein the rates of taxes on aluminium wire was held to be @ 12% instead of 4% by treating the same as electrical goods and demand raised against which these appeals have been filed.

Shri P.R. Agarwalla, Director appears and contended that the orders of re-assessments are bad in law us well as on facts. He contended that no proper and reasonable opportunity was allowed to the Appellant before revising original orders of assessment and there being no material on records justifying the revision, the revised orders of assessment are liable to be set aside, rag also contended that the Appellant who deals in Aluminium Wire made available all bills and other relevant details to the Supdt. of Taxes who levied taxes @4% treating the item as declared goods correctly and it could not be understood under what circumstances and on what basis or fresh materials be changed his opinion to levy tax @12% and us his action is not justified in law and the assessment is revised in an arbitrary and whimsical manned I impugned revised order of assessments are liable to be quashed. He further contended that the item sold by the Appellant is bare/naked Aluminium Wire to a private firm which cannot be called or treated as electrical cable ever by a man of ordinary prudence. He also contended that the allegation of the learned S.T. that the Appellant deals in Aluminium Wire used as electrical cable, is incorrect and nothing but figment of imagination and the contract of sale, was for bare aluminium wire and the Appellant has only sold that and the same can never be used as electrical cable in itself. He also contented that Section 11 does not allow fresh application of mind on the same issue and the action of the learned S.T. in invoking Section 11 of the Act is not as per provision of the Act and so the revised assessments have no locus standi and should be set aside.

I have very carefully considered the contentions of the Appellant. I have also gone through the documents produced and records of the case. On cane(sic) consideration of the arguments of the Appellant and perusal of records and documents I feel that the contentions of the Appellant are not devoid sufficient force behind them. The Appellant filed returns of his turn over claiming the turnover of aluminium wires as declared goods taxable @ 4% He also produced the books of accounts u/s 9(2) and was assessed by learned S.T. u/s 9(3) of the Act accepting the books of accounts and levying tax @ 4% on the turnovers of aluminium wire. Subsequenty at the instance of audio who opined that aluminium wire is nothing but electrical goods used (sic) cables and as such comes under the purview of electrical goods which is taxable @ 12% and perhaps not 4%, The assessment was reopened and the Appellant was re-assessed u/s 9(3) of the Act read with Section 11 of the Act Section 11 of the Act is analogous to Section 19A of the Assam Sales Tax Act I947. In dealing with similar case u/s l9A of the A.S.T. Act 1947, the Hon''ble Guwahati High Court held u/s 19A, the information which the of receiver is to satisfy that any turnover chargeable to tax has escaped assessment must be information which he receives subsequent to assessment order in order to confer upon him jurisdiction to initiate proceedings under this section. When the information regarding a certain turnover which was not charged to tax was already in the record and the Superintendent knew about it and also referred to the same in the original assessment order, the issue of notice u/s 19A to re-assess the dealer on that turnover is without jurisdiction, It is a case of mere change of opinion about the chargebility of certain turnover to tax and does not confer upon the Superintendent jurisdiction to initiate proceedings u/s 19A Sikaria Sons and Co v. Superintendent of Taxes, Guwahati (1973) 31 STC 25 (Guwahati).'' Again the expression ''information'' in context in which it occures in section, 19A means information or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing in the assessment. Commissioner of Income Tax, Gujarat Vs. A. Raman and Company,

Here the Appellant was assessed u/s 9(3) of the Act treating the turnover of the aluminium wires as declared goods taxable 4%. The ease was reopened and notice u/s 11 of the Act was issued at the instance of audit note which itself is based on the materials already in records of and not on any external sources and the same were already in records which the learned S.T. was well aware. Hence in view of the decisions of the Hon''ble Courts the Appellant was re-assessed on the mere change of opinion of the learned S.T. and not on the information received from external sources From the record I do not come across any material of which the learned S.T. was not aware while completing the assessment u/s 9(3) of the of the Act. Again the original assessment order made by the Supdt. of Taxes may be appealed against by the dealer. If no appeal is filed by the dealer, then that order is binding on both the dealer as well as the Department. The State of Assam and Ors. v. Garodia Bros. (1978) 41 STC 402 (Ghy)''. From the documents produced by the Appellant it is seen that impugned item Aluminium Wire has been sold to the private party e.g. bill No. KIL/21/87-88 dt. 15.2.88 disclose sale of Aluminium Wire to M/s. Assam Industrial Corporation and not electric cable, From the record, I do not come across any material to show that the Appellant sold electrical cables and hence in view of above, the orders of re assessments are not found sustainable in law.

Accordingly the orders of re-assessments are set aside.

2. On 3.1.96 after expiry of about three years, the Respondent No. 4, Deputy Commissioner of taxes. Guwahati Zone-B initiated proceedings u/s 20 of the Act of 1956 read with Section 74 of he Act of 1993 for suo-moto revision of assessment of the two periods. This was done on the basis of notice dated 3.1.96 on the reasoning that the original assessments were found to he erroneous and prejudicial to the interest of revenue. The Company submitted a detailed reply vide petition dated 18.3.96 praying/requesting to drop the suo-moto revisional proceedings. The main thrust was that the orders of re-assessment being subject matter of the appeals merged with the appellate order. As such, no suo-moto revision in respect of the same matter already adjudicated by the appellate authority could be exercised in view of the legal position as provided by the explanation to Section 36(1) of the Act of 1993. It was urged that the suo moto revisional power was exercised after the appointed day i.e. 1.7.93 u/s 36(1) of the Act. The Respondent No. 4 considering the contentions advanced before him disposed of the proceedings vide order dated 3.4.96. The Respondent No. 4 wrote in the letter/order that he did not find any valid grounds to initiate suo-moto revisional proceedings at this stage. That is Annexure-VI to the writ application. The findings inter alia reads as follows:

Probably the audit has misclassified the item of goods treating as aluminium cable instead of aluminium wire.

In view of the above facts, law, and taking into consideration the judgment of the Hon''ble Guwahati High Court, I being the Deputy Commissioner of Taxes. Guwahati Zone-B. do not find any valid grounds to initiate the Suo-moto revision Proceding at this stage.

On 31.7.96 the Respondent No. 5, the Joint Commissioner of Taxes, however, initiated fresh proceedings in respect of the above two return periods u/s 36(1) read with Section 74 of'' the Act of 1993 for suo-moto revision of the appellate order passed by the Respondent No. 3 on 1.3.93 communicated on 19.3.93. The Company was asked to show cause in the matter. That is Annexure-VII to the writ application. The Company submitted a detailed reply vide Annexure-IX. On 18.3.97 the order was received which is annexure-X. That Annexure-X in its entirety is quoted below:

ORDER

Dated, Dispur, the 18th March, 1997.

The dealer M/s. Kamakhya Industries Ltd. Mahabir Market Fancy Bazar Guwahati, is a registered dealer under the Assam Finance (Sales Tax) Act 1956 (since repealed) during the relevant perions i.e. in P.E. 31.3.88 and 3.9.88

During the above two periods, the dealer filed returns of Sales claim (sic) sales of "Aluminium Wire" us declared goods and paid tax @ 4%, the (sic) applicable for the goods declared to he of special importance in inter-se trade of commerce.

Though the dealer was originally assessed by the assessing officer treating the "Aluminium Wire", as declared goods, subsequently he was re-assessed treating the said goods as Electrical wire levying Tax @ 12%, as these aluminium wire was alleged to have been used as electrical wire.

The dealer preferred appeal before the learned Deputy Commissioner of Taxes (Appeals, Guwahati against the assessments of levying 12% tax. The learned Deputy Commissioner of Taxes (Appeals) Guwahati disposed of the appeal holding, inter-alia, that the aluminium wire sold by the dealer were not Electrical wire and not liable to be taxed @ 12% He set aside the said assessments and by implication held that the aluminium wire were to be taxed as declared goods.

Section 14 of the Central Sales Tax Act, 1956 listed certain items as goods of Special importance in the inter-State trade or commerce. Item No. (iv), (xv) u/s 14 listed the following goods.

Wire rods and wire rolled, drawn, galvanised, aluminium, tinned or coated such as by copper. The principal item under item (iv) is of course iron and steel.

Hence, it is quite evident that only the iron and steel wire which are alluminised are to be treated as declared goods.

But what the dealer dealt in was pure aluminium wire. In fact he was a manufacturer of aluminium wire and these were sold to Assam State\\electricity Board.

There, it appears to me that the learned Deputy Commissioner of Taxes (Appeals had erred in holding the aluminium wire sold by the dealer as declared goods and the Appellate orders and the consequential re-assessments orders for the above two periods treating the aluminium wire as declared foods are found to be erroneous in so far it is prejudicial to the interest of the Government revenue.

In the face of above, I initiated suo-moto revisional proceedings u/s 36(1) of the Assam General Sales Tax Act, 1993 read with Section 36(1) of the Assam General Sales Tax Act, 1993 read with Section 74 of the said Act. The dealer was served with a notice vide No. CGST-1/96 (1)/EA/9 dt. 31.1.96, disclosing the above facts and giving him an opportunity of being heard in this regard.

Though sufficient time and opportunity were allowed, the dealer failed to avail of the same and did not comply with the show-cause notice.

In view of the above discussion, and after careful consideration of the relevant records. I am inclined to hold that the goods i.e. aluminium wire sold by the Staler were pure aluminium wire and not alluminised iron and steel wire and hence the same cannot he treated as declared goods as envisaged u/s 14(iv)(xv) of the Central Sales Tax.

With this observation, I hereby set aside the Appellate Orders passed by the learned Deputy Commissioner of Taxes (Appeals), Guwahati in this regard and direct the assessing officer to re-assess the dealer again as per provision of the law.

3. It is the legality and validity of this order which has been challenged in this writ application. I have heard Mr. G.K. Joshi, learned Advocate for the Petitioners and Mr. K.H. Choudhury, learned Addl. Sr. Govt. Advocate, Assam for the Respondents. An affidavit-in-opposition was filed and the records were produced at the time of hearing. The learned Counsel for the Petitioners makes the following submissions:

i) Exercise of suo-moto power of revision u/s 36(1) of the Assam General Sales Tax Act, 1993 by the Respondent No. 5, Joint Commissioner of Taxes in respect of the matter or issue already considered and decided in the appeal proceedings is arbitrary, illegal, without jurisdiction and not tenable in law since such exercise of power is not permitted by the Explanation to the aforesaid Section 36(1) itself.

ii) Assuming though not agreeing that suo-moto power of revision u/s 36(1) of the Assam General Sales Tax Act, 1993 can be exercised in spite of the Explanation being a part of the above section, exercise of such power in the present case by the Respondent No. 5, the Joint Commissioner of Taxes is not maintainable in law on account of the under-noted reasons:

(a) Suo-moto power of revision having once been exercised already by the Respondent No. 4, the Deputy Commissioner of Taxes in the present case in respect of a matter or issue, such power cannot be re-invoked in respect of the same matter or issue by the Respondent No. 5, the Joint Commissioner of Taxes.

(b) Suo-moto power of revision once exercised, stands exhausted and re-exercise of the said power on a mere change of opinion docs not have any legal sanction or authority.

iii). Without prejudice to the above and in the alternative even agreeing that aluminium wire is not a declared goods within the meaning of Sub-clause (xv) of Clause (iv) of Section 14 of the Central Sales Tax Act, 1956 so as to be liable to rax at the rate of 4% under the Assam General Sales Tax Act, 1993. aluminium wire is also not electrical goods within the meaning of Item No. 16 of the Schedule of Assam Finance (Sales Tax) Act, 1956 so us to be liable to tax at the rate of 12% since the same could only be liable to tax at the rate of 8% as being other goods within the meaning of Item No. 3 of Schedule II to the Assam Sales Tax Act, 1947.

iv). In any view of the mattter levy of interest in the present ease arising on the non-payment of tax in respect of turnover of aluminium wire is not tenable in law.

4. At the beginning it must be stated that Sri Joshi. learned Counsel for the Petitioners party submits that aluminium is not a declared good within the meaning of Sub-clause (xv) of Clause (iv) of Section 14 of the Central Sales Tax Act, 1956 so as to be liable to tax at rate of 4% under the Assam General Sales Tax Act, 1993, aluminium wire is also not electrical goods within the meaning of Item No. 16 of the schedule of Assam Finance (Sales Tax) Act. 1956 so as to be liable to tax @ 12% since the same could only be liable to be taxed at the rate of 8% as being other goods within the meaning of Item No. 3 of Schedule II of the Assam Sales Tax Act, 1947.

5. In order to appreciate the contention, let us have a look at the relevant section i.e. Section 36(1) of the Assam General Sales Tax Act, 1993 which is quoted below:

36. (1) The Commissioner may call for and examine the records of any proceeding under this Act and if he considers that any order passed therein by any person appointed under Sub-section (1) of Section 3 to assist him is erroneous insofar as it is prejudicial to the interesis of the revenue, he may, after giving the dealer or the person to whom the order relates an opportunity of being heard and after making or causing be made such enquiry as he deems necessary, pass such order as the circumstances of the case justify, including an order enhancing or modifying the assessment of tax or penalty or cancelling such order and directing that a fresh order should be made. I Provided that no order under this sub-section shall be made after the expiry of eight years from the end of the financial year in which the order sought to be revised was made.

Explanation- The provisions of this Sub-section shall apply, notwithstanding that the order sought to be revised has been made the subject of any proceeding by way of appeal in respect of matters. not actually considered and decided in such proceedings.

(emphasis supplied)

Sub-Section 3 of Section 36 gives the power to the Commissioner to delegate the power to any officer appointed to assist him, but he must be an officer not below the rank of the Deputy Commissioner and in view of this Sub-section, on 14th September. 1993, a notification was issued delegating the power to the Deputy Commissioner of Taxes. Guwahati Zone-A. Deputy Commissioner, Guwahati Zone-B and Deputy Commissioner, Zone-C have been given the power to revise the orders passed by officer below them. Section 74 of the Act of 1993 provides for Repeals and savings. It further provides that any action taken under the Old Act shall be deemed to he valid action.

6. The power of revisional jurisdiction is exercised for the interest of State us well as the assessment. The essence of revisional jurisdiction lies under the duty of the superior officer entrusted with such jurisdiction to see that the subordinate officers can he kept within bounds prescribed by law and they do their duly required to be done and that they do it in legal manner. That jurisdiction is in essence superintendence and control in appropriate eases. But this power must be exercised within the bounds of statute and not beyond it. In Section 36 it is provided that power of revision cannot be initiated by Commissioner if certain matters have been considered and decided by the appellate authority, I have quoted above the appellate order and the appellate authority came to the categorical finding that do not come across any maievia to show that the Appellant sold electrical cables and hence in view of above, the orders of re-assessments are not found sustainable in law. After that when the matter went to Deputy Commissioner of Taxes. Guwahati Zone-B he found that there was no valid grounds to initiate the Suo-moto revision proceedings at this stage. Thereafter, this power was exercised by the Respondent No. 5 and it is urged that is without the valid law. In support of this contention, Sri Joshi. learned Counsel for the Petitioner places reliance in Orient Paper Mills Vs. State of Orissa and Others, This is a case from Orissa High Court. Two things have been pointed out in that decision the Orissa High Court (i) As a concept of law, it is unthinkable that a quasi-judicial authority having delegated his quasi-judicial function to a subordinate or co-ordinance authority shall again revise the order passed by that authority.

In paragraph 8 of the judgment the Orissa High Court pointed out as follows:

As a concept of law it is unthinkable that a quasi-judicial authority having delegated his quasi-judicial function to a subordinate or co-ordinate authority shall again revise the order passed by that authority. An identical question arose for consideration before the Gujarat High Court in a case reported in 1982 50 STC 322; 1981 Tax LR 2965 Ashwin Industries v. Deputy Commissioner of Sales Tax, Baroda), According to Section 67(1) of the Gujarat Sales Tax Act the Commissioner has power of revision of any order passed by any officer appointed to assist him on his own motion. According to Section 27(2) of the aforesaid Act, Deputy Commissioners, Assistant Commissioners and Sales Tax Officers were appointed to assist the Commissioner. According to Sub-section (5) thereof, the Commissioner is authorised to delegate powers in favour of a Deputy Commissioner and after such delegation the Deputy Commissioner is authorised to perform all functions of the Commissioner delegated to him. According to sub-section (7) thereof, the State Government can delegate functions of the Commissioner to Additional Commissioners. In view of the aforesaid provisions, it was held that suo-moto power of revision delegated to the Additional Commissioner or the Deputy Commissioner can be exercised by them and their orders passed in revisions cannot further be revised by the commissioner.

In the case there was a set of rules which authorised such exercise of power by the Commissioner. But the Orissa High Court pointed out that rule is exfatcic unsupportable.

The next case is (1994) 94 STC 190 (State of Andhra Pradesh v. T.G. Lakshmalah Setty and Sons) Where the Supreme Court pointed out as follows:

Any order validly made does not become void or illegal by subsequent declaration of law. The suo-moto power was conferred on higher authorities to correct errors of law or to correct Improper or irregular procedure or illegality in the procedure, to safeguard the interest of the revenue, as there was no express power given to the State, to file an appeal against order of assessment.

This law is binding on me, but at the same time, the question is that whether there can be suo-moto exercise of power of revision as in the case in hand, (iii) The Central India Spinning and Weaving and Manufacturing Company, Limited, The Empress Mills, Nagpur Vs. The Municipal Committee, Wardha, In this case the Supreme Court in paragraph 5 inter alia pointed out as follows:

In construing these words of the statute if there are two possible interpretations then effect is to be given to the one that favours the citizen and not the one that imposes a burden on him.

(iv) (1978) 41 STC 402 The State of Assam and Ors. v. Garodia Brothers and Anr. This is a case from this Court where this Court considered the earlier Act of 1956. This Court pointed out that once an order is passed which is binding on the department, the department cannot challenge such an order.

7. That being the position of law, I hold that the impugned order dt. 18.3.97 (Annexure-X) to the writ application is bad in law and the same shall stand set aside and quashed. But I direct that the Company shall be liable to pay tax at the rate of 8% and not at the rate of 4% as assessed.

8. The learned Advocate for the Respondents urges that Section 36(1) may he read down along with other sections, I do not find any force in this contention as much as the statute has created a definite bar and that being the position, this contention of the learned Counsel for the Respondents cannot be accepted.

9. The writ application is accordingly disposed of by quashing the Annexure-X. But at the same time, I direct the Company to pay tax @ 8% within 2 months without interest as it is not declared goods, but that comes within the definition of other goods within the meaning of Item 3 of Schedule II of the Assam Sales

Tax Act. I make no order as to costs.

