
(2019) 02 GAU CK 0102
In the Gauhati High Court
Case No : Revn.Pet. 1, 2 Of 2017

M/S Numaligarh Refinery Ltd

APPELLANT

Vs

State Of Assam And 2 Ors

RESPONDENT

Date of Decision : 28-02-2019

Acts Referred:

Assam Entry Tax Act, 2001 — Section 2(f), 3
Orissa Entry Tax Act, 1949 — Section 2 (J), 3
Kerala Act, 1993 — Section 2(d)

Citation : (2019) 02 GAU CK 0102

Hon'ble Judges : A. S. Bopanna, CJ; Arup kumar Goswami, J

Bench : Division Bench

Advocate : V. Lakshmikumaran, Y. Aldak, B. Sharma, D. Saikia, B. Gogoi

Final Decision : Dismissed

Judgement

A.S. Bopanna, CJ

1. Heard Mr. V. Lakshmikumaran, learned senior counsel assisted by Mr. Y. Aldak and Mr. B. Sharma, learned counsel for the petitioner. Also heard

Mr. D. Saikia, learned senior counsel assisted by Mr. B. Gogoi, learned Standing Counsel, Finance & Taxation for the respondents.

2. The petitioner in both these petitions is the same and the issue raised is also the same inasmuch as the similar judgments dated 07.12.2015 passed

by the Assam Board of Revenue, Guwahati (â??Revenue Boardâ? for short) in case Nos.31SRA/15 and 59STA/15 is assailed in these two petitions.

Hence, both these petitions are taken up together, heard and disposed of by this common order.

3. The brief factual matrix is that the appellant is a company incorporated under the Companies Act. It is a registered dealer under the Assam Value

Added Tax Act, (â??VAT Actâ? in short), Central Sales Tax Act and Assam Entry Tax Act (â??Entry Tax Actâ? for short). The petitioner is

engaged in the business of refining crude oil procured from M/s Oil India Ltd. and M/s ONGC Ltd. through the installed pipelines.

4. Since, the crude oil purchased by the appellant from the said entities which are located in another local area would enter the local area as defined

under the Entry Tax Act, the issue is with regard to the payment of appropriate quantum of entry tax for the assessment years 2011-12 and 2012-13.

The fact that the petitioner is an importer as defined under the Entry Tax Act and that it is liable to pay the entry tax on the crude oil procured from

Oil India Ltd. and ONGC Ltd. is not in dispute. However, the only issue that has been raised for consideration is as to whether the respondents can

collect the entry tax based on the value of invoice which also includes the Value Added Tax (â??VATâ?? for short). In that light, since the

assessment order dated 04.04.2015 had included the VAT paid on the purchase of crude oil also as a component to collect the entry tax payable, the

petitioner claiming to be aggrieved had filed the appeal before the Revenue Board. The Revenue Board, on considering the rival contentions was of

the opinion that the assessment as made by including the VAT amount also for the purpose of calculation of the entry tax, is justified. In that view, the

petitioner claiming to be aggrieved by the same is before this Court in these petitions.

5. From the contentions as urged, the fact that the petitioner is purchasing crude oil from Oil India Ltd. in the instant case and the same is supplied

through pipeline from Duliajan to the refinery of the petitioner at Numaligarh is the accepted position and the said two places are situated in different

local area is the factual position. The position is also that the petitioner is liable to pay the entry tax as the crude oil supplied from one local area will

enter another local area though through the pipeline, thus making the petitioner liable to pay the entry tax. The charging Section under the Entry Tax

Act, namely, Section 3 of the Act which provides for levy of tax states that there shall be levy and collection of the entry tax on the entry of the

specified goods into any local area for consumption, use or sale therein at the rate respectively specified against each item in the Schedule. The entry

tax shall be leviable on the import value of these specified goods and shall be paid by every importer of such goods. The contention on behalf of the

petitioner is that the import value as provided for the specified goods ought not to include the VAT paid by the petitioner on the imported crude oil.

6. The term imported value for the purpose of taxation is as contained in Section 2 (f) of the Entry Tax Act which reads as herein under:

(f) "Import value" means the value of goods specified in the Schedule as ascertained from the original invoice and includes the charges paid or

payable for insurance, excise duty, freight charges and all other charges incidentally levied on the purchase of such goods:

Provided that where the import value is not ascertainable on account of non-production or non-availability of original invoice, or where invoice

produced is proved to be false, or if such goods have been procured or obtained otherwise than by way of purchase, the import value shall be

determined on the basis of fair market value of such goods;

(emphasis supplied)

7. Further contention on behalf of the petitioner is that though VAT at the rate of 5 % is included in the invoice, the same is attracted only at the sale

point after the petitioner received the crude oil at Numaligarh and the other process with regard to the actual quantity and quality is decided and the

imported crude oil is ready for further process by the petitioner. In that view, it is contended that as per the understanding between the petitioner

which is an importer and its supplier, the crude oil is sent through pipeline and at the entry point to the local areas, the VAT is not attracted and, as

such, the value of the imported crude oil at the point of entry into local area less the VAT amount indicated in the invoice is to be taken for the

purpose of levying the entry tax. In that regard, it is contended that the phrase "all other charges incidentally levied on the purchase of such

goods" contained in Section 2(f) of the Entry Tax Act cannot be considered as permitting the respondents to include the VAT paid on the crude oil

under the phrase "other charges" when the VAT by itself is not specified in the provision. In order to draw a distinction, the learned senior

counsel for the petitioner has referred to Section 2 (J) contained in the Orissa Entry Tax Act wherein VAT has been specifically included under the

definition of purchase value. It is in that light contended that when there is no such specific indication in the Entry Tax Act, the levy on entry tax even

on that component is not justified.

8. The contention on behalf of the respondents is that firstly, as per the provision as contained in Section 2 (f) of the Entry Tax Act, it provides for the value of the goods ascertained from the original invoice as the import value. In that light, it is contended that in a circumstance where in the instant case the invoice for the crude oil supplied as at Annexure-P-I indicates the value by including the VAT at the rate of 5%, the requirement under the Act would get attracted and the entry tax would become liable to be paid by the petitioner on such value. Even otherwise, when as per the contract the supply of crude oil is made through the pipeline and vendor is situated at Duliajan, one local area and the petitioner is in Numaligarh, another local area, which admittedly are two different local areas, the sale of the crude oil from one local area and purchase of the same in another local area would attract the entry tax on the entire value including the VAT. In such circumstance, the petitioner cannot create or carve out an artificial entry point to contend that the value that is to be ascertained at such point alone is payable. The purchase at Numaligarh is made and the price of the purchased commodity is paid by the petitioner which would also include the VAT and therefore, the demand as made is justified.

9. In the light of the above, a perusal of the provision as extracted supra would indicate that the import value means the value of goods specified in the Schedule as ascertained from the original invoice and includes the charges as specified therein i.e. insurance, excise duty, freight charges paid or payable. Thereafter it states that, and all other charges incidentally levied on the purchase of such goods which would also mean paid or payable. The question is as to whether the VAT which is included in the invoice though not taken as the invoice value as contained in the first part of the provision, would fall under the other charges incidentally levied on the purchase of such goods. The fact that the petitioner is liable to pay VAT on the crude oil purchase cannot be in dispute. If that be so, the issue is as to which of the points should be considered as the entry point when the purchase is made in the local area of Numaligarh.

10. The learned senior counsel for the petitioner has very vehemently articulated his argument by referring to a self serving diagram which is reproduced here under. The two local areas are depicted and the periphery of Numaligarh is indicated as the entry point by marking it as A??A??

and contended that the liability to pay VAT would arise only at Numaligarh Refinery at Golaghat marked as 'A' after further process whereas, the entry tax is chargeable at point 'A' after it is despatched from point 'O' :

11. It is his contention that after several other procedures are followed after the entry at point 'A' relating to the evaporation report, the goods which are not as per specification and a final analysis is made, the VAT would become payable at point 'N'. In that light, to contend that the value of the goods at the entry point alone can be the basis, the learned senior counsel for the petitioner seeks to rely on the decision of the Hon'ble Supreme Court in the case of State of Karnataka and Another vs. M/s Hansa Corporation, (1980) 4 SCC 697 wherein it is held as herein under:

'38. Two minor subsidiary points were sought to be made en passant by Mr. S. T. Desai and a brief mention of them would be in order. It was

urged that there is a certain amount of vagueness in Section 3 inasmuch as no light is thrown by the words of the section or the other provisions of the

Act on the question as to computation of tax to be made at specified percentage ad valorem without specifying which price is to be taken into

consideration for levy of tax, namely, the sale price or the purchase price of the concerned scheduled goods. It was said that sale price and purchase

price of a dealer would be different and in the absence of any guideline in the charging section or any other provision in the Act it would lead to

arbitrary determination or computation of tax by taking "in one case sale price of the scheduled goods and in another case purchase price". The

contention overlooks the specific guideline to be found in the charging section itself. The taxing event is the entry of scheduled goods into a local area.

The tax becomes payable on the entry of scheduled goods in a local area. Therefore, the price of the scheduled goods at the time of entry paid by the

dealer who is the importer of goods within the scheduled area would be the ad valorem price on the basis of which tax would be computed. No

subsequent rise or fall in price has any relevance to the computation of the tax. The charging section says that the tax shall be levied and collected on

the entry of scheduled goods in a local area at specified percentage not exceeding two per cent ad valorem. Therefore, the price of the scheduled

goods at the time when the tax becomes chargeable irrespective of the fact that it would be computed at a later date when the dealer submits his

return as required by the other provisions of the Act, would be the price for computation of tax. And there is no ambiguity or any vagueness in this

behalf. There is thus specific guideline in the charging section itself for taking into account the price according to which tax would be computed. The

High Court negated this contention by observing that it would be open to the dealer to choose either the sale price or the purchase price whichever is

favourable to him for computation of his liability to tax. This approach overlooks the specific language of Section 3 which clearly indicates what price

is to be taken into account for computing the tax. When the goods are brought within the local area they have a certain price. The price may be the

price which the importer of goods has paid before bringing the goods within the local area. Even if the dealer is the manufacturer of goods at a place

outside the local area and brings the goods within the local area he must have determined the price of the goods. Therefore, the dealer has some

specific price of the scheduled goods which are being brought within the local area at the time of entry in the local area and the entry being the taxing

event that would be the price which alone can be taken into account for computing the tax ad valorem. Therefore, we find it difficult to agree with the

reasoning adopted by the High Court in rejecting the contention but for the reasons hereinabove mentioned the contention is devoid of merits and

accordingly it must be negated.

12. In that background it is contended that the Honâ??ble Supreme Court has held that the taxing event happens when the scheduled goods are

brought within the local area and the entry tax becomes payable on the entry of the scheduled goods into the local area and not the purchase value

which may increase due to various factors. Hence, he further contends that it is held that the price of the scheduled goods paid at the time of entry by

the dealer who is the importer of the goods within the scheduled local area would be the value for ad valorem tax to be computed. No subsequent rise

or fall in price has any relevance to the computation of the entry tax. However, from the decision cited supra, it is noticed that what was in issue

before the Honâ??ble Supreme Court was the challenge to the validity of the Karnataka Tax on Entry of Goods into Local Area for Consumption,

Use and Sale Therein Act, 1979. In the circumstance where a contention was raised that the provision as contained is arbitrary, ultra-vires inasmuch as there is no certainty with regard to the value that would be taken for the purpose of charging the ad valorem entry tax, the High Court in that context had left it to the option of the purchaser to pay the ad valorem entry tax either on purchase value or the sale value, whichever is beneficial to the purchaser. The Honâ??ble Supreme Court in that context, had arrived at the conclusion that the value to be taken cannot be indefinite as permitted by the High Court. While considering the provision, it was therefore held that the actual entry of the goods to the local area would be relevant for the purpose of determining the value to be considered for levy of entry tax thereby negating the arbitrariness or uncertainty in manner of imposing the entry tax. Hence, the said decision being an authority to the extent of stating that the entry tax is chargeable on the value to be determined on entry of the goods into the local area does not determine the components that are to be taken into consideration for determining the value at the time of entry into local area.

13. In the instant case, the fact of the entry of goods into the local area is not in dispute but the question is as to whether the entry point could be created at the point marked â??Aâ?? as per the diagram (supra) only to avoid the entry tax being levied including the VAT as indicated in the invoice when crude oil continues to pass through the pipeline without any check being made at point â??Aâ??. The learned senior counsel for the petitioner has also relied on the decision of the Honâ??ble Supreme Court in the case of Union Carbide India Ltd. v. Collector of Central Excise, Calcutta, 2003(158)ELT 15 (SC) to contend with regard to the distinction in the terms of â??valueâ?? â??priceâ?? and â??costâ??. However, we notice that the issue was considered in the context of excise duty wherein the assessee had already paid the duty on granules which was used for manufacture of batteries. In that context, relating to the cost of production it was observed that it cannot be proceeded on the basis as if the granules was obtained for the first time.

14. The learned senior counsel for the respondents would, on the other hand, rely on the decision of the Honâ??ble Supreme Court in the case of State of Kerala and Others vs. Fr. William Fernandez and Others (2017) 12 SCC

463. In the said case, amongst others, the issue which also arose for consideration is as to whether Section 2(d) read with section 3 of Orissa Entry Tax Act, 1949, Section 2 (d) read with section 2 (d) of Kerala Act, 1993 and Bihar Act, 1993 never intended to levy any entry tax on the goods entering into the local area of the State from any place outside the territory of India. In that light what was further considered also is as to whether in the definition of purchase value as contained in the Entry Tax legislations in question, non-inclusion of custom duty is indicator of fact that the legislature never intended to levy entry tax on the imported goods. In that background what was considered is that under the provision, to determine the import value, whether "custom duty", though was not included as one of the items in the Section, can also be included for the purpose for determining the value for charging the entry tax by bringing it under the "other charges" contained in the Section. The Hon'ble Supreme Court in that regard having taken note of the definition of purchase value and after noticing that "custom duty" was not included specifically, was of the opinion that, thirdly, other charge incidental to the purchase of such goods is provided for. It was noticed that the original invoice of the bill of the Schedule goods generally included the entire value including the import duty or custom duty and in any event, the inclusion of all other charges incidental to the purchase of such goods necessarily means all charges including custom duty which is incidental to the purchase. It was, therefore, held that in such case the non-inclusion of "customs duty" specifically in the definition of purchase value is inconsequential and cannot lead to mean that the legislature never intended to include the imported goods under the Entry Tax legislation. The Hon'ble Supreme Court in that regard had taken note of its earlier decision in the case of Garware Nylons Ltd. v. Pimpri Chinchwad Mahanagar Palika and Ors .(1995) 3 SCC 345 wherein the inclusion of "custom duty" despite not being mentioned in the Rule had arisen for consideration. Therefore what flows is that not only the entry tax is leviable on the imported goods but would also include custom duty on such goods for determining the value for the purpose of entry tax.

15. The learned senior counsel for the petitioner, no doubt, sought to distinguish the said decision by contending that in the case of custom duty, the same is payable when it enters territorial waters and as such the custom duty is

already included when the goods enter the local area for the purpose of levy of entry tax. He contends that unlike the said position, in the instant case, as repeatedly contended, at the point of entry to the local area VAT is not attracted and therefore, the consideration made therein would not cover the instant case.

16. Though such contention is put forth we have already taken note that an entry point to be created only because it is the periphery of the local area

would not be justified when the delivery of the crude oil is through pipeline. Hence, the point of delivery in the local area will have to be considered as

the entry of goods to the local area. If that be the position, even if the contention that the processing is to be done at the refinery and only thereafter

VAT would be payable is taken note of, when as per the decision of the Honâ??ble Supreme Court, the same is also incidental to the purchase,

irrespective of the fact as to whether the same is included in the invoice or not it would get attracted. The value of the VAT also would, therefore, get

included in the import value for the purpose of processing the entry tax as it would fall under â??other charges incidentally levied on the purchase of

such goodsâ? which is paid or payable. Though with reference to the invoice it was contended that as per the invoice at Annexure-P-I in Revision

Petition No.2/2017, the billing period is shown as 01.04.2014 to 30.04.2015 and the invoice is drawn subsequently on 13.05.2014 and, in that light, it is

contended that the supply is during the period from 01.04.2014 to 30.04.2014 and the same at that point had not attracted the VAT but it became

payable only subsequently on 13.05.2014 by which time it has already entered the local area, the said contention would not be acceptable as the

payment of VAT is incidental to the purchase of goods and would fall under the â??other chargesâ? which has been indicated in the Section and is

either paid or payable. Further on these factual distinctions sought to be made based on the quality and quantity of the goods being different at the two

different point and in that view the purchase value being different, no documents were laid before the original or appellate authority.

17. Hence, if all the above aspects are kept in perspective, we are of the opinion that the orders impugned herein do not call for interference.

18. Accordingly, the revision petitions being devoid of merit are dismissed with no order as to costs.