
(2012) 03 GAU CK 0027

In the Gauhati High Court

Case No : Writ Petition (C) No. 5391 of 2010, W.P. (C) No's. 5451 and 5473 of 2010

Pawan Industries

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 21-03-2012

Acts Referred:

Assam Value Added Tax Act, 2003 — Section 10, 12, 12(iii), 5(2)(a)(ii), 7
Central Sales Tax Act, 1956 — Section 5(1)
Constitution of India, 1950 — Article 269

Citation : (2013) 58 VST 281

Hon'ble Judges : A.K. Goeal, C.J.;C.R. Sharma, J

Bench : Division Bench

Advocate : B.P. Todi, A. Todi and A. Nath, for the Appellant; R. Dubey, Standing Counsel, Finance Department and D. Saikia, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Goeal, C.J.—This order will dispose of W. P.(C) No. 5391 of 2010, W.P. (C) No. 5451 of 2010 and W.P. (C) No. 5473 of 2010, as all the three petitions involve common question of validity of levy of purchase tax on the transaction of turnover of purchase of raw material, i.e., oil-seeds referable to oil-cake transferred outside the State on consignment basis in which event no sales tax is attracted. According to the petitioner, the oilcakes being merely by-product, in the course of production of oil, cannot be subjected to levy of tax. In W.P. (C) No. 5391 of 2010, Which is identical to other petitions, the petitioner is a dealer registered under the provisions of the Assam Value Added Tax Act, 2003. It purchases mustard seeds which are used for manufacturing of oil and the oil is sold in the local market. The by-product, i.e., oil-cakes are disposed of by way of stock transfer on consignment basis outside the State of Assam.

2. The assessing authority, in the course of assessment for the assessment year 2006-07, sought to levy purchase tax oh the proportionate purchase value of the

mustard seeds referable to the production of oil-cakes u/s 12(iii) of the Act as follows:

The dealer is paying the output tax u/s 10 against sale of mustard oil within the State. The second product mustard oil-cake is disposed of by the dealer by way of stock transfer to its appointed agents in the State of Tripura. Out of total stock of mustard seed used in the manufacturing of mustard oil-cake a part comprises locally procured mustard seed from unregistered dealer without payment of VAT. As per section 12(iii) of the Assam Value Added Tax Act, 2003 the dealer is found liable to purchase tax at four per cent on the proportionate purchase value of locally procured mustard seed, from unregistered dealer without payment of VAX which was used as raw material in the manufacturing of mustard oil-cake which was subsequently stock transferred to outside the State (Tripura).

3. Aggrieved by the above, the petitioner filed a revision petition before the Commissioner of Taxes, which has been dismissed with the following observations:

In the course of hearing the learned senior advocate for the petitioner admitted that mustard oil-cake is mentioned in certificate of registration of the petitioner as a commodity being dealt by the petitioner along with mustard oil. He also agreed that the value of mustard oil-cake procured is more than 30 per cent of the value of mustard oil produced in the process of manufacture.

The value of mustard oil-cake is significant part of total turnover of the petitioner, it cannot be considered as wastage as claimed by the petitioner. Although mustard oil-cake is not the main product of the process of manufacture, but it is also a product of manufacture. Further, the petitioner has got mustard oil-cake included as a commodity dealt by it. Hence, the petitioner cannot claim it to be wastage.

4. The contention raised in the petition is the intention of the Legislature is to collect tax on purchase of goods where no tax is leviable on sale u/s 10. In the present case, the petitioner is paying tax on the sale of oil which is manufactured from the mustard seeds and oil-cake was merely by-product. The proportionate value of purchase turnover of mustard seeds referable to value of oil-cakes, produced therefrom, could not be subjected to purchase tax as manufacture of oil-cakes is automatic. Reliance has been in a situation where sales tax is not attracted, the levy of purchase tax was certainly permissible on oil-seeds. Reliance has been placed on the judgment of the honourable Supreme Court in *Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc.*, and the judgment of the Punjab and Haryana High Court in *Shri Krishna Oil and General Mills Vs. State of Punjab*, passed in GSTR No. 63 of 1997, decided on January 22, 2009.

5. The question for consideration is whether when oil-cakes are disposed of in a situation where sales tax is not attracted u/s 10, the oilseeds referable thereto will be covered by levy of purchase tax under the provisions of section 12.

6. To appreciate the issue in hand, reference may be made to the statutory provisions in sections 10 and 12:

10. Levy of tax on sales.--(1) Every dealer, who is liable to pay tax for any year u/s 7, shall pay output tax on his taxable turnover for such year--

(a) in respect of goods specified in the Second, Third and Fifth Schedule, at every point of sale of such goods within the State, at the rate or rates specified therein; and

(b) in respect of goods specified in the Fourth Schedule, at the first point of sale of such goods within the State, at the rate or rates specified therein;

12. Levy of tax on purchases.--Every dealer who in the course of his business purchases any taxable goods from any person, in the circumstances in which no tax u/s 10 is leviable on the sale price of such goods, shall be liable to pay tax on the gross turnover of purchase of such goods, if after such purchase, the goods are,--

(i) used or disposed of in any manner other than by way of sale in the State; or

(ii) consumed or used in the manufacture of tax free goods specified in the First Schedule; or,

(iii) consumed or used in the manufacture of taxable goods, and such manufactured goods are disposed of otherwise than by way of sale in the State or in the course of inter-State trade and commerce or export out of the territory of India, or

(iv) despatched to a place outside the State other than as a result of sale in the course of inter-State trade or commerce or export out of the territory of India;

and such tax shall be levied at the same rate at which tax u/s 10 would have been levied on the sale of such goods within the State on the date of such purchase.

7. A reference to section 12 shows that when the petitioner purchases taxable goods, namely, mustard seeds and in respect of turnover referable to the production of oil-cakes disposed of by way of stock transfer, no tax u/s 10 was leviable, levy of purchase tax u/s 12 is clearly attracted.

8. As regards judgment in Steel Authority of India Ltd., the same relates to leviability of excise duty under the Central Excise Act, 1944 on scrap which was by-product in the course of production of iron and steel. On facts noted in the said judgment, scrap was chargeable to nil rate of duty and the question was whether the inputs used for production of steel qualified for exemption when duty was paid on the production of steel and scrap was merely a by-product. The stand of the Revenue was that since scrap was exempted from tax, the exemption notification will not apply to the inputs in view of condition for exemption that the product should not be exempted from the tax. This plea of

the Revenue was not accepted. The said judgment is distinguishable as the scheme of exemption of inputs of exempted excisable goods is different from the concept of purchase tax.

9. The concept of purchase tax has been discussed in *Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc.*, as under (pages 142 and 143 in 88 STC):

91.... If, however, the manufactured goods are sold within the State, no purchase tax is collected on the raw material, evidently because the State gets larger revenue by taxing the sale of such goods. (The value of manufactured goods is bound to be higher than the value of the raw material). The State Legislature does not wish to--in the interest of trade and general public--tax both the raw material and the finished (manufacture) product. This is a well-known policy in the field of taxation. But where the manufactured goods are not sold within the State but are yet disposed of or where the manufactured goods are sent outside the State "(otherwise than by way of inter-State sale or export sale) the tax has to be paid on the purchase value of the raw material: The reason is simple if the manufactured goods are disposed of otherwise than by sale within the State or are sent out of the State (i.e., consigned to dealers own depots or agents), the State does not get any revenue because no sale of manufactured goods has taken place within Haryana, In such a situation, the State says, it would retain the levy and collect it since there is no reason for waiving, the purchase tax in these two situations. Now coming to inter-State sale and export sale, it may be noticed that in the case of inter-State sale, the State of Haryana does get the tax revenues--may not be to the full extent. Though the Central sales tax is levied and collected by the Government of India, article 269 of the Constitution provides for making over the tax collected to the States in accordance with certain principles. Where, of course, the sale is an export sale within the meaning of section 5(1) of the Central Sales Tax Act (export sales) the State may not get any revenue but larger national interest, is served thereby. It is for these reasons that tax on the purchase of raw material is waived in these two situations. Thus, there is a very sound and consistent policy underlying the provision. The object is to tax the purchase by a manufacturer of goods whose existence as such goods is put an end to by him by using them in the manufacture of different goods in certain circumstances. The tax is levied upon the purchase price of raw material, not upon the sale price--or consignment value--of manufactured goods....

10. Relying on the said scheme, the Punjab and Haryana High Court in *Shri Krishna Oil and General Mills Vs. State of Punjab*, passed in GSTR No. 63 of 1997 decided on January 22, 2009, dealt with identical question of levy of purchase tax on the purchase of oil-seeds referable to production of oil-cakes, as follows (pages 234-237 in 35 VST):

It is thus evident that section 4B applies only on those cases where- (i) the goods are purchased like raw material by a dealer liable to pay tax under the Act

in the State, (ii) the goods so purchased cease to exist as such goods for the reason they are consumed in the manufacture of different commodities and (iii) such manufactured commodities are either disposed of within the State otherwise than by way of sale or despatched to a place outside the State otherwise than by way of an inter-State sale or export sale. In other words, if such manufactured goods are not sold within the State of Punjab, but yet disposed of within the State then no tax is payable on such disposition. Likewise where manufactured goods are despatched out of State as a result of an inter-State sale or export sale, no tax is payable on such sale. Again where such manufactured goods are taken out of State to manufacturers own depots or to the depots of his agents then no such tax is payable-on such removals. The question which has arisen is whether purchase tax would be payable when the event of purchase takes place or at any later stage?

In the present case, the cotton seed purchased by the dealer-petitioner was subjected to manufacturing process. It resulted into extraction of oil which was the primary product. However, it also brought into existence the oil-cakes (khal). The undisputed facts are that the oil so extracted and a part of oil-cakes were sold in the State of Punjab and on account of the provisions made in section 5(2) (a)(ii) of the Act such sales were not to be included in the taxable turnover. However, purchase tax on such purchases made by the dealer-assessee is leviable u/s 4B of the Act in respect of those transactions which are not to be included in the taxable turnover u/s 5(2)(a)(ii) of the Act. The sale of oil-cakes outside the State of Punjab is not covered by any of the clauses of section 5(2)(a) (ii) of the Act. Therefore, the event of tax would come into existence on such purchases of the cotton seed to the extent the by-product oil-cakes has been sold outside the State of Punjab, The aforesaid view is fully supported by the judgment of the honourable Supreme Court in the case of Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., .

The honourable Supreme Court was considering section 9 of the Haryana General Sales Tax Act, 1973 (as it stood then). The honourable Supreme Court has also opined that provisions of section 4B of the Act are similar in material particulars to that of the provisions of section 9 of the Haryana Act and therefore we are of the view that the views expressed in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., would apply to the provisions of the Punjab Act as well. While overruling the view taken by it in the earlier judgment in the case of Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, , it has been held that taxable event is the purchase of raw material which is subjected to manufacturing process in the hands of the last purchaser. The aforesaid view is discernible in para 91 of the judgment and is extracted hereunder (at page 142 of 88 STC):

Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, takes

only the last eventuality and holds that the taxable event is the removal of goods from the State and since such removal is to dealers' own depots/agents outside the State, it is consignment, which cannot be taxed by the State Legislature. With the greatest respect at our command, we beg to disagree. The levy created by the said provision is a levy on the purchase of raw material, purchased within the State which is consumed in the manufacture of other goods within the State. If, however, the manufactured goods are sold within the State, no purchase tax is collected on the raw material, evidently because the State gets larger revenue by taxing the sale of such goods. (The value of manufactured goods is bound to be, higher than the value of the raw material). The State Legislature does not wish to--in the interest of trade and general public--tax both the raw material and the finished (manufactured) product.

The aforesaid reasoning has been found to be based on a sound policy in the field by taxation. Explaining the policy, their Lordships have observed as under:

This is a well-known policy in the field of taxation. But where the manufactured goods are not sold within the State but are yet disposed of or where the manufactured goods are sent outside the State (otherwise than by way of inter-State sale or export sale) the tax has to be paid on the purchase value of the raw material. The reason is simple: if the manufactured goods are disposed of otherwise than by sale within the State or are sent out of State, (i.e., consigned to dealers' own depots or agents), the State does not get any revenue because no sale of manufactured goods has taken place within Haryana. In such a situation, the State says, it would retain the levy and collect it since there is no reason for waiving the purchase tax in these two situations. Now coming to inter-State sale and export sale, it may be noticed that in the case of inter-State sale, the State of Haryana does get the tax-revenue may not be to the full extent. Though the Central sales tax is levied and collected by the Government of India, article 269 of the Constitution provides for making over the tax collected to the States in accordance with certain principles.

It is further appropriate to mention that the object of charging section is to tax the purchase of goods by the manufacturer. The observations completely answer the argument raised by the counsel for the petitioner that the disposal of oil-cakes (khal) outside the State of Punjab on consignment basis would not attract the levy of purchase tax as it is a consignment sale. In that regard the observations made in para 91 are extracted in extenso which reads thus (at page 143 of STC):

The object is to tax the purchase of goods by a manufacturer whose existence as such goods is put an end to by him by using them in the manufacture of different goods in certain circumstances. The tax is levied upon the purchase price of raw material, not upon the sale price--or consignment value--of manufactured goods. Would it be right to say that the levy is upon consignment of manufactured goods in such a case? True it is that the levy materialises only when the purchased goods (raw material) is consumed in the manufacture of

different goods and those goods are disposed of within the State otherwise than by way of sale or are consigned to the manufacturing-dealer's depots agents outside the State of Haryana. But does that change the nature and character of the levy ? Does such postponement--if one can call it as such--convert what is avowedly a purchase tax what is on raw material (levied on the purchase price of such raw material) to a consignment tax on the manufactured goods ? We think not. Saying otherwise would defeat the very object and purpose of section 9 and amount to its nullification in effect. The most that can perhaps be said is that it is plausible (as pointed out by Ranganathan, J. in his separate opinion) to characterise the said tax both as purchase tax as well as consignment tax. But where two interpretations are possible, one which sustains the constitutionality and/ or effectuates its purpose and intendment and the other which effectively nullifies the provision, the former must be preferred, according to all known canons of interpretation..

The provisions of section 4B of the Act fell for consideration before a three-Judge Bench of the honourable Supreme Court in the case of M/s. Devi Dass Gopal Krishan Pvt. Ltd., etc. etc., Vs. State of Punjab and another etc. etc., . After considering the provisions of various other Acts and noticing the judgment of the honourable Supreme Court rendered in the case of Mukerian Papers Ltd. Vs. State of Punjab, , the honourable Supreme Court held that there was no conflict between Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., and Mukerian Papers Ltd. Vs. State of Punjab, . The view has been expressed in para 6 of the judgment which reads thus (at page 176 of 95 STC):

Now coming to the merits of the contention, we are of the considered opinion that there is no reason to take a view different from the one taken in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., . All the contentions urged now have been considered and dealt with in the said decision. In our opinion, the approach adopted in Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, does not accord with the scheme, intendment and language of the relevant provisions of the Haryana and Bombay Acts and cannot be accepted.

A further perusal of the judgment in M/s. Devi Dass Gopal Krishan Pvt. Ltd., etc. etc., Vs. State of Punjab and another etc. etc., ; [1994] Supp 2 SCC 59 would show that the honourable Supreme Court has Upheld the validity of section 4B of the Act holding that the State is fully empowered to levy purchase tax and has adopted the same reasoning as adopted in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., .

The argument that the levy created by the purchase tax levied by section 4B (or any other similar section in respect of other States) has really been on manufacture of goods and therefore not a tax referable to entry 54 of List II of the Seventh Schedule to the Constitution was rejected and the contrary argument that such provision merely levies pure and simple purchase tax on the

raw material, like cotton seed in the present case, was accepted. Therefore, the legislative competence of the State Legislature to levy purchase tax u/s 4B of the Act has been upheld. Once the aforesaid position is clear from the various judgments of the honourable Supreme Court then the first question of law deserves to be answered against the dealer-assessee and in favour of the Revenue especially when taxable event is the purchase of cotton seed which in the hands of oil-mill is the last stage of purchase.

11. The second consequential question was also considered and it was held that the proportionate turnover of seeds referable to oil cake could be split up from the total turnover of purchase:

12. The issue in the above judgment is identical with the issue with which we are concerned. We do not find any reason to differ from the above view.

13. According, we do not find any reason to interfere with the order passed by the statutory authorities levying purchase tax on the purchase value of oil-seeds referable to the production of oil-cakes which is disposed of by way of stock transfer in a situation where on sales tax is attracted. The petitions are dismissed.