
(1995) 04 GAU CK 0002

In the Gauhati High Court

Case No : Civil Rule No. 1185,1188, 1098 to 1102, 1190,1089, 1241 and 1278 of 1995

Santosh kumar harlalka: Jaspal Rupani: Raitani Engineering Works: Atul Bora: Bhowrilal Agarwalla: Technocom: Ns Construction Company: **APPELLANT**

Vs

State of Assam and Ors. **RESPONDENT**

Date of Decision : 03-04-1995

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 27, 27

Citation : (1995) 1 GLJ 333

Hon'ble Judges : D.N.Baruah, J

Bench : Single Bench

Advocate : K.K.Gupta, S.Kejriwal, R.K.Agarwal, C.Barua, B.P.Todi, A.K.Saraf, S.K.Kejriwal, Advocates appearing for Parties

Judgement

1. The above Civil Rules involve common questions of facts and law, therefore, I propose to dispose of these Civil Rules by a common judgment.

2. Petitioners in these petitions challenge the letter No.6591 dated 5.8.93 issued by the 3rd respondent the Superintendent of Taxes, Unit D, Guwahati, directing the General Manager (Construction), NF Railway, Maligaon, to deduct taxes at source from the payment to be made to the petitioners bills, and also the letters issued by the 4th respondent the Financial Adviser and Chief Accounts Officer (Construction) NF Railway instructing the Railway authorities to deduct taxes with retrospective effect.

3. The facts for the purpose of disposal of these Civil Rules may be stated as follows : The petitioners in these Civil Rules are Railway contractors. During the course of execution of work, petitioners submit running bills and the Railway Administration makes the payment on the basis of the running bills. However, in pursuance of the letters dated 5.8.93 issued by the 3rd respondent and 9.3.95 issued by the 4th respondent, the 5th respondent the General Manager

(Construction), NF Railway, Maligaon, Guwahati, decided to deduct Assam General Sales Tax at source @ 2% with retrospective effect. The petitioners have challenged the actions of the respondents. Hence the present petitions.

4. I have heard Mr.C.Baruah, learned counsel appearing on behalf of the petitioner in Civil Rule No. 1185 of 1995; Dr. AK Saraf, learned counsel appearing on behalf of the petitioners in other Civil Rules mentioned above and Dr. BP Todi, learned Government Advocate, Assam, on behalf of the 1st to 3rd respondents.

5. At the outset the counsel appearing on behalf of the petitioners submit that they do not press the question of validity of sections 27f 8 (1) (e) and 8(3) (iv) of the Assam General Sales Tax Act, 1993 at this stage though they challenged in the petitions and further prayed that these points may be kept open.

6. The contention of the learned counsel for the petitioners is that the 3rd respondent has no jurisdiction to give direction to 4th respondent to deduct sales tax at source as the rate and the manner of deduction of tax at source have not been prescribed as envisaged in the Assam General Sales Tax Act, 1993 (for short the Act): In this connection, the learned counsel for the petitioners have drawn my attention to section 27 of the Act. Under the said section, every person (not being an individual or a Hindu undivided family) responsible for making any payment or discharging any liability on account of any amount payable for the transfer of property in goods (whether as goods or in some other form) involved in a works contract specified in Schedule VI or for the transfer of the right to use any goods specified in Schedule VI for any purpose are liable to pay sales tax and the authority is empowered to deduct tax at source.

7. Subsection (b)(i) of section 27 runs thus :

"27. (1) (b) Every person responsible for paying sale price or consideration or any amount purporting to be the full or part payment of sale price or consideration in respect of any sale or supply of goods liable to tax under this Act to the (State) Government or to a Company, Corporation, Board, Authority, undertaking or any other body by whatever name called, owned, financed or controlled wholly or substantially by the (State) Government, or a public company shall, at the time of credit to the account of or payment to the payee of such amount in cash, by cheque, by adjustment or in any other manner whatsoever, deduct tax therefrom in the prescribed manner at the prescribed rate."

8. The learned counsel for the petitioners submit that rate and manner have not been prescribed by the respondents, therefore, the authority have no jurisdiction to give direction for deduction of tax at source as indicated. The counsel for the petitioners further submit that the Government having not prescribed the manner and the rate, issuance of notices are without jurisdiction and liable to be struck down. The 4th and 5th respondents also cannot act on the basis of an illegal notice issued by the 3rd respondent.

9. Dr. Todi, on the other hand, supports the action, of 3rd respondent. He submits that the 3rd respondent has jurisdiction to issue such notices. The proposed action of 3rd, 4th and 5th respondents is just, proper and in accordance with the provisions of law, therefore, this Court may not interfere with the said action. The learned Government Advocate further, submits that the intention of the law making authority is patent from the section 27 of the Act to the effect that the tax can be deducted at source in the manner as proposed by the 3rd respondent. Therefore there is nothing wrong in taking action by the respondents. Dr. Todi also has drawn my attention to subsection (2) of section 27. According to him tax to be deducted as per Schedule VI of the Act.

10. On the rival contentions of the counsel for the parties, it is to be seen whether the action of respondent No.3 in issuing the notice is without jurisdiction and whether respondent Nos.4 and 3 can deduct tax at source at the instance of respondent No.3.

11. Section 27 (b) of the Act makes special provisions relating to deduction of tax at source in certain cases as I indicated above. From mere reading of the said section it is apparently clear that for deducting tax at source the authority must prescribe the manner and the rate. Dr. Todi very candidly submits that no rate has been prescribed. Schedule VI has been made in terms of section 8 (1) (e). Section 8 (1) (e) of the Act relates to any transfer of property in goods (whether as goods or any other from) involved in a works contract of the nature specified in Schedule VI, at the rate or rates specified in that Schedule. On persual of Schedule VI and section 8 (1) (e), I do not find that the Schedule indicates at what rate the tax to be deducted at source. Dr. Todi after going through the provisions of law submits that no rate has been prescribed. However, he made an attempt to show that Rule 35 of the Assam General Sales Tax Rules (for short the Rules) prescribe the manner by which the tax at source to be deducted.

12. Rule 35 (1) is quoted below :

"35: Deduction of tax at source (1) No deduction of tax as prescribed in section 27 shall be made in respect of exempted category of goods as listed in Schedule I of the Act or in case of sale of goods where such sale is certified by the Assessing Officer as being exempted from tax. Such certificate shall in variably be embodied in each bill to be presented for payment."

13. A bare looking of Rule 35(1) it is clear that rule making authority has prohibited deduction of tax at source. Thus, in my opinion, cannot be the manner of realisation of tax at source. Therefore, I am of the opinion that as per the "Rules" no rate and manner have been prescribed to deduct tax at source. In the absence of any prescribed rate and manner, the 3rd respondent has no jurisdiction to issue notice dated 5.3.93 directing the 4th respondent to deduct taxes at source and the respondent No.5 has also no authority and jurisdiction to deduct the tax at source in the manner as it is proposed. Therefore, the letter

dated 5.8.93 issued by the 3rd respondent is liable to be set aside as ultra vires.

14. In view of the above discussions, I allow the writ petitions setting aside the notice dated 5.8.93 issued by the 3rd respondent directing the 4th and 5th respondents to deduct tax at source from the payment to be made to the petitioners bill and direct the 4th and 5th respondents not to deduct tax at source on the basis of the impugned notice:

15. However, I make it clear that the authority after prescribing the manner and the rate shall at liberty to deduct tax at source.

16. In the result, the petitions are allowed. However, in the facts and circumstances of the case, I make no order as to costs.