
(2006) 05 GAU CK 0038
In the Gauhati High Court

Sri Jay Kumar Bardia

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 10-05-2006

Acts Referred:

Constitution of India, 1950 — Article 366

Citation : (2009) 3 GLR 766 : (2006) 4 GLT 422 : (2007) 5 VST 210

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The petitioner is aggrieved by the assessment order of the taxing authority under the Assam General Sales Tax Act, 1993 (AGST) and the revisional order thereto. He is also aggrieved by the order of compulsory registration as "dealer" u/s 12 of the Act.

2. The petitioner is engaged in the business of setting up pandal/shamiana including setting of furniture and fixtures, lights, floor covering and similar articles in the name and style of M/s. Chakkeswari Bhandar. The petitioner is the sole-proprietor of the business establishment. According to the petitioner since the business in which he is engaged is in the nature of services for reward and not by way of sale and supply of materials, he is not required to be registered under the provisions of the Act and consequently, is also not liable to any tax.

3. The respondent No. 4, i.e., the Senior Superintendent of Taxes, Silchar, Assam, issued the notice dated November 6, 1995 directing the petitioner to produce the books of account and other related documents by November 16, 1995 for verification and subsequently, by notice dated January 11, 1996, the petitioner was directed to show cause as to why compulsory registration should not be made or effected. The books of account of the petitioner were seized on June 17, 1996 on the ground of petitioner's failure to get himself registered under the Act. After such seizure, the respondent No. 4 issued two notices dated

June 19, 1996 and July 4, 1996 for production of books of account and to show cause why the compulsory registration should not be effected and other penal action should not be taken against the petitioner.

4. The petitioner on July 10, 1996, submitted his reply to the show cause notice dated July 4, 1996 denying his liability of registration and tax under the Act. It is the case of the petitioner that the respondent No. 4 without considering his reply, issued notice dated January 20, 1997 intimating the petitioner that the seized books of account revealed gross turnover of Rs. 1,47,426 during the year 1995-96 and asked the petitioner to show cause as to why he should not be registered u/s 12 of the Act and also as to why the assessment should not be completed imposing 30 per cent penalty u/s 23 of the Act in addition to the tax and interest payable. The petitioner by his reply dated February 4, 1997 reiterated his stand of non-liability for compulsory registration and payment of tax under the Act.

5. The respondent No. 4 issued letter dated February 26, 1997, whereby the registration certificate bearing No. SIL/GST-1613 dated February 14, 1997 effective from April 1, 1995 was sent to the petitioner with direction to submit return. Thereafter, by assessment order dated May 28, 1997 the respondent No. 4 made the best judgment assessment order determining the gross turnover at Rs. 1,47,426 and consequently a total liability of Rs. 7,144 was imposed upon the petitioner along with interest and penalty fixed at Rs. 1,138 and Rs. 1,392 respectively.

6. Being aggrieved by the assessment order passed by the respondent No. 4, the petitioner preferred an appeal before the respondent No. 3 which was rejected by order dated March 23, 1999 holding that the petitioner was liable for registration and payment of tax, being the owner of a tent house and engaged in transfer of the right to use of goods to other persons as a "lessor" and that as per Schedule VII to the Act furniture of all kinds are taxable and that the assessing officer taxed only the furniture and not other goods.

7. The petitioner has preferred the instant writ petition against the aforesaid orders, inter alia, on the ground that his business does not come within the purview of the Act and secondly, the assessment order is not tenable being violative of the principles of natural justice inasmuch as the petitioner was not given sufficient opportunity for submission of returns. According to the petitioner there was no question of passing the assessment order invoking the power to assess the dealer to the best of the judgment of the taxing authority. It will be appropriate at this stage to refer to the relevant provisions of the Act which have been extensively referred to by the learned Counsel for the parties.

2. (19) "lease" means any agreement or arrangement whereby the right to use any goods for any purpose is transferred by one person to another whether or not for a specified purpose for cash, deferred payment or other valuable consideration without the transfer of ownership and includes a sub-lease but

does not include any transfer on hire-purchase or any system of payment by instalments;

(25) "operating lease" means a lease other than a financial lease;

(33) "sale" with all the grammatical variation and cognate expressions means any transfer of property in goods by any person for cash, deferred payment or other valuable consideration, and includes

(i) to (iii) ...

(iv) any transfer of the use of any goods under an operating lease;

(v) to (vi) ...

7. (7) For the purpose of this section "taxable quantum" means:

(i) in the case of a dealer who has more than one place of business in the State or who is an importer or a manufacturer or a casual dealer or a non-resident dealer or an agent of the non-resident dealer or a dealer in whose case the tax is leviable at the point of last purchase.... Nil;

(ii) in the case of a dealer, being a lessor under an operating lease.... Rs. 1,00,000

(iii) in respect of any other dealer or contractor or lessor... Rs. 1,00,000.

8. (1) The tax leviable u/s 7 for any year shall be charged on the taxable turnover during such year-

(a) to (e) ...

(f) in respect of any operating lease as specified in Schedule VII, at the rate or rates specified in that Schedule.

11. (1) Every dealer liable to pay tax under the provisions of this Act shall get himself registered with the assessing officer and shall possess a certificate of registration.

(2) Every dealer required by Sub-section (1) to be registered shall apply for registration to the assessing officer in the prescribed manner and obtain a certificate of registration.

(3) On receipt of an application under Sub-section (2) the assessing officer shall, if he is satisfied after such inquiry as may be deemed necessary that the application is in order, register the applicant.

12. (1) The assessing officer may, in addition to taking any other action under the provisions of this Act, require any dealer who, in his opinion, is liable to registration but has not made an application in this behalf, to apply for registration and register him:

(2) The State Government may by rules provide that such a class of dealers

carrying on business in such goods or such classes of goods as may be specified therein shall also seek registration notwithstanding that they may not be liable to pay tax under this Act if their gross turnover exceeds such limits as may be prescribed.

(3) Registration made under Sub-section (1) or Sub-section (2) shall take effect as if it had been made on application under Sub-section (2) of Section 11.

16. (1) Tax payable under this Act shall be paid in such manner and at such intervals as may be prescribed:

Provided that different intervals may be prescribed for different categories of dealers.

(2) Any payment of tax made under Sub-section (1) shall be accompanied by a statement in the prescribed form of the turnover of the sales or of purchases in respect of which the tax is paid.

(3) Every registered dealer and every dealer who may be required so to do by the assessing officer by notice issued in the prescribed manner shall furnish in addition to the statement or statements, if any, furnished under Sub-section (2) an annual return in the prescribed form accompanied by such statement as may be prescribed within such time as may be prescribed:

Provided that the State Government may by rules framed in this behalf require any dealer or class or classes of dealer to file, apart from the annual return, a quarterly return in such form, in such manner and within such time-limit as may be prescribed.

(4) If any dealer has not furnished a return within the time allowed under Sub-section (3) or, having furnished a return under that subsection, discovers any omission or other error therein, he may without prejudice to the charge of any interest or penalty under Chapter VI furnish a return or a revised return, as the case may be, at any time before the assessment is made and such return shall be accompanied by receipt showing payment of tax due, if any, on the basis of such return.

(5) Every return under this section shall be signed and verified in the prescribed manner,-

(a) In the case of an individual, by the individual himself, and where the individual is absent from India by the individual concerned or by some person duly authorised by him in his behalf and where the individual is mentally incapacitated from attending to his affairs by his guardian or by any other person competent to act on his behalf;

(b) In the case of a Hindu undivided family, by the karta and where the karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family;

- (c) In the case of a company or local authority, by the principal officer thereof;
- (d) In the case of any other association, by any member of association or the principal officer thereof; and
- (e) In the case of any other person, by that person or by some person competent to act on his behalf.

17. (1) to (4) ...

(5) If a dealer fails to furnish a return as required u/s 16 or having furnished the return, fails to comply with all the terms of the notice issued under Sub-section (3), the assessing officer may, to the best of his judgment assess the dealer and determine the tax payable by him on the basis of such assessment:

Provided that before making assessment the assessing officer may allow the dealer such further time as he thinks fit to furnish the return or to comply with the terms of the notice issued under Sub-section (3).

8. Mr. O. P. Bhati, learned Counsel for the petitioner, submitted that a reference to the impugned notices would indicate that in none of the notices there is any mention of "furniture", but on the other hand, the compulsory registration and assessment of tax have been made on furniture in reference to Schedule VII (entry No. 8) of the Act. He also submitted that nowhere in the impugned notices and the orders, it has been disclosed as to how and why the petitioner is liable for compulsory registration and payment of tax. According to the learned Counsel, the transactions of the petitioner do not come within the purview of the definition of Section 2(19) of the Act. He submitted that tax can be imposed only in respect of operating lease and placed reliance on the meaning of the term as defined in Black's Law Dictionary.

9. In addition to the above, Mr. Bhati, learned Counsel for the petitioner, also submitted that even if the petitioner is liable to be registered as a "dealer" under the Act, he ought to have been given sufficient opportunity to have his say in the matter before the assessment order was passed. He submitted that no notice having been issued to the petitioner requiring him to file return and even no notice having been issued before the summary assessment, there was gross violation of the principles of natural justice. According to him, in such situation there was violation of Section 44(3) of the Act. He also placed reliance on the following decisions:

State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., .

Dwijendra Kumar Bhattacharjee v. Superintendent of Taxes [1990] 78 STC 393 (Gau).

10. Mr. D. Saikia, learned Counsel appearing for the Revenue, made submissions in reference to the counter-affidavit filed by the respondents. According to him the petitioner's transaction is covered by the definition of "lease" u/s 2(19) of the Act making him, liable for compulsory registration and tax. He also made

submissions in reference to Sections 8(1)(f), 11 and 12 of the Act. According to him, the seizure of books of account was rightly done as per the provisions of Section 44 of the Act. He also placed reliance on the following decisions to bring home his points of argument:

Harbans Lal and Another Vs. State of Haryana,

Modern Decorators v. Commercial Tax Officer [1990] 77 STC 470 (WBIT).

Aggarwal Brothers Vs. State of Haryana and Another,

HLS Asia Ltd. v. State of Assam [2003] 132 STC 217 (Gau).

Lakshmi Audio Visual Inc. and Another Vs. Assistant Commissioner of Commercial Taxes and Another,

Rohini Panicker v. Additional Sales Tax Officer [1997] 104 STC 498 (Ker).

11. The relevant provisions of the Act centering around which the controversy has been raised and sought to be resolved have been quoted above. The definition of the term "lease" together with the definitions of the terms "lessee" and "lessor" as defined in Section 2(19), (20) and (21), respectively, really clinch the issue at hand. Although learned Counsel for the petitioner strenuously argued that in respect of the transactions, the right to use any goods for any purpose is not transferred so as to bring the same within the purview of the definition of "lease", but the plain and simple meaning of the term squarely covers the kind of transactions with which the petitioner is involved. If that be so, the petitioner becomes the "lessor" and the person hiring the goods becomes the "lessee".

12. Although the terms "furniture" has not been defined, but entry No. 8 of Schedule VII of the Act takes into its fold "furniture of all kinds". Section 8 of the Act deals with the tax leviable u/s 7 for any year. Section 7 makes every "dealer" liable to pay tax. The term "dealer" has been defined in Section 2(10). "Dealer" means any person who carries on the business of selling or purchasing goods in the State and includes a contractor or a "lessor". "Operating lease" as defined in Section 2(25) means a lease other than a financial lease. Section 8(1)(f) speaks of operating lease as specified in Schedule VII.

13. A conjoint reading of all the above provisions leave no manner of doubt that the petitioner being a "dealer" under the Act is liable for registration and payment of tax. The term "operating lease" defined in the Black's Law Dictionary on which the learned Counsel for the petitioner placed reliance reads as follows:

Operating lease. A lease agreement, usually cancelable, which provides the lessee with the use of an asset for a period of time which is considerably shorter than the useful life of the asset. Unlike a capital lease, the lessee in an operative lease does not assume the economic risks of ownership, and the lesser generally provides all of the maintenance and services on the lease asset.

14. When the Act itself provides the definition of "operating lease" for the purpose of application of the provisions of the Act, there is no need to go for any external aid. Even the above-quoted definition is of no help to the case of the petitioner, inasmuch as even if we go by the said definition, the transactions with which we are concerned do satisfy the requirements of the term "lease", which according to the definition of "operating lease" as contained in Section 2(25) of the Act means a lease other than a financial lease.

15. Much emphasis has been placed on the decision of the apex court in *Rashtriya Ispat Nigam Ltd.* [2002] 126 STC 114 : [2002] 3 SCC 314, by the learned Counsel for the petitioner. In that case the transaction in question did not involve transfer of right to use the machinery in favour of the contractors. The respondent therein was the owner of the steel project and for the purpose it allotted different works to contractors. The respondent undertook to supply sophisticated machinery to the contractors for the purpose of being used in execution of the contracted works and received charges for the same. The appellant made provisional assessment levying tax on hire charges u/s 5-E of the Andhra Pradesh General Sales Tax Act, 1957. The respondents filed writ petition seeking declaration that the tax levied, exercising power u/s 5-E of the Act on the hire charges collected during the period 1988-89 was illegal and unconstitutional.

16. The High Court on the basis of the materials on record and upon scrutiny and examination of the relevant clauses contained in the agreement and looking to the agreement as a whole concluded that the transaction between the parties did not involve transfer of right to use the machinery in favour of the contractors and in absence of satisfying the essential requirement of Section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondents from the contractors were not exigible to sales tax. The apex court analysing the various clauses contained in the agreement held that the transaction did not involve transfer of right to use of machinery in favour of the contractors and accordingly upheld the decision of the High Court.

17. The aforesaid decision is in respect of provisions of Section 5-E of the APGST Act which reads as follows:

5-E. Tax on the amount realised in respect of any right to use-goods.-Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realised or realisable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of five paise in every rupee of the aggregate of such amount realised or realisable by him during the year:

Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than Rs. 1,00,000.

18. Apart from the fact that the provisions of the Act with which we are concerned in the present proceeding cannot be said to be in pari materia, the transaction with which the said case was concerned is not the kind of transaction with which we are concerned in the present proceeding. In that case the respondent allotted different works to the contractors for the purpose of some projects with the undertaking to supply sophisticated machinery for the purpose and agreements were executed to that effect. It was in that context and in reference to Section 5-E of the Act, the decision of the High Court was upheld by the apex court. Thus, this case is clearly distinguishable from the fact-situation involved in the present proceeding.

19. In the case of Dwijendra Kumar Bhattacharjee [1990] 78 STC 393, the division Bench of this Court dealing with the best judgment assessment held that the same being a quasi-judicial proceeding, the rules of natural justice must be followed. This aspect of the matter shall be dealt with at a later stage.

20. In the case of Harbans Lal [1993] 88 STC 357, the Punjab and Haryana High Court was concerned with the business of giving tents, kanats, crockery, utensils, furniture, shuttering to the builders/contractors for the purpose of construction of buildings, supply of gas in cylinders and cylinders on returnable basis and giving buses on hire belonging to the petitioner to the third parties. The writ petitions were filed on the issuance of notices by the sales tax authorities for levy of the proposed tax or where the assessing authority has framed initial assessment. Referring to Clause (29A) of article 366 of the Constitution of India, it has been held in the said case that the ambit of entry 54 of List II of the Seventh Schedule to the Constitution, was wide to a considerable extent which provides definition to the "tax on the sale or purchase of goods".

21. In the above case, the High Court was concerned with the provisions of the Haryana General Sales Tax Act, 1973. Section 2(i) of the Act defines "sale" as any transfer of property in goods for cash or deferred payment or other valuable consideration and includes transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration and supply. Dealing with the question as to whether in the situation as stipulated in the petition there would be "transfer of the right to use any goods", the Punjab and Haryana High Court held the petitioners running the business of tent houses liable to pay sales tax. In that case also the petitioners supplied crockery, utensils and furniture for the purpose of holding functions to the consumers.

22. In the above decision, the High Court placed reliance on the decision of the West Bengal Taxation Tribunal in Modern Decorators [1990] 77 STC 470, in which it was held that the tables, chairs, etc., which the decorators let out to their customers were within the meaning of the Act, viz., Bengal Finance (Sales Tax) Act, 1941 and within the definition of "sale". Likewise, in the case of Rohini Panicker [1997] 104 STC 498, the Kerala High Court dealing with the term "sale" and "deemed sale" under the Kerala General Sales Tax Act, 1963 held that the

lending of video cassettes to the members of the library amounts to transfer of right to use such goods for hire and the petitioner would come within the definition of "dealer" and is liable to be taxed.

23. In the case of HLS Asia Ltd. [2003] 132 STC 217 (Gauhati), the conditions of the contract clearly indicated that the petitioner had entered into an agreement/arrangement whereby the right to use all equipment for the purpose of oil logging and perforation was transferred to Oil India on payment of rental charges. It has been held that the contract was a "lease" within the meaning of Section 19 of the AGST Act. In that case also the dispute involved was in respect of taxability of the services rendered by the petitioner-company.

24. The apex court in Aggarwal Brothers [1999] 113 STC 317 (SC); [1999] 9 SCC 182, has affirmed the decision of the Punjab and Haryana High Court in Harbans Lal [1993] 88 STC 357. It has been held that mere transfer of the right to use goods for consideration is sufficient so as to come within the purview of the Act in question and that the transfer of the goods itself is not necessary. It has been held that hiring of shuttering by the owner thereof to builders and contractors for use in construction of buildings constituted deemed sale.

25. All the aforesaid decisions fully support the findings already arrived at about the liability of the petitioner for compulsory registration under the Act and payment of tax for the transactions involved in the business of the petitioner, constituting "lease". This now leads us to the case of Dwijendra Kumar Bhattacharjee [1990] 78 STC 393 (Gauhati), which has been pressed into service to buttress the argument that even if the petitioner is liable to payment of tax, adequate opportunity ought to have been given to him to submit the returns and before the best judgment assessment was arrived at.

26. In the aforesaid case, it has been held that the assessing officer invested with the power to make assessment of tax discharges quasi judicial functions and he is bound to observe the principles of natural justice in reaching his conclusions. It has further been held that the assessing officer cannot rely on any evidence or any fact in arriving at his conclusion without first pointing out the same to the assessee and giving him a reasonable opportunity to meeting the case which is sought to be made out in the assessment order. If an assessment is based on materials, which were not disclosed to the assessee, the order of assessment would be vitiated.

27. Section 16 of the Act deals with the submission of returns and payment of taxes. Section 17 of the Act deals with the assessment. Section 17(5) provides that if a "dealer" fails to furnish a return as required u/s 16 or having furnished the return, fails to comply with all the terms of the notice issued under Sub-section (3), the assessing officer may, to the best of his judgment assess the "dealer" and determine the tax payable by him on the basis of such assessment, provided that before making assessment the assessing officer may allow the dealer such further time as he thinks fit to furnish the return or to comply to the

terms of the notice issued under Sub-section (3).

28. The petitioner was first issued with notice dated November 6, 1995 directing him to produce the books of account and the same was in the context of the petitioner having not registered its firm. This was followed by the notice dated January 11, 1996 to show cause as to why the compulsory registration under the Act shall not be made. Thereafter, the books of account in possession of the petitioner were seized on June 17, 1996 and by notice dated June 19, 1996 the petitioner was directed to produce the books of account. This was again followed by notice dated July 4, 1996 for compulsory registration. Although the petitioner submitted his reply dated July 10, 1996, the Senior Superintendent of Taxes, Silchar, by his notice dated January 20, 1997 intimated the petitioner about his liability to pay tax and asked him to show cause as to why he should not be compulsorily registered and also as to why assessment should not be completed for payment of tax.

29. When the matter rested thus, the Senior Superintendent of Taxes, Silchar, furnished the petitioner with the certificate of registration with liability to submit return with effect from the date of liability by February 20, 1997. Be it stated here that the liability of the petitioner was for the period 1995-96. The petitioner did not do anything in the matter. He also did not ask for any documents and/or materials from the taxing authority and sat over the matter. Situated thus, the impugned assessment order dated May 8, 1997 was passed on the basis of the materials available on record holding the taxable turnover to be Rs. 1,47,426. The revisional order is also in respect of the liability of the petitioner to pay tax upon his compulsory registration.

30. In the aforesaid case of Dwijendra Kumar Bhattacharjee [1990] 78 STC 393 (Gauhati), the petitioner wanted time on the ground that assessment for four years was being taken at a time and it was not possible on his part to furnish the same within the stipulated time. His prayer was rejected without considering the reasons given by him. The returns submitted by the petitioner were rejected noting certain defects in the accounts. The defects were also not brought to the notice of the petitioner to enable him to explain or clarify the same. It was in those circumstances, it was held that the petitioner was denied reasonable opportunity of hearing. It was also found that the assessment was based on pure guess and surmises. Same is not the case at hand. The petitioner was asked to submit his return, which he failed to do. He also did not ask for any time and/or the materials on record. The assessment was arrived at on the basis of the books of account and it cannot be said to be based on mere guess and surmises. The petitioner was aware of the materials.

31. In view of the above, I am of the considered opinion that the aforesaid case of Dwijendra Kumar Bhattacharjee [1990] 78 STC 393 (Gauhati), is of no help to the case of the petitioner. Thus, on the second ground also, the writ petition fails. I do not find any infirmity in the impugned orders.

32. For the foregoing reasons and discussions, the writ petition fails and it is dismissed. There shall be no order as to costs.