(2008) 04 OHC CK 0063

In the Orissa High Court

Studio Sujata — APPELLANT

Vs

Commissioner of Sales Tax — RESPONDENT

Date of Decision : 02-04-2008

Acts Referred:
ORISSA SALES TAX ACT, 1947 — Section 24(1), 24(2)(b), 24(3)

Citation : (2008) 106 CLT 317 : (2008) 1 OLR 953 : (2008) 17 VST 289

Hon'ble Judges : A.K. Ganguly, C.J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

A.K. Ganguly, C.J.—Initially three S.J.Cs. being S.J.C. Nos. 10 of 1997, 8 of 1997 and 9 of 1997 were filed and subsequently renumbered as STREV Nos. 212, 214 and 216 of 2007 respectively. In view of the common questions of facts and law, all the three Revision Applications are heard and disposed of together.

2. The following questions of law arising out of the order passed by the Orissa Sales Tax Tribunal on 8.12.1993 in Second Appeal Nos. 3345 to 3350 of 1991-92 have been referred to this Hon''ble High Court in terms of the order of this Hon''ble Court dated 24.2.1997. The questions are:

(i) Whether on the facts and in the circumstances of the case, the Tribunal is right to held that tax is exigible for photographs as execution of works contract ?

(ii) Whether on the facts and in the circumstances of the case, the conclusion of the Tribunal is perverse due to non-consideration and mis-consideration of facts and law and, therefore, it is liable to be set aside for re-hearing ?

3. The materials facts out of which those questions arise are that the petitioner carries on the business of processing and developing photography. In the usual course of business, the petitioner takes photographs of persons or of family and then develops the negative by employing his skill and labour and then supplies the photographs to the clients. These photographs which are prepared by the petitioner are not commercial items because they are neither purchased nor sold. However, to develop these photographs employment of skill and labour is

essential. It may be mentioned that petitioner does not carry on any sale of photographs of national leaders, God and Goddess.

4. After the passing of 46th amendment of the Constitution of India and consequent amendments thereto in Orissa Sales Tax Act (OST Act), the Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar sent notices to assess the petitioner as an unregistered dealer u/s 12 (5) of the OST Act, inter alia, contending that the petitioner''s activities can be called ''works contract''. Pursuant to said notice, the petitioner gave its reply and appeared before the Sales Tax Officer and produced the books of account and documents including Receipts, Purchase Memos, Vouchers, Ledger and thereby denied its liability under the OST Act. The petitioner also submitted objection petitions on various dates i.e. 28.12.1985, 10.1.1986, 20.2.1986 and 29.2.1988 contending, inter alia, that the petitioner has no sales tax liability under OST Act and the notices, which were issued, are without jurisdiction.

5. Ignoring the said objections of the petitioner, the Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar assessed the petitioner as an unregistered dealer, inter alia, holding that the petitioner is liable to pay sales tax as petitioner has been alleged to carry activities of ''works contract''. Therefore, orders of assessment being dated 29.2.1988 for the years 1984-85 (9/84 to 3/85), 1985-86 and 1986- 87 u/s 12(5) of OST Act and under Rule 5 of the Orissa Additional Sales Tax Rules, 1975 were passed and a tax of Rs. 20,765.00 and penalty of Rs. 5,000.00 totalling to Rs. 25,765.00 was imposed on the petitioner. The petitioner then filed the First Appeal before the learned Assistant Commissioner of Sales Tax. The First Appellate Authority by an order dated 27.9.1991 confirmed the levy of tax under the OST Act, but reduced the penalty to Rs. 1250.00. Thereupon, the petitioner filed the Second Appeal before the Orissa Sales Tax Tribunal, Cuttack. The said Tribunal heard the Second Appeal and in course of hearing, the petitioner raised various contentions. Ultimately, the Tribunal upheld the levy of tax but deleted the penalty.

6. Thereafter the petitioner came up with a reference application u/s 24(1) of the Orissa Sales Tax Act framing certain questions for being referred to the Hon''ble High Court. The said prayer of the petitioner was rejected by the Tribunal. Then the petitioner moved Hon''ble High Court u/s 24(2)(b) of the Orissa Sales Tax Act, 1947 whereupon the High Court directed the Tribunal to state to case and refer the questions u/s 24(3) of the OST Act for a decision of the High Court.

7. Accordingly, the Tribunal stated the case and referred the aforesaid questions for a decision of the High Court.

8. Learned Counsel for the petitioner before the High Court submitted that in the transaction in question, there is no contract of sale between the petitioner and the client. It is only a contract of service and the photographs, which the petitioner produced by supplying the same has no commercial value and are not marketable. So, there is no question of a works contract. It is the consistent

stand of the petitioner that the present photographs which are produced by the petitioner have no utility or value to any other person than the customer. By developing such photographs, the petitioner only renders service to his customers. The customer pays for the service rendered by the petitioner. It is the contention of the petitioner that his activity is similar to that of consulting firm preparing plan and sketches pursuant to client''s specification or professional giving opinion on papers. All those activities are done to serve the client. Therefore, this does not come within the purview of the definition of ''goods'', ''sale'', ''dealer'' or ''works contract''. It is the petitioner''s case that he purchased the goods, namely, papers on payment of sales tax. Further levy of tax on the personal service rendered to the client of the petitioner will amount to double taxation. It is also the contention of the petitioner that the paper which is used in the photography are incidental and insignificant.

9. In support of its contention, learned Counsel for the petitioner has relied on several judgments. First reliance was place on the judgment of the Supreme Court in the case of The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio, of the report, learned Judges of the Supreme Court held that a photographer takes the photograph and develops the negatives and does other photographic work and thereafter supplies the prints to his client. By doing so he cannot be said to enter into a contract for sale of goods. On the other hand, the contract is for use of skill and labour by the photographer to bring about the desired result. Learned Judges held that the job of a photographer is a contract for work and labour and it is not a contract of sale.

10. Reliance was also placed on a judgment of this High Court in the case of Photo Emporium Vs. Additional District Magistrate and Others, in which this High Court followed the ratio of the judgment of the Supreme Court in the case of B.C. Kame. In that case, the stand of the Revenue was disapproved by the Orissa High Court.

11. Similar view was taken in 110 STC 145 in the case of Foto Colour Labs Pvt. Ltd. v. Commercial Taxes Officer where the Tribunal held that the transfer of paper in the photograph is purely incidental and payment is only taken to give positive prints and not to get the photo papers. Therefore, the contract in between the petitioner and his client is not a contract of sale, and neither directly or indirectly works contract is involved in the supply of photo papers. Similar view was taken by the West Bengal Taxation Tribunal in the case of Studio Kamalalaya v. Commercial Tax Officer reported in 89 STC 307.

12. In the case of Bavens v. Onion of India report in 97 STC 161, learned Judges held that when a photographer takes a photograph of his customer, he develops the negative and supplies positive prints in the desired size to the customer. In doing so the photographer uses his own camera and his own film. The negative belongs to the photographer and not to the customer. No basic goods are provided by the customer which are subjected to processing by the photographer so as to make the contract a works contract. There is no accretion to goods or

property or the nucleus of a property which belongs to the customer. It is the skill of the photographer which is most important to get the desired result.

13. Hon''ble Karnataka High Court followed the same principle in the case of Keshoram Surindranath Photo-Mag (P.) Ltd. and Others Vs. Assistant Commissioner of Commercial Taxes (LR), City Division and Others, In that judgment, learned Judges of the Karnataka High Court relied on the judgment of the Supreme Court in B.C. Kame''s case and came to the conclusion that in the job of the photographer in supplying positive prints to his customer, no works contract is involved and photographs are not marketable or saleable commodity and as such no tax can be levied on it.

14. Against the said judgment of the Karnataka High Court, the State of Karnataka High Court filed a SLP before the Hon''ble Supreme Court bearing SLP Nos. 6136-6163 of 2000 and the Hon''ble Supreme Court dismissed the SLP on 20th April, 2000.

15. In the case of Rainbow Colour Lab v. State of M.P. learned Judges of the Hon''ble Supreme Court reiterated its judgment in B.C. Kame''s case and came to the following conclusion:

It is also of common knowledge that the photo prints supplied by them to their customers are not marketable commodities and as goods they have no value.

Hon''ble Supreme Court in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, again reiterated the principle in B.C. Kame''s case and held that the work done by the photographer is only in the nature of a service contract not involving any sale of goods and held that the stand taken by the State cannot be sustained.

16. Learned Counsel for the petitioner submitted that the photographs taken by the petitioner are not goods which can be sold and is not a marketable commodity like any other goods. When the copies of photographs are made out, they have no utility or value to any other person than the customer. It is already admitted that the papers utilized for photographs are tax paid goods. Therefore, it is contended by the learned Counsel for the petitioner that the work of photography does not come within the purview of works contract as defined in Section 2(jj) of the Orissa Sales Tax Act.

17. Learned Counsel for the Revenue in this case virtually did not contest the submission made by the learned Counsel for the petitioner and in support of his contention, learned Counsel for the Revenue relied on a decision of the Supreme Court in the case of Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes and Ors. reported in (2008) 10 SC 236. In that judgment, learned Judges held that since the contract in question is a service contract, it is difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract irrespective of the element of service provided.

For the reasons discussed above, we answer the first question in the negative and the second question, in the affirmative. We thus answer both the questions in favour of the assessee and against the Revenue.

The three revision applications are thus disposed of.

No costs.

B.N. Mahapatra, J.

18. I agree.

