SUPREME COURT OF INDIA

Indian Oil Corporation Ltd.

Vs.

State of Assam

C.A.No.6619 of 2001

(Ashok Bhan,Altamas Kabir and Dalveer Bhandari JJ.)

27.11.2006

JUDGMENT

DALVEER BHANDARI, J.

This appeal is directed against the judgment dated 3.5.2001 passed by the High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh, in Writ Appeal No.36 of 1999. The appellant Indian Oil Corporation Ltd. is a limited company incorporated under the Companies Act, 1956 and a registered dealer under the Assam General Sales Tax Act, 1993 (hereinafter referred to as "the Act"). The appellant company has been engaged in the business of sale and supply of petroleum products in the country including the State of Assam.

The appellant company has been purchasing various petroleum products from Bongaigaon Refinery & Petrochemicals Ltd. (hereinafter referred to as the "the BRPL") on payment of sales tax as per the provisions of the Act. On the recommendation of the Oil Prices Committee set up by the Government of India, Resolution dated 16.12.1977 was adopted by the Government which required a dealer to sell its products at the prices fixed by the Central Government and the prices so fixed by the Central Government included surcharge to be collected from the buyers and deposited to the 'Oil Pool Account'. The appellant company - a dealer, therefore, had no alternative but to sell the products at the prices so fixed inclusive of surcharge and transfer the surcharge to the said 'Oil Pool Account'. The appellant company was entitled to retain only the basic price, the sales tax paid at the time of purchase of the products in Assam from the BRPL and the profit margin specified by the Central Government. According to the appellant, the amount of surcharge collected and remitted to the 'Oil Pool Account' did not form part of the turnover of the appellant and the said amount of surcharge was immediately remitted to the 'Oil Pool Account' by way of pool account settlement.

According to the appellant, under Section 8 of the Act, tax was levied in respect of the goods specified in Schedule II at the first point of sale within the State. Items 63 to 73 of Schedule II enumerate various petroleum products. As per Explanation 1 to Section 8(1)(a) of the Act read with Rule 12 of the Assam General Sales Tax Rules, 1993 (hereinafter referred to as "the Rules"), if the resale price of a dealer exceeded 40% of the purchase price, the resale was deemed to be first point sale within the State. At this stage, in order to properly appreciate the issues involved in the case, we deem it appropriate to set out Section 8(1)(a) of the Act, Rule 12 of the Rules and Section 2(34) of the Act as under: "Section 8. Charge of Tax and Rates

(1) The tax leviable under section 7 for any year shall be charged on the taxable turnover during such year-

(a) in respect of goods specified in Schedule II, at the first point of sale within the State, at the rate or rates specified in that Schedule;

Explanation I : Where a person sells a substantial part of the goods manufactured by him or imported by him to another person for sale under the brand name or such other person or for resale as distribution or selling agent or for resale after repacking or subjecting the goods to any other process not amounting to manufacture and the price charged on resale exceeds the sale price by more than such percentage as may be prescribed in respect of such goods or class of goods, the resale by such other person shall, subject to rules if any, framed in this behalf, be deemed to be at the first point of sale within the State;

x x x "

The relevant portion of Rule 12 of the Rules reads as under:

"Rule 12 (1). Where a person after purchasing goods covered by Schedule II under clause (a) of sub-section (1) of section 8 sells such goods in such manner as mentioned in the Explanation to the aforesaid clause and if the price charged on such re-sale exceeds forty percentum of the original sale or purchase price, in respect of such goods or class of goods the resale of such goods by such person shall be deemed as first point of sale within the State and the rates of tax shall be as specified in Schedule II for such items.

x x x "

Section 2(34)(d) of the Act defines the "sale price" as under:

"2(34) "Sale Price" means

(d) in respect of a sale under any other sub- clause of clause (33), the amount received or receivable by a dealer as valuable consideration for the sale of goods including any sum charged, whether stated separately or not for anything done by the dealer in respect of the goods at the time of or before delivery thereof or undertaken to be done after the delivery whether under the contract of sale or under a separate contract but excluding-

(i) the cost of outward freight, delivery or installation or interest when such cost of interest is separately charged, subject to such conditions and restrictions as may be prescribed, and

(ii) any sum allowed as a cash discount according to ordinary trade practice:

PROVIDED that in a case where there is no bill of sale or the sale bill is, in the opinion of the assessing authority, for an amount substantially lower than the market price of the goods, the valuable consideration receivable by the dealer shall be taken to be the market price determined in the prescribed manner.

Explanation I. Any tax, cess or duty which is liable to be paid in respect of any goods before the

buyer can obtain delivery and possession of such goods and all costs, expenses and charges incurred before the goods are put in a deliverable state shall, notwithstanding any agreement, covenant or understanding that such tax, cess, duty, costs, expenses or other charges be born or paid by the buyer or any other person, be included in the sale price.

x x x "

The difference between the "purchase price" and the "sale price" received/retained by the appellant was much less than 40%; however, if the 'surcharge' was included in the "sale price" the difference became more than 40%.

According to the appellant, in the impugned judgment, the High Court ought to have directed that the appellant would be liable to pay the sales tax only on differential amount, that is to say, the difference between the amount paid by it to the BRPL and the amount collected by it from the customers through its dealers. The appellant company had prepared a chart and submitted before the High Court, which showed the purchase price and the sale price of various products dealt by the appellant company and the amount of surcharge to be collected by the appellant company on behalf of the Central Government. The chart prepared, submitted and relied upon by the appellant company is set out as under:

Products Purchase Price Ex. REF Price Sales Price w.e.f. 1.3.94 Amount to be surrendered to Pool A/c Sale Price up on 1.3.94 Amount to be surrendered to Pool A/c ATF 3245.38 10886.71 7463.56 10886.71 7463.56 HSD 2552.66 6311.70 3620.20 5561.70 3123.99 MS 4263.76 15480.22 10990.56 14480.22 10155.54 FC 1967.33 5008.75 2901.24 5008.75 2901.24 SKO 2287.00 2212.54 Nil 2212.54 Nil LPG 3420.00 5860.75 680.00 5156.55 680.00

The appellant company, for instance, had submitted that on Aviation Turbine Fuel, the appellant paid Rs.3245.38 per KL to the BRPL as sale price and collected Rs.10,886.71 per KL from its customers. However, out of Rs.10886.71, the appellant retained only Rs.3423.15 per KL as valuable consideration for sale of ATF and the remaining amount of Rs.7463.56 was remitted to the 'Oil Pool Account'. The State had levied Sales Tax on the entire amount of Rs.10,886.71 without giving adjustment of Rs.3245.38 paid for the same goods to the BRPL on which tax was already paid. According to the appellant, the respondents were bound to give adjustment of the amount of sales tax paid to the BRPL at the time of purchase of petroleum products and can at the most levy sales tax on the differential amount of Rs.7463.56. According to the appellant, in the impugned judgment, the High Court completely ignored and overlooked this aspect of the matter though specifically pleaded and argued.

The grievance of the appellant was that the Revenue, subsequent to the impugned order of the High Court, had passed ex parte assessment orders and raised demand of Rs.303.98 crores retrospectively from the years 1994-95 to 1997-98 and levied tax on the entire amount collected by the appellant from its customers without giving any adjustment of the sales tax paid by the appellant to the BRPL on which tax had already been levied treating the same as first sale under Section 8(1) of the Act and also levied huge amount of Rs.158.12 crores by way of interest.

According to the appellant, the question which arose for consideration was whether the "sale price" was the consideration receivable by the dealer which was fixed by the Government of India or the amount the dealer was required to collect by way of consideration plus amount payable to the 'Oil

Pool Account'. The other question which, according to the appellant, arose for consideration was if the 'first point of sale' is deemed to be the sale of the appellant (IOC) by virtue of Explanation 1 to Section 8 of the Act, it cannot be taxed in the hands of the BRPL because Explanation 1 to Section 8 does not contemplate 'first point sale' in the hands of two dealers, it only contemplated shifting of 'first point of sale'. A question would also arise as to whether non-adjustment of taxes paid by the appellant while purchasing the goods from the BRPL at the point of first sale in Assam, when the second sale by the appellant of the same goods in Assam was treated to be the first sale because of the deeming provision in Explanation 1 to Section 8(1)(a) of the Act and the tax was charged on the same goods would not amount to double taxation.

The appellant company reiterated that it had to sell its products at the prices fixed by the Government of India and while fixing such prices, an amount on account of 'surcharge' had been included which was to be collected as 'surcharge' and had to be deposited with the 'Oil Pool Account'. Under the Administered Price Mechanism, oil companies were obliged to charge a uniform sales tax price within the State irrespective of first sale of the taxable goods or resale of tax paid goods. Any under-recovery or over-recovery on account of the different incidence of tax on sale of taxable/tax paid goods had to be adjusted through the 'Oil Pool Account' by appropriate claim/surrender respectively. The State Surcharge Scheme for a particular State was formulated by the Oil Co-ordination Committee by considering various taxes leviable in that State. While doing so, any over/under-recovery which arose on account of composite billing, where inter oil company exemption was not available, was also adjusted to work out the net amount to be charged to the consumers of the State by way of State Surcharge. The appellant submitted that during the years 1994-95 to 1997-98, it had paid Rs.44.16 crores by way of sales tax to the BRPL in respect of the same transactions in question.

The Senior Superintendent of Taxes, respondent no.3, on 7.2.1996, asked the appellant company about details of the "purchase" and "sale price" of various products dealt with by the appellant company and was of the view that since the "sale price" of the appellant company is more than 40% of the purchase price, as per the Explanation to Section 8(1)(a) of the Assam General Sales Tax Act, 1993 read with Rule 12 of the Assam General Sales Tax Rules, 1993, the second sale was to be treated as the first sale and the appellant company was liable to pay tax on the second sale considering it to be the first sale in the State of Assam.

The appellant company pointed out to the Senior Superintendent of Taxes, respondent no.3, that the "sale price" of the appellant company included an amount of 'surcharge' collected on behalf of the Central Government and in that view of the matter the "sale price" for the purpose of the Act should be determined after reducing the amount of 'surcharge' collected by the appellant company on behalf of the Central Government which had to be contributed to the 'Oil Pool Account'.

The Senior Superintendent of Taxes, on 17.2.1996, directed the appellant company to produce the accounts and records relating to purchase and sale of the BRPL products from 1.7.1993 up to date on 18.2.1996. The information as required was submitted by the appellant company.

The appellant company was served with another notice dated 28.3.1996 by the Senior Superintendent of Taxes directing the appellant company to show cause against initiation of penal action on the ground that the appellant company was liable to pay tax on the sale of products purchased from the BRPL being selling agent as per Section 8(1)(a) of the Act read with Rule 12 of the Rules, but the appellant company allegedly suppressed the liability by not paying the taxes on

such sale. The appellant company was also directed to clear the payment of taxes on sale of products from the BRPL and disposed within the State of Assam for the period from 1.7.1993. The appellant filed a writ petition in the High Court challenging the aforesaid notice dated 28.3.1996 whereby the demand was made of payment of tax inter alia on the ground that the notice was without jurisdiction since no tax was payable by the appellant inasmuch as the difference between the purchase price and the "sale price" received/retained by the appellant was much less than 40% so as to attract the tax liability. The learned Single Judge vide judgment dated 2.11.1998 dismissed the writ petition holding that the amount of 'surcharge' collected by the appellant company even though passed on to the 'Oil Pool Account' had to be included in the "sale price" as defined under sub-section (34) of Section 2 of the Act.

The appellant aggrieved by the said judgment of the learned Single Judge filed a writ appeal before the Division Bench of the High Court. The Division Bench, vide judgment dated 3.5.2001, dismissed the writ appeal inter alia holding that the 'surcharge' collected by the appellant on behalf of the Central Government and contributed to the 'Oil Pool Account' was not statutory collection but was collected under the executive instructions and cannot be excluded while calculating the "sale price". It was held that the sale by the appellant company was to be treated as first sale within the meaning of Section 8(1)(a) of the Act read with Rule 12 of the Rules since the resale price exceeded 40% of the purchase price.

The appellant aggrieved by the impugned judgment has preferred this appeal before this Court.

The appellant company, though reiterated all the grounds, challenged before the High Court but during the course of arguments Mr. G.E. Vahanvati, the learned Solicitor General laid emphasis on the following submissions:

a) That, according to the provisions of the Act, particularly sub-section 1 of Section 8 read with Explanations 1 & 2 did not envisage double taxation;

b) That, the appellant on purchase of petroleum products from the BRPL had already paid sales tax construing the same as the first point of sale in the State. The question of levying tax on the very same goods again in the State in the hands of IOC cannot arise because Explanation 1 merely contemplated shifting of first point of sale in the State on the happening of certain contingencies stipulated therein but did not contemplate double or multipoint taxation by levying tax in the hands of two dealers in the State in respect of sale of the very same goods.

c) According to Mr. Vahanvati, the High Court, in the impugned judgment, ought to have held that the sales tax would be leviable only on the difference of the resale price and purchase price since under Section 8(1) of the Act, tax was levied at the point of first sale. The appellant on purchase of goods from the BRPL had paid sales tax and as such the sales tax would be leviable on the difference of the price otherwise it would amount to double taxation not envisaged by the Scheme of the Act.

Mr. Vahanvati, to buttress his submissions had placed reliance on the judgment of this Court in M/s Advance Bricks Company v. Assessing Authority, Rohtak & Another [1987 (Supp) SCC 650]. In this case, the appellant was a registered dealer under the Haryana General Sales Tax Act, 1973. The appellant's case was that it had purchased sun-dried bricks from a registered dealer on payment of sales tax and that amount represented the sale price of such tax-paid bricks and subsequently burnt

and sold the same bricks at a higher price. It was held that the appellant was liable to pay tax on such burnt bricks. The question arose whether the appellant was entitled to set-off the sales tax already paid to the registered dealer when they purchased the sun-dried bricks. The appellant's claim was rejected by all authorities including the High Court. Ultimately, this Court held that the appellant had paid sales tax to a registered dealer at the time of purchase of sun-dried bricks and the amount of tax then paid should be given credit and balance should be recovered.

The learned Solicitor General submitted that on the same analogy, the appellant company in the instant case should be directed to pay the sales tax on the difference of amount between the purchase price and resale price. This would be in consonance with the scheme of the Act.

In pursuance to the show-cause notice issued by this Court, counter affidavit was filed on behalf of the respondents by the Extra Assistant Commissioner, Government of Assam. In the said counter affidavit, it was alleged that in the instant case, the appellant company had purchased petroleum products from the BRPL and sold the same through its various dealers to the consumers and had also collected sales tax from the consumers on the entire sales. The entire collection of sales tax was done as per the provisions of the Act. However, instead of depositing the entire collected sales tax with the State government, the appellant had misappropriated it and contrary to the statutory provisions had not deposited the sales tax with the State Government.

Mr. C. A. Sundram, the learned Senior Counsel appearing for the respondents, submitted that the definition of "sale price" includes every amount received by the appellant company from the buyers as consideration for the sale of the goods. As per the sub- clause (d) of Section 2(34), the amount received or receivable by the dealer as the valuation of the consideration in the sale of goods including any sum charged whether stated separately or not or anything done in respect of the goods at the time of or before delivery comes within the definition of the "sale price".

Mr. Sundram stated that bare reading of Section 8(1)(a) of the Act and Rule 12(1) of the Rules makes it abundantly clear that the provisions of the Act stipulate in no unambiguous term that the levy of tax was on the second sale, treating the same to be the first sale, if the difference of the original purchase price and the resale price was more than 40%.

It was further submitted by Mr. Sundram that it was unfair to suggest that contribution to the 'Oil Pool Account' should not be taken into account for determining the sale price, when the appellant itself had collected sales tax from the purchasers on sale price which was inclusive of the purported surcharge towards the Central 'Oil Pool Account'. In the counter affidavit, para 'C' has mentioned that the invoice issued by the appellant clearly revealed that the appellant had collected sales tax on the total assessable value which was inclusive of the 'Oil Pool Account' contribution. Mr. Sundram further submitted that there was no justification in not depositing the sales tax amount collected by the appellant from the consumers and misappropriating the same.

We have heard the learned counsel for the parties at length and examined the pleadings. In our considered view, a conjoint reading of Section 8(1) of the Act and Explanations I & II clearly lead to the conclusion that the second point of sale was shifted as first point of sale if the resale price of a dealer exceeded 40% of the purchase price. Admittedly, resale price in the instant case exceeded 40% of the purchase price, therefore, the resale price was deemed to be the first point sale.

According to the scheme of the Act, particularly sub-section (1) of Section 8 did not envisage

double taxation in the same State. In the instant case, the appellant company had paid sales tax on purchase of petroleum products from the BRPL. In that event, according to the scheme of the Act, the sales tax would be leviable only on the difference of the resale price and purchase price since under sub-section (1) of Section 8 of the Act, tax is levied at the first point sale. The appellant company had purchased goods from the BRPL and admittedly paid sales tax on the said purchase. According to the clear construction of the provisions of the Act, the appellant was now under an obligation to pay sales tax only on the difference amount between purchase price and the entire sale price. Directing the appellant company to pay sales tax on the entire amount resold would amount to double taxation.

In the counter affidavit, it was clearly alleged that the appellant company had collected sales tax from the consumers through various dealers on the entire resale price. However, instead of appellant company depositing the entire collected sales tax with the respondent State government had misappropriated it. According to the respondents it was a clear case of unjust enrichment and the appellant company cannot retain the excess amount collected by it.

In the additional affidavit filed by Mr. Ajay Sinha, Deputy Manager (Finance) on September 21, 2006 stated that the company had not collected any amount by way of sales in their invoices and sale made by them out of the purchases made from the BRPL. In case what is stated in the counter affidavit is correct then the appellant company cannot be permitted to retain the amount collected towards sales tax from the consumers on the entire sales. The amount, if any, collected had to be deposited with the State government. It is not possible for this Court to resolve this factual controversy whether in fact the appellant company had collected sales tax on the entire amount from the consumers. In view of the conflicting averments in the counter affidavit and the additional affidavit, we deem it appropriate to remit this matter to the Senior Superintendent of Taxes, Gauhati Unit 'A' for ascertaining the fact whether the appellant company had in fact collected sales tax on the entire sales as alleged by the respondents in the counter affidavit. If necessary, the said Senior Superintendent of Taxes may give opportunity to the parties to submit relevant documents in order to ascertain the said fact. In order to avoid any further delay in the matter, we direct the Senior Superintendent of Taxes to decide this controversy as expeditiously as possible and in any event within three months from the date of the receipt of this order.

In case, the Senior Superintendent of Taxes arrives at a definite conclusion that the appellant company had in fact collected sales tax on the entire sales, then the appellant company would deposit the entire sales tax amount collected from the consumers with the respondent-State within four weeks' of the order passed by the Senior Superintendent of Taxes along with 9% interest from the date of collecting the amount towards sales tax till payment. If the amount, as directed, is not paid by the appellant company within the stipulated period, the same would be recovered as the arrears of land revenue by the respondent State.

This appeal is disposed of according to the aforementioned terms indicated in the preceding paragraphs. In the facts and circumstances of the case, we direct the parties to bear their own costs.