(2009) 07 GAU CK 0003

Gauhati High Court

Case No: None

Chem Trade India (P) Ltd. and Another		APPELLANT
	Vs	
State of Assam and Others		RESPONDENT

Date of Decision: July 21, 2009

Acts Referred:

- Assam Value Added Tax Act, 2003 - Section 105, 17
- Constitution of India, 1950 - Article 226

Citation: (2010) 1 GLR 800 : (2010) 27 VST 421

Hon'ble Judges: Amitava Roy, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Amitava Roy, J.

The writ jurisdiction of this Court has been invoked to nullify the order dated December 23, 2008 passed by the Commissioner of Taxes, Assam elucidating that the item "power tillers" is taxable at 12.5 per cent under the Assam Value Added Tax Act, 2003 (hereafter referred to as, "the Act") for the period May 1, 2005 to July 28, 2005, i.e., prior to its inclusion in serial No. 65 of the Second Schedule to the enactment. The show-cause notice dated December 29, 2008 of the Superintendent of Taxes (Central VAT Audit Cell) attached to the Commissioner of Taxes, Assam, Dispur, Guwahati requiring the petitioner-firm to explain as to why its turnover of Rs. 3,72,98,098 for the aforementioned period would not be assessed at that rate is consequently also under challenge.

2. I have heard Dr. A. K. Saraf, Senior Advocate assisted by Mr. D. Baruah, Advocate, for the petitioners and Mr. D. Saikia, learned Standing Counsel, Revenue, for the respondents.

3. Whereas, petitioner No. 1 has introduced itself to be a private limited company incorporated under the Companies Act, 1956 with its registered office at Chandmari, Guwahati and a registered dealer under the Act engaged in the business of sale and supply of various agricultural implements including power tillers, petitioner No. 2 has described himself to be its director. The petitioner-company had submitted its return on turnover under the Act before the assessing authority for the assessment year 2005-06 (May 1, 2005 to March 28, 2006 as corrected by order in M.C. No. 2014 of 2009 dated August 5, 2009) and paid the tax on the sale of "power tillers" at four paise in a rupee, i.e., four per cent. This was based on the comprehension that "power tiller" was included within the "agricultural implements" not operated manually or not driven by animal as enumerated in entry No. 1 of the Second Schedule to the Act. The assessing officer, however, in course of the assessment proceeding held the view that the item "power tiller" in terms of Notification No. FTX.55/2005/Pt-II/20 dated July 29, 2005 issued by the Government of Assam in the Finance (Taxation) Department was taxable at 12.5 per cent for the period May 1, 2005 to July 28, 2005 as during that time it ought to be construed as a residuary item included in Schedule V of the legislation. The assessing authority perceived that as the "power tiller" had been specifically included in entry No. 65 of the Second Schedule to the Act with effect from July 29, 2005 by this notification, the same could not be said to have been included in entry No. 1 of the said Schedule prior thereto and thus was taxable at 12.5 per cent as a residuary item.

4. Being seriously disadvantaged by the above stand taken by the assessing authority, the petitioner filed an application u/s 105 of the Act before the Commissioner of Taxes, Assam, seeking necessary clarifications on this issue contending in categorical terms, inter alia, that "power tillers" were agricultural implements driven by power and that therefore, even before the amendment of entry 65 of the Second Schedule, it was covered by entry No. 1 of that Schedule and thus was taxable at four per cent. By the impugned order, the Commissioner of Taxes, Assam after hearing both the sides has held that in view of the inclusion of the item "power tiller" in entry 65 of the Second Schedule with effect from July 29, 2005, the legislative intention was to treat it otherwise than an agricultural implement prior thereto and therefore, it was taxable at 12.5 per cent from May 1, 2005 to July 28, 2005. As a consequence of the above determination, the Superintendent of Taxes (Central VAT Audit Cell) issued a show-cause notice dated December 29, 2008 to the petitioner-company requiring it to reply as to why its turnover on "power tiller" amounting to Rs. 3,72,98,098 for the aforesaid period would not be assessed at 12.5 per cent. The petitioners are thus before this Court for redress.

5. The respondents in their affidavit affirmed by the Additional Commissioner of Taxes, Assam, Guwahati, while endorsing the determination made vide the impugned order dated December 23, 2008, have asserted that the item "power tiller" had never been contemplated to be included in entry 1 of the Second

Schedule to the Act as would be evident from a conjoint reading of entry Nos. 1 and 65 thereof after the amendment. According to the answering respondents, it is apparent from the contents of entry No. 65 that tractors, power tillers, harvesters and threshers were not considered to be instruments adaptable only for the use in the agricultural activities. They pleaded that the item "power tiller" having been included in entry 65 of the Second Schedule only with effect from July 29, 2005, the legislative intention was obvious that the same was taxable at 12.5 per cent prior thereto. While admitting that tractors, power tillers, harvesters, threshers which are engineered products with a high degree of sophistication adaptable for use in agricultural activity and also for distinct and separate activity of transportation and haulage in case of tractors and power tillers, they have maintained that "power tiller" is not only an agricultural implement. The respondents though admitted that the pursuit of agriculture may encompass ventures like tilling of land, sowing of seeds, planting, weeding, removal of undesirable undergrowths and the like, it does not include the activity of transportation and hauling which is the added function of a power tiller as is manifest from the brochure of the device annexed to the writ petition. According to them, the Commissioner of Taxes, Assam, has validly held that the power tiller is not an agricultural implement and that the petitioner has failed to establish otherwise.

6. Dr. Saraf has persuasively argued that abiding by the contents of entry No. 1 of the Second Schedule to the Act, it cannot be logically conceived that "power tiller" stood excluded from the comprehension of agricultural implements visualized thereunder before the amendment and therefore, the mere inclusion thereof in item No. 65 of the same Schedule, per se does not extinguish its said identity. Insisting that an agricultural process does not signify mere cultivation of land, but envisions exploits from tilling of the land till harvesting and rendering the produce fit for the market, the learned Senior Counsel has urged that as the "power tiller" is admittedly applied in various intermediate operations, it is by all means an agricultural implement and construed to be so at all relevant times. Dr. Saraf maintained that in view of the role conceived of the power tillers in the agricultural process, mere inclusion thereof in entry No. 65 of the Second Schedule to the Act would not ipso facto signify the denudation of its individuality as an agricultural implement under item 1 thereof. As the brochure of the power tiller in the business of which the petitioner-company is engaged unambiguously demonstrates that its predominant use is only in agricultural purposes, it is obviously an agricultural implement, he urged. According to him, the practical utility of a power tiller for other incidental purposes like transportation would not be destructive of its uniqueness as an agricultural implement and therefore, the plea of the Revenue to this effect is misplaced. The learned Senior Counsel therefore insisted that the impugned order of the Commissioner of Taxes, Assam to the contrary is a misreading of the relevant provisions of the Act and is therefore liable to be annulled. To button his arguments, Dr. Saraf placed reliance on the decisions of the

apex court in,

(1) D. H. Brothers Pvt. Ltd. v. Commissioner of Sales Tax, U.P. [1992] 84 STC 267.

(2) Hindson Automobiles, In re [1955] 6 STC 660 (Pepsu).

(3) Polestar Electronic (Pvt.) Ltd. Vs. Additional Commissioner, Sales Tax and Another,

(4) Hindustan Poles Corporation Vs. Commissioner of Central Excise, Calcutta,

(5) T. N. State Electricity Board v. Central Electricity Regulatory Commission [2007] 7 SCC 636.

7. Mr. Saikia per contra, has been emphatic to urge that the amendment of entry 65 of the Second Schedule to the Act is an unmistakable indicator of the fact that a power tiller prior thereto was not construable as an agricultural implement. He has therefore, insisted that the clarifications provided by the Commissioner of Taxes, Assam is valid in all respects and that the power tiller is chargeable at 12.5 per cent for the period May 1, 2005 to July 28, 2005. Referring to the brochure of the power tiller of the petitioners, the learned Standing Counsel has maintained that it is demonstrative of the multifarious use thereof and by no means could be deemed to be an agricultural implement. According to him, though one or more accessories of the power tiller by the nature and extent of their use in the agricultural operations could be regarded as agricultural implement, the device as a whole cannot be conceded that status. Referring to entry 65, Mr. Saikia argued that the appliances mentioned therein have been referred to in their generic sense and therefore cannot be equated with agricultural implement contemplated in entry No. 1 of the same Schedule. Mr. Saikia sought to draw sustenance for his pleas from the decisions of the apex court in,

(1) State of Punjab Vs. Hindsons (P) Ltd.,

(2) M/s. D.H. Brothers Pvt. Ltd. Vs. Commissioner of Sales Tax, U.P., Lucknow,

(3) U. P. State Agro Industrial Corporation Limited v. Kishan Upbhokta Parishad [2007] 13 SCC 246.

8. The competing assertions have been duly evaluated. Noticeably, the liability of the petitioners to pay the impost under the Act is not in dispute. The controversy centers around the rate thereof for the period May 1, 2005 to July 28, 2005 on the commencement of the Act with effect from May 1, 2005. The relevant extracts of the Schedules figuring in the debate as existing at the enforcement of the Act are as hereunder:

Second Schedule

Sl. No.	Description of goods

1.	Agricultural implements, not operated manually or not driven by animal.

...

Sl. No.	Description of goods
65.	Tractors, threshers, harvesters and attachments and parts thereof.

Fifth Schedule

Sl. No.	Description	Rate of tax (paise in the rupee)
1.	All other goods not covered by First, Second, Third and Fourth Schedule	12.5
2.	Works contract	12.5
3.	Lease transactions	12.5

By Notification No. FTX.55/2005/Pt-II/20 dated July 29, 2005 issued by the Commissioner and Secretary to the Government of Assam, Finance (Taxation) Department, Dispur and published on the same date in the Assam Gazette (Extraordinary), amendments to the Act were introduced in exercise of powers conferred by Section 17 thereof whereby, inter alia, the words "power tillers" were introduced between the words "tractor" and "threshers" in entry 65 of the Second Schedule and resultantly the said entry wears a newlook as hereinbelow:

Sl. No.	Description of goods
65	Tractors, threshers, harvesters & attachments and parts thereof. Amendment: In between the words and punctuation mark ''tractor'' and ''threshers'' the words ''power tillers'' have been inserted Notification No. FTX.55/2005 Pt-II/20 with effect from July 29, 2005.

9. Noticeably, the parent Act at the time of its enforcement did not in categorical terms mention "power tillers" either in entry No. 1 or 65 of the Second Schedule thereto. While entry No. 1 of the First Schedule catalogued all exempted goods mentioned as agricultural implements manually operated or animal driven, entry 1 of the Second Schedule referred to the agricultural implements not operated manually or not driven by animal to be taxable at four per cent. Entry No. 65 of that Schedule at that point of time did not mention "power tillers". With the notification dated July 29, 2005 occasioning an amendment amongst others to the Second Schedule the words "power tillers" were included in entry No. 65 to be charged at four per cent. Does the legislative initiative ipso facto establish that, the "power tillers" were hitherto contemplated in entry 1 of the Fifth Schedule of the residuary item to be taxed at 12.5 per cent ?

10. It is not the case of either of the parties that a "power tiller" has no association at all with the agricultural enterprises. The Revenue seeks to exclude it from the purview of an agricultural implement in view of the multitude of use to which it can be applied apart from agricultural purposes. The brochure of the "power tiller" of which the petitioner-company is the dealer, certifies its range of use for tilling, ploughing, weeding pumping, levelling, hulling, transporting, etc. It comments for its use to make the entire agricultural process easier, faster and more economical. The various facilities and advantages have too been highlighted therein. The "power tiller" as advertised in the brochure is unambiguously illustrative of the feasibility of its multipurpose use, however, related to agricultural operations commencing from tilling of the soil till the transportation of the produce.

11. The apex court in M/s. D.H. Brothers Pvt. Ltd. Vs. Commissioner of Sales Tax, U.P., Lucknow, being seized with the question as to whether the sugarcane crusher (kohlu) is an "agricultural implement" with M/s. D.H. Brothers Pvt. Ltd. Vs. Commissioner of Sales Tax, U.P., Lucknow, the meaning of the notification involved, referred to with approval its observations in Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy, on the purport of the expressions "agriculture, agricultural operations and agricultural purposes". The relevant extract thereof is quoted hereinbelow : (at page 270 of 84 STC)

Agriculture is the basic idea underlying the expressions ''agricultural purposes'' and ''agricultural operations'' and it is pertinent therefore to enquire what is the connotation of the term ''agriculture''. As we have noted above, the primary sense in which the term agriculture is understood is agar-field and cultra-cultivation, i.e., the cultivation of the field, and if the term is understood only in that sense agriculture would be restricted only to cultivation of, the land in the strict sense of the term meaning thereby, tilling of the land, sowing of the seeds, planting and similar operations on the land. They would be the basic operations and would require the expenditure of human skill and labour upon the land itself. There are however other operations which have got to be resorted to by the agriculturist and which are

absolutely necessary for the purpose of effectively arising the produce from the land. They are operations to be performed after the produce sprouts from the land, e.g., weeding, digging the soil around the growth, removal of undesirable undergrowths and all operations which foster the growth and preserve the same not only from insects and pests but also from degradation from outside, tending, pruning, cutting, harvesting and rendering the produce fit for the market. The latter would all be agricultural operations when taken in conjunction with the basic operations above described and it would be futile to urge that they are not agricultural operations at all. . .

12. The essence of the exposition is that an agricultural operation cannot be restricted only to tilling, sowing, planting and the other activities being resorted to by the agriculturists which are absolutely necessary for the purpose of effectively raising the produce from the land and that weeding, digging the soil around the growth, removal of undesirable undergrowths and all operations which would foster growth and preservation thereof, tending, pruning, cutting, harvesting and rendering it fit for the market would all be enfolded therein.

13. In the face of the amplitude and expanse of an agricultural operation as conceived of and countenanced by the apex court, the notion of an agricultural implement cannot logically be restricted to a device exclusively used for the purpose of tilling the land alone. Correspondingly an enlarged connotation of an agricultural implement if not provided, there would be contradiction in terms leading to conceptual ambivalence and incongruence entailing absurd consequences. Thus, in the estimate of this Court, in the perspective of the discernment of agricultural operations, propounded in the Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy, an appliance used in anyone or more of the activities that constitutes such a pursuit would deserve to be construed as an agricultural implement, its other utilities notwithstanding. Merely because, such a device can be applied for purposes other than those envisaged in actual agricultural operations would not denude it of its identity as an agricultural implement. The Revenue''s plea that the "power tiller" of the petitioners in view of the capacity of its use for the purpose of transportation, haulage, etc., cannot be regarded as an agricultural implement, therefore does not commend for acceptance.

14. The limited perception of agricultural exploits as is sought to be projected by the Revenue to negate the identity of the petitioners'' power tiller as an agricultural implement, would in the teeth of realm of agricultural operations viewed and approved by the apex court in Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy, thus, not only be unrealistic, but also disregardful of the actuals.

15. The decision of the apex court in U. P. State Agro Industrial Corporation limited v. Kishan Upbhokta Parishad [2007] 13 SCC 246, dwelt upon the issue as to whether an animal driven vehicle could be said to be an agricultural implement. The facts

and the device involved being distinctly different, the answer rendered in the negative therein is of no assistance to the Revenue. Entry 1 of the First as well as the Second Schedule to the Act in hand contemplates agricultural implement of two types. Those operated manually or driven by animals are exempted from the levy whereas, such devices not operated manually or not driven by animal are to be charged at four per cent. Conceptually, an agricultural implement operated by power seems to be conceptualized in entry No. 1 of the Second Schedule to the Act. The animal driven vehicle involved in the U. P. State Agro Industrial Corporation Ltd. [2007] 13 SCC 246 admittedly had no nexus whatsoever with the actual agricultural operations. Neither a proximate nor a remote analogy therefore, can be drawn from that decision to reinforce the plea of the Revenue.

16. The decision of the apex court in Hindson Automobiles [1955] 6 STC 660 is also of no avail to the Revenue in face of the unequivocal enunciation in Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy,

17. The belt pulley used in a truck and also sold as a spare part otherwise was held by the apex court in State of Punjab Vs. Hindsons (P) Ltd., not to be an agricultural implement. It was observed that such a belt pulley if used in a truck may increase its utility in agricultural operations, but that by itself would not make it an agricultural implement. This decision as well in the opinion of this Court, does not advance the case of the Revenue as the machine involved herein is a "power tiller" and not any part of or accessory thereof common to any other device. This is more so, as the utilization of "power tillers" in some agricultural activities is admitted by the Revenue.

18. The apex court while dilating on the elementary norms of interpreting statutory enactments, expounded in Polestar Electronic (Pvt.) Ltd. Vs. Additional Commissioner, Sales Tax and Another, that the intention of the Legislature should be gathered from the language used by it and it is not permissible for the court to speculate the same. It would be impermissible for it to hypothesize as to what the Legislature must have intended to and then condition the language of the statute to make it accord to the presumed intention of the Legislature. It quoted with approval the rendering in Cape Brandy Syndicate v. Commissioners of Inland Revenue [1921] 1 KB 64 that there is no presumption as to tax and there is no room for any intendment. It was held that if the Legislature had failed to clarify its omission by use of appropriate language, the benefit must go to the tax-payer and that even if there is any doubt as to interpretation, it must be resolved in favour of the subject. The same view was reiterated in substance in T. N. State Electricity Board [2007] 7 SCC 636.

19. That the burden is on the Department to establish in the facts of a given case that the goods in question can by no conceivable reasoning be brought either to any of the tariff items so as to take resort to the residuary item was underlined by the apex court once again in Hindustan Poles Corporation Vs. Commissioner of Central

Excise, Calcutta,

20. The unsubstantiated plea of the legislative intendment of exclusion of power tillers from the purview of agricultural implement contemplated in entry 1 of the Second Schedule to the Act, in the absence of any tangible and persuasive materials on record in support thereof thus cannot validate the order impugned. The fact that the same rate of tax for an agricultural implement envisaged in entry 1 of the Second Schedule to the Act as well as "power tillers" on its insertion in entry 65 thereof has been maintained, cannot also be lost sight of. Had it been the intention of the Legislature to distinguish a "power tiller" from an agricultural implement, within the meaning of entry 1 of the Second Schedule to the Act, there would have been a clear indication to that effect either in the Act or in the notification effecting the amendment. The inclusion of power tiller in clear terms in entry 65 though may be viewed as an endeavour to set at rest any possible controversy with regard to its identity and entitlements as an agricultural implement, in the considered opinion of this Court, the same ipso facto does not signify that at the commencement of the Act, such a recognition was neither in contemplation nor approved by the law makers.

21. On a totality of the considerations as hereinabove, the clarification provided by the Commissioner of Taxes as corrected by order in M.C. No. 2014 of 2009 dated August 5, 2009, Assam vide the impugned order cannot be sustained in law and on facts. The petitioners'' endeavour to obtain the same u/s 105 of the Act does not disentitle it to question the unfavourable finding under article 226 of the Constitution of India. Axiomatically therefore, the impugned order dated December 23, 2008 and the consequential show-cause notice dated December 29, 2008 are hereby quashed.

22. The petition is allowed. No costs.