
HIGH COURT OF GUJARAT (D.B.)

BHAILAL AMIN GENERAL HOSPITAL

Versus

STATE OF GUJARAT & 1

Date of Decision: 01 August 2016

Citation: 2016 LawSuit(Guj) 2524

Hon'ble Judges: [K S Jhaveri](#), [G R Udhwani](#)

Eq. Citations: 2017 98 VST 415

Case Type: Tax Appeal

Case No: 1673 of 2009, 430 of 2010, 23 of 2015, 2134 of 2009, 2478 of 2009

Acts Referred:

[Gujarat Value Added Tax Act, 2003 Sec 78](#), [Sec 2\(10\)](#).

Final Decision: Appeal allowed

Advocates: [Joshi](#), [Nanavati Associates](#), [Hardik Vora](#)

Cases Referred in (+): 1

K S Jhaveri, J.

[1] By way of these appeals under section 78 of the Gujarat Value Added Tax Act, 2003, ("the Act" for short) the appellant has challenged the order of the Gujarat Value Added Tax Tribunal (hereinafter referred to as "the Tribunal") whereby the Tribunal has held that the appellant is 'dealer' within the meaning of section 2(10) of the Act.

[2] These appeals were admitted by this court for consideration of the following substantial questions of law:

Tax Appeal No. 1673 of 2009:

"Whether the Gujarat Value Added Tribunal substantially erred in law in upholding Determination Order dated 7.6.2007 passed by the Joint Commissioner that the appellant, a public charitable trust running and maintaining a public hospital, is a dealer while carrying on the activity of buying, selling and supplying medicines in

the performance of its functions for achieving its avowed object of charity through free/subsidized medicines services"

Tax Appeal Nos. 430 of 2010, 23 of 2015, 2134 of 2009:

"Whether the Tribunal is right in its approach vide the impugned judgement and order in construing the provisions embodied in section 2(10) of the Gujarat Value Added Tax Act, 2003 so as to hold that the appellant would not be entitled to the exemption from the definition of 'dealer' thereunder vide Exception (iii) thereof"

Tax Appeal No. 2478 of 2009:

"(1) Whether the Hon'ble GVAT Tribunal was right in law in upholding the order of the Jt. Commissioner, holding the appellant as a dealer within the meaning of section 2(10) of the GVAT Act and is not covered by Explanation (iii)

(2) Whether the Hon'ble GVAT Tribunal erred in law in holding the appellant to be a dealer within the meaning of section 2(10) of the GVAT Act. The Tribunal has not properly interpreted the Explanation (iii) where a charitable, religious or educational institution have specifically been granted exemption, if the object is not in the nature of business"

[3] Learned counsel for the appellant-trust Mr. Joshi, senior Advocate, contended that as per Exception (iii) to section 2(10) of the Act, which is reproduced hereunder, the appellant is not a dealer:

"Exception The following shall not be deemed to be a dealer within the meaning of this clause, namely, (I) and (ii) xxxxxxxx (iii) a charitable, religious or educational institution, carrying on the activity of manufacturing, buying, selling or supplying goods, in performance of its functions, for achieving its avowed objects, which are not in the nature of business".

3.1 He has further contended that the appellant being a charitable trust is not engaged in businesses and not a dealer as defined in section 2(10) of the Act. In support of this contention, he has relied on the decision of the Apex Court in the case of [Commissioner of Sales Tax v. Sai Publication Fund](#), 2002 4 SCC 57, particularly, paragraph Nos. 10 and 11, which are extracted below:

"para 10 - The contention that the Trust in question is "dealer" within the meaning of Section 2(11) read with Section 2(5A) requires careful scrutiny. As is evident from Section 2(11), every person is not "dealer" but only those persons "who carry on the business" by buying or selling goods are regarded as "dealers". From the very definition of dealer, it follows that a person would not be a dealer in respect of

the goods sold or purchased by him unless he carries on the business of buying and selling such goods. "Dealer" and "person" are separately defined in Section 2(11) and Section 2(19) of the Act respectively. "Person" means not only natural person but includes any company or association or body of individuals whether incorporated or not and also a Hindu Undivided Family, a firm or a local authority; whereas "dealer" on the other hand means only such persons who carry on the business of buying and selling of goods in the State including those who are deemed to be dealers by virtue of definition of "dealer" contained in Section 2(11) of the Act. As rightly noticed by the High Court, it is clear from charging Section 3 that every dealer, whose turnover of sale or purchase during any year exceeds the limits specified therein, is liable to payment of tax under the Act on his turnover of sales or purchases. Although the Act provides for levy of tax on the sales or purchases of certain goods in the State of Maharashtra, the levy is restricted only to sales or purchases made by dealers. As is manifest from Section 3 itself, the liability to pay sales tax is only on the dealers. From the combined reading of Section 3, 2(5A) and 2(11) of the Act, it follows that the tax under the Act is leviable on the sales or purchases of taxable goods by a dealer and not by every person. From the facts of the present case, the sole object of the assessee Trust is to spread the message of Siababa of Shridi. It is also not disputed that the books and literature etc. containing the message of Saibaba were distributed by the Trust to the devotees of Saibaba at cost price. There is no dispute that the primary and dominant activity of the Trust is to spread the message of Saibaba. This main activity does not amount to "business". The activity of publishing and selling literature, books and other literature is obviously incidental or ancillary to the main activity of spreading message of Saibaba and not to any business as such even without profit motive and it is in a way a means to achieve the object of the Trust through which message of Saibaba is spread. It is clear from the Trust Deed and objects contained therein that it was not established with an intention of carrying on the business/occupation of selling or supplying goods. This being the position, it cannot be said that the Trust carries on the business of selling and supplying goods so as to fall within the meaning of "dealer" under Section 2(11) of the Act. 11. No doubt, the definition of "business" given in Section 2(5A) of the Act even without profit motive is wide enough to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture and any transaction in connection with or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern. If the main activity is not business, then any transaction incidental or ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on "business"

connected with or incidental or ancillary sales will rest on the Department. Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of "business". To put it differently, the inclusion of incidental or ancillary activity in the definition of "business" pre-supposes the existence of trade, commerce etc. The definition of "dealer" contained in Section 2(11) of the Act clearly indicates that in order to hold a person to be a "dealer", he must 'carry on business' and then only he may also be deemed to be carrying on business in respect of transaction incidental or ancillary thereto. We have stated above that the main and dominant activity of the Trust in furtherance of its object is to spread message. Hence, such activity does not amount to "business". Publication for the purpose of spreading message is incidental to the main activity which the Trust does not carry as business. In this view, the activity of the Trust in bringing out publications and selling them at cost price to spread message of Saibaba does not make it a dealer under Section 2(11) of the Act."

3.2 Mr. Joshi, learned senior advocate, has taken us to the definition and the status of the appellant which is a charitable trust and the main activity of the appellant is not pharmaceutical activity but hospital activity and therefore, the appellant is not engaged in business and not a dealer. In that view of the matter, the order of the Tribunal is required to be reversed. He submitted that pharmaceutical activities are carried out at concessional rate, making loss.

[4] Learned Assistant Government Pleader Mr. Hardik Vora appearing for the respondent State has contended that the trust, doing the activity of buying, selling and supplying of medicines to the patients, will fall within the definition of 'dealer'. Therefore, the Tribunal has rightly held that the appellant is a dealer within the definition of section 2(10) of the Act and no interference is called for with the same.

[5] We have heard learned counsel for the parties. We have gone through the material evidence available on record. Since the appellant being a charitable trust, is doing the activity of purchasing, selling and supplying medicines to patients in order to achieve its avowed objects, it is not engaged in business activity and therefore, the appellant is not a dealer within the meaning of Exception (iii) to section 2(10) of the Act. In that view of the matter, we answer the question in favour of the appellant and against respondent.

[6] So far as Tax Appeal Nos. 430 of 2010, 23 of 2015, 2134 of 2009 are concerned, we have dealt with identical question in Tax Appeal No. 1673 of 2009, where we held that the appellant is not a 'dealer' in view of Exception (iii) to section 2(10) of the Act. The appellant is also carrying on some activities which are not business activities. In

that view of the matter, we answer the question in favour of the appellant and against the respondent.

[7] So far as Tax Appeal No. 2478 of 2009 is concerned, the questions will be governed by our decision in Tax Appeal No. 1673 of 2009 where we have held that the activity of buying, selling and supplying medicines in performance of the functions of the appellant in order to achieve the object of charity does not amount to business activity and the appellant is not a dealer. In that view of the matter, we answer the questions in favour of the appellant and against the respondent.

[8] In the result, all these appeals are allowed.

