

(2017) 02 DEL CK 0019

In the Delhi High Court

Case No : Writ Petition (C) Nos. 1757, 1758 of 2017 and 1803 to 1846 of 2017

ABB India Ltd.

APPELLANT

Vs

Commissioner Trade & Taxes

RESPONDENT

Date of Decision : 27-02-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Sales Tax Act, 1946 — Section 5(2)

Citation : (2017) 4 ADDelhi 517

Hon'ble Judges : Mr. S. Ravindra Bhat and Mr. Najmi Waziri, JJ.

Bench : Division Bench

Advocate : Mr. R. Jawaharlal, Mr. Siddharth Bawa, Mr. A.K. Bhardwaj, Mr. Manish Hirani and Mr. Shyamal Anand, Advocates, for the Petitioner; Mr. Shadan Farasat and Mr. Ahmed Said, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

S. Ravindra Bhat, J. (Oral)—CM Nos.7805/2017, 7807/2017, 8005/2017, 8007/2017, 8009/2017, 8011/2017, 8013/2017, 8015/2017, 8017/2017, 8019/2017, 8021/2017, 8023/2017, 8025/2017, 8027/2017, 8029/2017, 8031/2017, 8033/2017, 8035/2017, 8037/2017, 8039/2017, 8041/2017, 8043/2017, 8045/2017, 8047/2017, 8049/2017, 8051/2017, 8053/2017, 8055/2017, 8057/2017, 8059/2017, 8061/2017, 8063/2017, 8065/2017, 8067/2017, 8069/2017, 8071/2017, 8073/2017, 8075/2017, 8077/2017, 8079/2017, 8081/2017, 8083/2017, 8085/2017, 8087/2017, 8089 /2017& 8091/2017 (for exemptions)

Allowed, subject to all just exceptions.

2. The applications are disposed off.

W.P.(C) No. 1757/2017 & CM No.7804/2017, W.P.(C) No. 1758/2017 & CM No.7806/2017 W.P.(C) No. 1803/2017 & CM No.8004/2017 W.P.(C) No. 1804/2017 & CM No.8006/2017 W.P.(C) No. 1805/2017 & CM No.8008/2017 W.P.

(C) No. 1806/2017 & CM No.8010/2017 W.P.(C) No. 1807/2017 & CM No.8012/2017 W.P.(C) No. 1808/2017 & CM No.8014/2017 W.P.(C) No. 1809/2017 & CM No.8016/2017 W.P.(C) No. 1810/2017 & CM No.8018/2017 W.P.(C) No. 1811/2017 & CM No.8020/2017 W.P.(C) No. 1812/2017 & CM No.8022/2017 W.P.(C) No. 1813/2017 & CM No.8024/2017 W.P.(C) No. 1814/2017 & CM No.8026/2017 W.P.(C) No. 1815/2017 & CM No.8028/2017 W.P.(C) No. 1816/2017 & CM No.8030/2017 W.P.(C) No. 1817/2017 & CM No.8032/2017 W.P.(C) No. 1818/2017 & CM No.8034/2017 W.P.(C) No. 1819/2017 & CM No.8036/2017 W.P.(C) No. 1820/2017 & CM No.8038/2017 W.P.(C) No. 1821/2017 & CM No.8040/2017 W.P.(C) No. 1822/2017 & CM No.8042/2017 W.P.(C) No. 1823/2017 & CM No.8044/2017 W.P.(C) No. 1824/2017 & CM No.8046/2017 W.P.(C) No. 1825/2017 & CM No.8048/2017 W.P.(C) No. 1826/2017 & CM No.8050/2017 W.P.(C) No. 1827/2017 & CM No.8052/2017 W.P.(C) No. 1828/2017 & CM No.8054/2017 W.P.(C) No. 1829/2017 & CM No.8056/2017 W.P.(C) No. 1830/2017 & CM No.8058/2017 W.P.(C) No. 1831/2017 & CM No.8060/2017 W.P.(C) No. 1832/2017 & CM No.8062/2017 W.P.(C) No. 1833/2017 & CM No.8064/2017 W.P.(C) No. 1834/2017 & CM No.8066/2017 W.P.(C) No. 1835/2017 & CM No.8068/2017 W.P.(C) No. 1836/2017 & CM No.8070/2017 W.P.(C) No. 1837/2017 & CM No.8072/2017 W.P.(C) No. 1838/2017 & CM No.8074/2017 W.P.(C) No. 1839/2017 & CM No.8076/2017 W.P.(C) No. 1840/2017 & CM No.8078/2017 W.P.(C) No. 1841/2017 & CM No.8080/2017 W.P.(C) No. 1842/2017 & CM No.8082/2017 W.P.(C) No. 1843/2017 & CM No.8084/2017 W.P.(C) No. 1844/2017 & CM No.8086/2017 W.P.(C) No. 1845/2017 & CM No.8088/2017 W.P.(C) No. 1846/2017 & CM No.8090/2017

3. Issue notice. Mr. Shadan Farasat, Advocate accepts notice on behalf of the Revenue.

4. With the consent of the parties, these matters are taken up for hearing.

5. The grievance of the petitioner in all these cases is that the contracts which it entered into with BSES Yamuna Power Ltd., BSES Rajdhani Power Ltd., Delhi International Airport Ltd. (for short "DIAL") and North Delhi Power Ltd. (for short "NDPL") for supply design, manufacturing, erection and commissioning of electrical systems, could not have been taxed under the Delhi Value Added Tax Act, 2004 (for short "DVAT Act") - given these were the subject matter of inter State sale and import under Section 5(2) of the Central Sales Tax Act, 1946 (for short "CST Act"). The period pertains to assessment years 2007-08 and 2008-09. The assessee/petitioner had entered into specific contracts with each of the parties for the supply of said electrical systems. Upon default assessments made by the DVAT Authorities, the petitioner preferred appeals to the Objection Hearing Authorities (for short "OHA") contending that the nature of the transactions was inter State sale and the movement of goods of import pursuant to distinct contracts which had spelt out different specifications. The petitioner relied upon Sections 3(a) and 3(b) and 5(2) of the CST Act. It was contended

inter alia that the payments were directly linked to the erection and installation and not to local sales as to attract DVAT. The petitioner's appeals to the Special Commissioner (OHA) were rejected. The petitioner had relied upon a Division Bench ruling of this Court in ABB Limited v. The Commissioner, Delhi Value Added Tax 194 (2012) DLT 97 (DB).

6. The OHA rejected the submissions made by the petitioner/appellant inter alia recording as follows:-

"11. It is noteworthy that the items supplied by the objector against these three companies are such which are not consumer specific and specifications could be common to many other operators involved into similar business. Perusal of the contract documents also indicates that the responsibility of the supplier was extended upto fabrication, installation and operationalization of equipments. In case of any damage or loss of property the supplier has been made responsible. The Ld. Assessing Authority has rightly held that the items were handed over to the beneficiary at site after installation and commissioning. The clauses for inspection are quite different from the provisions made in case of DMRC. The list of suppliers as provided by DMRC in cited case has not been shown in respect of other three contractee organisations. It has been noted that the items supplied are not such that only the contractee organisations could have utilized and thus there was feasibility for diversion. It is further added that in the case of DMRC drawings & certification were provided by DMRC in respect of their purchases. No such arrangement were found to have been provided to objector in case of sales made to NDPL, BSES and DIAL thereby indicating that privity of contract between the supplier and the user is not firmly established. The contractee in these cases had not been specified the suppliers and objector had not been specifically asked to make the procurements from outstation suppliers. Possibility of diversion of goods cannot be overruled in such eventuality. Goods dispatched on behalf of ABB were also found to be received after inter-State movement by ABB itself which was responsible for insurance and security at site till operationalisation. Therefore, the inter-State sales were for all practical purposes from ABB to ABB and the goods passed on to the final user at the time of execution of works contract.

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13. The final conclusion is that these transactions also did not satisfy the conditions highlighted by the Hon"ble High Court of Delhi in the case of objector dealer for the DMRC related transactions for the period of 2005-06. Obviously the facts cited above are not individually determinative or decisive, but the net conclusion, which emerges on taking a holistic view by appreciation of all ingredients, is that the requirements of Section 3 of CST Act are not satisfied in respect of these transaction. It can be clearly inferred that the objector dealer of CST Act in respect of works contract executed for vendors other than DMRC since the sales do not qualify as such. Hence disallowance of the exemptions on the interstate sale/import is upheld and the contention of the objector dealer that the

present case is covered by the cited judgments is not found sustainable.

14. Certain transit sales were also made by the objector dealer for NDPL/ BSES. The contentions of the counsel that these were in pursuance of the contract with the NDPL was examined. It was observed that delivery of the goods was taken by the objector dealer itself and transit sale transaction was not complete as property in goods was effected by transfer of documents of title while the goods were not in transit. It was already predetermined that the goods were to be transferred to NDPL/BSES. Hence the transfer of goods by transfer of documents was predetermined and not effected in course of transit. In case of works contract the title of goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods while the goods are in transit from one state to another, unless the property in goods passes by transfer of document of title to the goods, provisions of section 3(b) cannot be applied. The conditions are not satisfied in this case. In view of the above the rejection of exemption by the AA is upheld on this account."

7. The petitioners' appeals to the DVAT Tribunal are pending. However, in its applications for waiver of the pre-deposit condition which is premised upon the Division Bench's ruling of this Court - and which was affirmed by the Supreme Court in *Commissioner, Delhi Value Added Tax v. ABB Limited* (2016) 6 SCC 791, the Tribunal held that the matter required closer examination and on that premise granted relief to the extent that the petitioner was permitted to deposit 20% of the tax and interest demand and 10% of the penalty amount - the aggregate of which works out to Rs. 2.91 crores in all these cases. The DVAT Tribunal prima facie observed as follows:-

"23. After hearing both the counsel we have considered the record of the case including the rival submissions, grounds of appeal, default assessment orders, orders passed by the OHA and the decisions cited this Tribunal is of the considered view that the point raised for consideration can only be meticulously examined on the basis of documents and evidence to be produced when the matter is heard on merits. Moreover, the provisions of section 76(4) of the Act cannot be termed as undue hardship or irreparable loss to the appellant. Accordingly considering the submissions made by the Ld Counsel for Revenue as well as law and procedure which require entertainment of the appeals on merits being not an absolute right of the appellant but always subject to the fulfilment of the condition to be prescribed under section 76(4) of the DVAT Act, this Tribunal is of the view that the appellant at this stage is required a direction to deposit 20% of the amount in dispute of tax and interest and 10% of the amount in dispute of the penalties which is consequential in nature, rounded off to the nearest tenth digit, as precondition for hearing the appeals on merits within a period of 30 days. Orders passed accordingly. The applications stand disposed of. On compliance of the orders the file be listed for hearing on 01.03.2017."

8. It is contended by the petitioner that there is no radical difference between

the transactions that were the subject matter in the previous ruling and the present case, save and except its customers are different. It is also highlighted that these cases involve three different types of transactions, all of which fall within the scope of "inter State sale", defined under the Central Sales Tax Act. It is submitted that the first kind of transaction is a movement of goods, appropriated to the contracts by the petitioners which it manufactures, from other parts of the country but which ultimately are used for its customers purposes in the latter's premises - this falls under Section 3(a) of CST Act. The second kind of transaction is covered by Section 3(b) of CST Act i.e. bought out items strictly in accordance with the specifications, used for erection and installation purposes and the goods are imported again for the purpose of fulfilling the contractual obligations - subjected to Section 5(2) of CST Act. In that sense, there is no difference between the nature of the transactions in this case and those dealt with in the judgment of this Court. The petitioner had entered into contracts with DMRC in the previous reported decision.

9. Counsel for the revenue on the other hand argued that there are important differences in the nature of the transactions and the scope of the contracts. He highlighted the observations of the OHA that the goods can well be used for purposes other than they were contracted for by the petitioner on the one hand and its customer's i.e. L & T (on behalf of DIAL), BSES Yamuna Power Ltd. and NDPL. In these circumstances, the DVAT Tribunal acted within jurisdiction while directing deposit of a portion of the tax liability. Learned counsel highlighted that substantial relief has been given to the petitioner by the Tribunal. It is further submitted that a substantial amount involved (i.e. Rs. 8,00,00,000/-) is in respect of high seas sales, which were never the subject of the Division Bench's ruling, that was ultimately affirmed by the Supreme Court.

10. This Court has considered the submissions. The Supreme Court in ABB Limited (supra) noted nature of the transaction between the petitioners. The relevant portion of the same is as under:-

"17. The aforesaid conclusion leading to our concurrence with the views of the High Court is also based upon the salient facts, particularly the various conditions in the contract and other related covenants between DMRC and the respondent which have been spelt out in paragraph 31 of the High Court judgment (ABB Ltd. v. Commr., 2012), enumerated and described as follows: (ABB Ltd. case, SCC OnLine Del)

- "(1) Specifications were spelt out by DMRC;
- (2) Suppliers of the goods were approved by the DMRC;
- (3) Pre-inspection of goods was mandated;
- (4) The goods were custom made, for use by DMRC in its project;
- (5) Excise duty and Customs duty exemptions were given, specifically to the goods, because of a perceived public interest, and its need by DMRC;

(6) The Project Authority Certificate issued by DMRC the name of the subcontractors as well as the equipment/goods to be supplied by them were expressly stipulated;

(7) DMRC issued a Certificate certifying its approval of foreign suppliers located in Italy, Germany, Korea etc. from whom the goods were to be procured.

(8) Packed goods were especially marked as meant for DMRC's use in its project."

Before us there was no attempt to assail the aforesaid features and to even remotely suggest any factual error on the part of the High Court in noting those features.

18. The salient features flowing out as conditions in the contract and the entire conspectus of law on the issues as notice earlier, leave us with no option but to hold that the movement of goods by way of imports or by way of inter-state trade in this case was in pursuance of the conditions and/or as an incident of the contract between the assessee and DMRC. The goods were of specific quality and description for being used in the works contract awarded on turnkey basis to the assessee and there was no possibility of such goods being diverted by the assessee for any other purpose. Hence the law laid down in *K.G. Khosla & Co. (P) Ltd. v. CCT*, AIR 1966 SC 1216 has rightly been applied to this case by the High Court. We find no reasons to take a different view."

11. The Revenue is undoubtedly correct in submitting that the DVAT Tribunal has granted significant relief to the petitioners. At the same time, the Court notices that the declaration of law by the Supreme Court was in respect of almost the nature of the transactions as in this case; they do not prima facie differ from the facts that led to the judgment of the Division Bench (as endorsed by the Supreme Court). No significant material particulars were shown to distinguish the two cases.

12. In the circumstances, this Court is of the opinion that the impugned orders to the extent that they direct the petitioners to deposit 20% of the tax and interest demanded and 10% penalty assessed cannot be sustained. They are accordingly set aside. The Court was informed during the hearing that the DVAT Tribunal, which is seized of the appeals, is likely to hear them on 01.03.2017. In the light of the modifications directed, the DVAT Tribunal shall proceed to hear the appeals on merits and render its decision preferably within three months from today. All rights and contentions of the parties are reserved; nothing stated in this order shall preclude the rights of the parties to urge all contentions. All the petitions are allowed in the above terms. All the petitions and the pending applications are disposed off.

13. A copy of this order be given dasti to the parties under the signatures of the Court Master.