(2008) 08 OHC CK 0098

In the Orissa High Court

B. Engineers and Builders Ltd. APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 05-08-2008

Acts Referred:

Central Sales Tax Act, 1956 — Section 3, 4, 5
Constitution of India, 1950 — Article 226, 227

Citation : (2008) 2 OLR 798

Hon'ble Judges : R.N. Biswal, J;B.P. Das, J

Bench : Division Bench

Judgement

B.P. Das, J.—The petitioner, M/s. B. Engineers & Builders Ltd., which is a company within the meaning of the Companies Act, 1956, has filed this writ petition with a prayer to direct the O.Ps. to reimburse Orissa Sales Tax levied on works contract, which has been paid by the petitioner as assessed by the assessing authority for the assessment years, 1998-1999, 1999-2000 and 2000-2001 and to quash the letter dated 2.7.2004 issued by O.P. 17, Executive Engineer, Rengali Right Canal Division No. II, Dhenkanal, rejecting the claim of the petitioner for reimbursement (Annexure-7). The petitioner has further prayed to quash the circulars dated 7.11.2001 and dated 19.6.2002 issued by the Financial Adviser-cum-Additional Secretary to Government, Department of Water Resources (Annexures-1 & 3).

2. Bereft of unnecessary details, the facts leading to this writ petition are as follows:

The State Government brought an amendment to the Orissa Sales Tax Act, 1947 (the Act) by Orissa Sales Tax (Amendment) Act, 1984 for levying sales tax on works contract with effect from 7.4.1984. The State Government specified that the rate of tax payable by a dealer on the taxable turnover in respect of "works contract" shall be 4%. On 4.11.1986 the State Government in the Department of Irrigation and Power issued a letter declaring that in case of works contract executed on or after 7.4.1984 containing the specific clause for reimbursement of sales tax, the Department of Irrigation and Power would be liable for reimbursement of the amount of sales tax actually paid by the concerned contractor on production of necessary documentary evidence in token of making such payment. According to the petitioner, Clause 45.2 of the National Competitive Bidding Contract specifies that any Central or State Sales Tax and other taxes on completed items of work of this contract as may be levied excluding penalty levied for contractor''s fault and paid by the contractor shall be reimbursed by the employer to the contractor on proof of payment on production of assessment certificate on every financial year.

In view of the covenant of the contract as well as the decision of the State Government under Annexure-10, the O.Ps. effected reimbursement of sales tax on works contract paid by petitioner to the Sales Tax Department in respect of the assessment years 1995-1996 till 1997-1998. As per the notification issued by the State Government u/s 5 of the Orissa Sales Tax Act, the rate of tax payable by a dealer on the taxable turnover in respect of the "works contract" shall be 8%. Thereafter, the Assistant Commissioner of Sales Tax passed the orders of assessment for the years 1998-1999, 1999-2000 and 2000-2001 levying sales tax on works contract '' 8% on the taxable turnover in respect of the works contract (Annexure-4 series).

The petitioner as per the statement under Annexure-6 computed the total sales tax paid by it pursuant to the tax assessed by the assessing authority for the above mentioned period and claimed reimbursement of the tax paid by it as per the assessment orders, vide Annexure-4 series in respect of the works contract executed/ undertaken to the tune of Rs. 3,07,90,775/-. On 7.11.2001 the State Government in the Department of Water Resources made a clarification that a completed item of works for which the contractor has entered into an agreement with the department is either immovable property or works contract and in either case is not exigible to sales tax, and therefore, the question of payment of sales tax on the said immovable property or works contract and consequential reimbursement by the Department as per Clause 45.2 of the General Condition of Contract or similar provision existing in other contracts does not arise and accordingly, the State Government instructed its Executive Engineers not to reimburse the sales tax levied on cement, steel etc. and also directed for recovery of the amount from the contractor where sales tax has already been reimbursed. According to the learned Counsel for the petitioner, the Circular dated 7.11.2001 issued by the State Government in the Department of Water Resources (Annexure-1) is directly against the statutory provisions contained in Section 5(2)(AA) of the Orissa Sales Tax Act, 1947.

As the petitioner has referred to Section 5(2)(AA) of the Act, it would be profitable to quote the said Section:

(AA) Notwithstanding anything contained in Sub-section (2)(A); "Taxable turnover" in respect of:

(i) ''works contract'' shall be deemed to be the gross value received or receivable by a dealer for carrying out such contract, less the amount of labour charges and service charges incurred for the execution of this contract.

Section 2(jj) "Works Contract" includes any agreement for carrying out, for cash for deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property.

3. According to the learned Counsel for the petitioner, in view of the aforesaid statutory provisions, the circular in Annexure-1 is not maintainable as the immovable property or the works contract is exigible to sales tax and accordingly, O.P.1 is bound to make reimbursement of the sales tax on works contract paid by the petitioner to the sales tax authority, for which the order rejecting the claim of the petitioner for reimbursement in Annexure-7 is liable to be quashed. It was further argued that the clarification made in Annexure-1 is based on misconception and is against the provisions of the Orissa Sales Tax Act.

4. On the contrary, a stand has been taken by O.P.1- State Government that as the issue involved regarding enforcing the terms and conditions of a contract, the same should not be entertained in a proceeding under Articles 226 & 227 of the Constitution of India. In this regard the State referred to Clause 45(1) of the General Conditions of Contract, which is quoted hereunder:

The rates quoted by the contractor shall be deemed to be inclusive of the sales and other taxes including royalties on all materials that the contractor will have to purchase for performance of this contract.

According to Mr. Nanda, learned Counsel for the State, in view of the aforesaid Clause, the payments made to the contractor include all taxes, royalties etc. and also include the sales tax paid thereon. The claim of the petitioner for reimbursement of a sales tax is not sustainable in the eye of law, as the payment towards tax has also been made to it while paying through contract price, the subsequent payment will amount to unjust enrichment to the petitioner. According to him, in a works contract transfer of property in goods involved in the execution of the works contract under the Orissa Sales Tax Act, as amended by Act No. 13 of 1984, is exigible to tax. It is further argued by Mr. Nanda that the works contract itself is not taxable. In other words, it is only transfer of property in goods involved in the execution of works contract is taxable and not the works contract itself.

Mr. Nanda further referring to the charging Section, i.e., Section 4 of the Orissa Sales Tax Act and the definition of ''Dealer'' in Section 2(c) of the said Act, submitted that only the goods used or involved in the execution of works contract whether as goods or in some other form are exigible to tax and not the works contract. Section 2(d) of the Orissa Sales Tax Act defines ''goods'' which is as follows:

Section 2(d)- "Goods" means all kinds of movable property other than actionable claims, stock, share or securities, and includes goods used or involved in the execution of works contract whether as goods or in some other form, all growing crops, grass and things attached to or forming part of the land which are agreed before sale or under the contract of sale to be severed.

Relying upon the aforesaid provision, the State Counsel submitted that only the movable goods are exigible to sales tax. Therefore, the goods involved in execution of works contract, which is subject to tax, has already been paid by O.P.1 while paying the price for the contract. The contracted price was inclusive of tax. The State Counsel further submitted that the taxable turnover in relation to works contract as defined u/s 5(2)(AA)(i) of the Act shall be deemed to be the gross value received or receivable by a dealer for carrying out such contract less amount of labour charges and services charges incurred for the execution of this contract. According to Mr. Nanda, from the above it can safely be concluded that reimbursement of the tax claimed by the petitioner has already been paid to it, and therefore, there is no need of further reimbursement.

5. Learned Counsel for the State submitted that reading of the definitions ''Goods'' and ''Sale'' in Sub-sections (d) & (g) of Section 2 of the Orissa Sales Tax Act makes it clear that there is no tax as such on works contract but it is a tax on transfer of property involved in the execution of works contract. The property in goods used in the works contract is deemed to have passed on to the contractee as soon as the goods and materials used are incorporated to the immovable property by the principle of accretion and to the movable property by the principle of accession or blending. In this regard learned Counsel for the State relied upon the decisions of the apex Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, and Builders Association of India v. State of Karnataka (1993) 88 STC 248 (SC).

6. The sum and substance of the argument of the State Counsel is that the goods used or involved in the execution of works contract whether as goods or in some other form are exigible to tax and as per the definition of ''goods'', only the movable goods are subject to tax under the Sales Tax Act and as the petitioner has already received the tax, which has been included in the contract price, it is not entitled to anything.

In this regard, at the outset we make it clear that we are not going to settle any dispute, which involves factual adjudication. But the question cropped up for consideration of this Court is whether the circular in Annexure-1 is contrary to the provisions of the Orissa Sales Tax Act. The counter affidavit filed by the Sales Tax Department takes a similar stand and denies the claim of the petitioner.

7. Let us now refer to the decision cited by the counsel for the petitioner in support his case. In Gannon Dunkerly & Co. v. State of Rajasthan (1993) 88 STC 204, the Supreme Court while dealing with the question of imposition of tax on transfer of properties involved in execution of works contracts, held as follows:

... The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover:

(a) labour charges for execution of the works;

(b) amount paid to a sub-contractor for labour and services;

(c) charges for planning, designing and architect''s fees;

(d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;

(e) cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and

(f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

(g) other similar expenses relatable to supply of labour and services;

(h) profit earned by the contractor to the extent it is relatable to supply of labour and services.

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

We may, however, make it clear that apart from the deductions referred to above, it will be necessary to exclude from the value of the works contract the value of the goods which are not taxable in view of Sections 3, 4 and 5 of the Central Sales Tax Act and goods covered by Sections 14 and 15 of the Central Sales Tax Act as well as goods which are exempt from tax under the sales tax legislation of the State. The value of goods involved in the execution of a works contract will have to be determined after making these deductions and exclusions from the value of the works contract.

In the light of the aforesaid judgment, let us have a look at the provisions of Section 5(2)(AA) of the Orissa Sales Tax Act, which is as follows:

5(2)(AA) - Notwithstanding anything contained in Sub-section (2)(A) "Taxable turnover" in respect of,:

(i) ''works contract'' shall be deemed to be the gross value received or receivable by a dealer for carrying out such contract, less the amount of labour charges and service charges incurred for the execution of this contract.

(ii) ''delivery of goods on hire-purchase or any system of payment by instalment''s shall be deemed to be the hire-purchase price or total sum payable by person for the purchase of goods, irrespective of the payment of the price in periodical instalments.

Clause-45.2 of the General Conditions of Contract of the NCB is as follows:

Any central or state sales tax and other taxes on completed items of work of this contract as may be levied excluding penalty levied for Contractor''s fault and paid by the contractor shall be reimbursed by the employer to the contractor on proof of payment on production of assessment certificate on every financial year. During the course of contract period, deductions of sales tax on works contract turnover at the source, shall be made from each bill at such rate and conditions as may be required under the provisions of Orissa Sales Tax Act and Rules.

8. It is also an admitted fact that the O.Ps., in fact, effected reimbursement under Clause 45.2 of the General Conditions of Contract during the assessment years from 1995-1996 till 1997-1998. The aforesaid provisions of the General Conditions of Contract would indicate that any central or state sales tax and other taxes on completed items of work of this contract as may be levied excluding penalty levied for Contractor''s fault and paid by the contractor shall be reimbursed by the Employer to the contractor on proof of payment on production of assessment certificate on every financial year. The assessment orders are annexed to this writ petition as Annexures-S4 series. It is also a fact that the rates quoted by the petitioner was in pursuant to Clause-45.1 of the General Conditions of Contract, which is incorporated as follows:

The rates quoted by the contractor shall be deemed to be inclusive of the sales and other taxes including royalties on all materials that the contractor will have to purchase for performance of this contract.

The petitioner now claims reimbursement of tax paid by it on actual turnover of the works contract and not on the tax paid by it on the materials procured by it, which have gone into for the purpose of execution of the works contract. The further admitted fact that O.Ps. 6 to 18 have, in fact, deducted the sales tax at source from the bills raised by the petitioner from time to time in due progress of the work and the same have in turn been deposited with the Sales Tax Department.

9. Before arriving at the conclusion, we may refer to the Circular dated 4th November, 1986 issued by the Irrigation and Power Department, Government of Orissa (Annexure-10 to the rejoinder affidavit filed by the petitioner) on reimbursement of sales tax on works contracts. It-is stated therein that in accordance with the Orissa Sales Tax (Amendment) Act, 1984 read with Orissa Sales Tax (Amendment) Ordinance, 1985, sales tax has become payable on the turnover of works contract with effect from 7.4.1984 and certain instructions have been given for information and guidance of all concerned, the relevant part of which is extracted hereunder:

(i) In case of Works Contracts executed on or after 7.4.84 which contained specific clause for reimbursement of Sales Tax, this Department is liable to reimburse the amount of Sales Tax actually paid by the concerned contractor on production of necessary documentary evidence in token of making such payment, after obtaining an undertaking from the concerned contractor to the following effect:

If the Contractor prefers or has preferred appeal/revision before the concerned appellate authority under the Sales Tax Law for remission of the Sales Tax dues paid by him and the said appeal/revision results in any reduction of such dues, the differential amount, i.e., the amount of Sales Tax re-imbursement and the amount of Sale Tax payable as decided on appeal/ revision will be refunded back to Government by the Contractor.

(ii) Similar re-imbursement will also be permissible and in the same manner as indicated in SI. (i) above in case of contracts executed prior to 7.4.84 where the work was in progress beyond that date, which contained specific clause for such re-imbursement.

(iii) The amount of penalty levied, if any, under the Sales Tax Law on any count and paid by the Contractor-dealer shall not be re-imbursed by the Department to the concerned Contractor.

(iv) No clause either for re-imbursement of Sales Tax or payment of such tax by the Department to the Contractor should be inserted in the Notice Inviting Tenders or Tender document and no tender containing any clause or condition to the above effect should be accepted.

10. Now Annexure-1, which is sought to be quashed, is a clarification but not in supersession of Annexure-10, as it is projected by the State Government. The said clarification cannot take away the effect of the statutory provision. The orders of assessment in Annexure-4 series indicate that after deducting the labour charges, service charges, amount of tax paid, materials used in the execution of works contract, from the gross turn over of the assessment year, the balance has been put to tax by the Sales Tax Authority. The tax, as we find, has been imposed in the light of the decision of Gannon Dunkerly (supra).

11. From the discussions made above, the irresistible conclusion is that the sales tax has been levied in the orders of assessment in respect of the amount received pertaining to items of work completed during the financial year. The clarification in Annexure-1, which unilaterally takes away the claim of the petitioner for reimbursement, is contrary to Clause-45.2 of the General Conditions of Contract and Section 5(2)(AA) of the Orissa Sales Tax Act as well as the decision of the apex Court in Gannon Dunkerly (supra). Accordingly, the clarification letter dated 7.11.2001 (Annexure-1) issued by the Financial Adviser-cum-Additional Secretary to Government, Department of Water Resources is quashed and the O.Ps. are directed to grant appropriate reimbursement in terms of Clause-45.2 of the General Conditions of Contract, as claimed by the petitioner.

R.N. Biswal, J.

12. I agree.