(2014) 08 RAJ CK 0001

In the Rajasthan High Court

Case No : I.T. Appeal Nos. 258 and 259 of 2012

Commissioner of Income Tax APPELLANT

Vs

Samtel Glass Ltd. RESPONDENT

Date of Decision : 13-08-2014

Acts Referred:
Income Tax Act, 1961 — Section 194C, 194J, 201, 201(1A), 9(1)(vii)

Citation : (2014) 271 CTR 581 : (2014) 369 ITR 392

Hon'ble Judges : J.K. Ranka, J;Ajay Rastogi, J

Bench : Division Bench

Advocate : Sanjiv Gupta, Advocate for the Respondent

Judgement

J.K. Ranka, J.—Both these income-tax appeals are directed against the common order dt. 27th July, 2012 passed by the Income-tax Appellate Tribunal, Jodhpur Bench, Jodhpur (for short, "Tribunal") [reported as ITO vs. Samtel Glass Ltd. (2013) 154 TTJ (Jd) 401 : (2013) 87 DTR (Jd)(Trib) 12--Ed.] by which the Tribunal, while affirming the common order passed by the CIT(A), has dismissed the appeals filed by the appellant-Revenue. It relates to the asst. yrs. 2008-09 and 2009-10. Since the issues involved are similar and identical, both these appeals are being decided by this common order. In both these appeals, the Revenue has raised question and we are called upon to decide the applicability of provisions of s. 194C and 194J of the IT Act (for short, "Act") in respect of the payments made by the respondent-assessee towards the transmission charges and whether it is in the nature of sale or contract in between the respondent-assessee and Gas Authority of India Ltd. (for short "GAIL").

2. Brief facts, as emerging on the face of record, are that the respondent-assessee is a private limited company and a survey was carried out at the business premises of the respondent-assessee on 16th Dec. 2008 which was basically with reference to the provisions relating to TDS. The Authorized Officer noticed that the respondent-assessee had made huge payments towards transmission transaction charges to GAIL for supply of gas pursuant to an

agreement/contract entered into by both the parties. It was further noticed that though the respondent-assessee was deducting TDS on other payments made but did not deduct TDS on the payments made towards the transmission charges to GAIL. The AO issued a show-cause notice to the respondent-assessee requiring, inter alia, the respondent-assessee to prove as to why huge payments have been made towards the transmission charges in addition to gas price for certain services provided to the respondent-assessee (purchaser) and the terms and conditions contained in the agreement also revealed that the services provided by the GAIL to the respondent-assessee to facilitate the uninterrupted supply of gas is of technical services in nature. Accordingly, the AO was of the view that provisions of s. 194C and 194J of the Act are applicable. The respondent-assessee, inter alia, submitted a detailed explanation and contended that it is a sale agreement of gas having been sold between GAIL as seller and with the assessee company as buyer for sale of natural gas (regasified LNG) on 23rd Jan., 2004. A side letter dt. 23rd Jan., 2004 was also issued for revising art. 9.2 of the said GSA. There was another side letter of the same date stating that the prices of the Gas are on CIF basis. It was further contended that the price is comprised of following elements:

3. Both the parties further agreed that there would be fixed transmission charges of Rs. 12,44,363 per month for the year 2004-05 and it will be increased @ 3 per cent on yearly rest basis w.e.f. 1st April, 2005. They further agreed that the total price includes basic custom duty, service-tax and is exclusive of all taxes, duties and statutory levies, by whatever name called and levied by either Central, State Governments or local bodies, sales-tax, entry tax and other tax and duties and statutory levies shall be payable extra as applicable from time time. It was further agreed that the buyer shall be liable for any of the above tax/duties/levies with respect to the sale, transfer, transport or importation of the gas as also any taxes/duties/statutory levies for which the buyer is liable under this article but which may have been paid by the seller shall be reimbursed by the buyer together with applicable interest, if any, within 15 days after written request by the seller. It was further submitted that if all the clauses of the gas sale agreement (GSA) are taken into consideration, it was abundantly clear that the price paid by the assessee-company is towards purchase of the gas only. The assessee also quoted art. 2 which specifically stated about purchase and sale between the parties. It was further mentioned that after revising the clauses in the agreements that the facilities (pipelines, metering equipments and other gas accessories) are facilities of the seller only, seller is maintaining these equipments for facilitating effective delivery of the gas, seller is providing technical or whatsoever services to themselves while maintaining their own facilities and not buyer''s facilities as such provisions of s. 194C or 194J of the IT Act are not applicable. Along with reply, the assessee also enclosed a copy of purchase invoice issued by the GAIL to the assessee bearing No. RJ00030229 dt. 30th Nov., 2008 where it was pointed out that the seller charged VAT on all elements of the price of the gas. It was reiterated that the price paid by the

company to GAIL is price for Gas and not availing any type of services from the GAIL. It was also contended that even GAIL, the seller, has also treated the entire transaction as transaction of sale and by producing the P & L a/c of the said company (GAIL), it was contended that the GAIL has credited the entire sale proceeds in its P & L a/c which was apparent not only on the basis of the P & L a/c but copy of statement of account from GAIL of the assessee as well. The assessee also relied upon circular issued by the CBDT bearing No. 13 dt. 13th Dec, 2006 [(2006) 206 CTR (St) 117] and contended that in the light of the said circular as well, the assessee is not liable to deduct tax at source under s. 194C or 194J of the Act. It was further submitted on behalf of the assessee relying upon judgment of the Hon''ble apex Court in the case of Hindustan Coca Cola Beverage Pvt. Ltd. Vs. Commissioner of Income Tax, that the Hon''ble apex Court has held that where the payee has already paid tax on the income on which there was a short deduction of tax at source, recovery of tax cannot be made once again from the tax deductor and this was proved by the assessee on the basis of P & L a/c and other material provided to the AO. However, the AO did not agree with any of the contentions raised by the assessee and after coming to his own conclusion and relying upon art. 8, more particularly cl. 8.10 of the agreement, he came to the conclusion that the present case is not a case of sale of gas only but it also includes certain terms and conditions for providing services which are technical in nature which attracts TDS provision and accordingly found the assessee liable for TDS under the provisions of s. 194J at Rs. 16,92,800 for the asst. yr. 2008-09 and Rs. 12,69,600 for the asst. yr. 2009-10. It also charged interest under s. 201(1A) at Rs. 2,71,481 and Rs. 82,614 respectively for the two assessment years. The AO also tried to distinguish the judgment rendered by the Hon''ble apex Court in the case of Hindustan Coca Cola Beverage (P) Ltd. vs. CIT (supra).

4. Aggrieved by the imposition of TDS and interest under s. 194J and 201(1A) respectively, two appeals came to be filed before the CIT(A). The assessee reiterated the facts led before the AO and the CIT(A), after analyzing the agreement vis-a-vis other material placed on record as also the judgments cited before it, was of the view that the gas sale agreement (GSA) with GAIL was essentially an agreement for purchase/sale of goods and that the AO did not give good justification for isolating transmission charges as fees for technical services or payment for works contract and thus came to the conclusion that neither s. 194J nor s. 194C was applicable to the payments made to GAIL under GSA. The CIT(A) alternatively also came to the conclusion that since the GAIL had paid tax on all payments under the GSA for both the assessment years and such receipts were included in its relevant return of income, even otherwise, there was no scope for invoking s. 201 of the IT Act and accordingly deleted the entire levy of TDS as well as interest.

5. Aggrieved with the order of the CIT(A), the Revenue preferred two appeals before the Tribunal and the Tribunal also concurred with the findings of the CIT(A) and after referring to clauses of the agreement as also other factors

upheld the order passed by the CIT(A) and dismissed the appeals preferred by the Revenue. Thus, the aforesaid order of the Tribunal is being assailed before us by the Revenue.

6. Mr. Sanjiv Gupta, ITO, appearing on behalf of the Revenue, contended that the agreement between the two companies, namely, the assessee as well as GAIL was not merely a purchase/sale transaction and that it was a continuous on going process and after purchase/sale having been concluded, both the parties were involved in on going activities and thus it cannot be said that it was merely a purchase/sale transaction. He further contended that it is essentially a service transaction and the services provided by GAIL to the assessee are technical in nature and therefore, either it falls under the provisions of s. 194C or s. 194J of the Act. He further contended that the first liability was of the assessee and merely because the Hon''ble apex Court observed that if the recipient (payee) has paid tax, then there is no liability, is secondary in nature. He further contended that the liability was there and the AO rightly came to the conclusion of levying of TDS as also interest on account of nonpayment of the TDS. He ultimately contended that the orders passed by both i.e., the CIT(A) as well as Tribunal, are bad in law, perverse and substantial question of law arises out of the order of the Tribunal.

7. We have considered the submissions of the officer appearing on behalf of the Revenue and have also perused the impugned order as well as the orders of the lower authorities and, in our view, no substantial question of law arises out of the order of the Tribunal so as to call for interference by this Court for the reasons henceforth.

8. The AO has reproduced some of the clauses of the agreement entered into between the assessee as well as GAIL and the AO has highlighted para 8.1.1 which speaks of installation, operation and maintenance of facilities. It would be appropriate to quote art. 5 and para 8.1.1 and 8.10 which provides as under:

"Article 5 of the agreement deals with the delivery and pressure. The relevant portion of this article is also reproduced hereunder for convenience.

5.1. Delivery: Subject to the provision of art. 8.1.1 gas sold to the buyer pursuant to this agreement shall be delivered by the seller at the delivery point.

5.2. Title and risk: The facilities as defined in art. 8 upto the delivery point shall be constructed, operated and maintained by the seller at its own risk and cost.

5.3. Delivery pressure: The seller shall maintain the ability to supply gas to the buyer at the delivery point at the pressure of 12 kg./c.m. 2(g) + 1 kg/c.m. 2.

8.1.1. The seller and the buyer shall provide the seller''s facilities and the buyer''s facilities respectively, as may from time to time be necessary to enable party to perform its obligations under this agreement and the seller and the buyer shall operate, repair and maintain, the seller''s facilities and the buyer''s facilities respectively, and all replacements in good working order and condition throughout the duration of the agreement and operate the same in accordance with reasonable and prudent operator.

8.10. For effecting deliveries of the seller shall install and maintain at its own risk and cost the piping control and regulation and metering equipment in the gas metering station and all other accessories. The said equipment so installed by the seller shall remain the property of the seller and the seller shall have the right to remove such equipment at any time within twelve (12) months after the expiry of the contract. The seller shall have the right to use the buyer''s land and utilities essentially required for installation, operation and maintenance of the gas metering station and allied equipments required for supply of gas. These facilities as required and used by the seller at the terminal shall be free of cost."

9. Though the AO has quoted other clauses as well but in our view, the said two clauses, referred to hereinabove, will be sufficient and will clinch the issue for disposal of the present appeals. A perusal of cl. 8.1.1., quoted hereinabove, clearly describes two parties as buyer and seller and in furtherance thereof, if the seller provides certain facilities on account of the business exigencies to maintain good relations and for on going contract/agreement, then, in our view, such an agreement of purchase and sale cannot be said to be an agreement in between the parties which could change the nature of the contract as technical services falling within the ambit of s. 194C or s. 194J of the Act. It is also a finding of fact that not only the seller charged other amounts but equally charged VAT in the bills exchanged between the parties. When the seller charged VAT, then essentially the seller as well as buyer both were of the view that it is sale and purchase per se and nothing more. It has also come on record that the assessee, by providing copy of the sale bills, had categorically observed about this aspect. It would also be appropriate, to quote definition of sale/sale price as available in the Rajasthan VAT Act 2003 which provides as under:

"(35) ''sale'' with all its grammatical variations and cognate expressions means every transfer of property in goods by one person to another for cash, deferred payment or other valuable consideration and includes--

(i) a transfer, otherwise than in pursuance of a contract, of property in goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) any delivery of goods on hire-purchase or other system of payment by installments;

(iv) a transfer of the right to use goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) a supply of goods by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; and

(vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply shall be deemed to be a sale and the word "purchase" or "buy" shall be construed accordingly;

Explanation.--Notwithstanding anything contained in this Act, where any goods are sold in packing, the packing material in such case shall be deemed to have been sold with the goods;

(36) ''sale price'' means the amount paid or payable to a dealer as consideration for the sale of any goods less any sum allowed by way of any kind of discount or rebate according to the practice normally prevailing in the trade, but inclusive of any statutory levy or any sum charged for anything done by the dealer in respect of the goods or services rendered at the time of or before the delivery thereof, except the tax imposed under this Act;"

10. In our view, on perusal of the said definition of sale and sale price as provided under the Rajasthan VAT Act and on perusal of the clauses, quoted hereinabove that the property in goods has been transferred from one hand to another. Thus, it was a transaction of sale and purchase and nothing more. It is already on record that even GAIL, the seller of the gas, had provided material to the assessee in the shape of P & L a/c as also other material wherein the GAIL has shown receipts in the P & L a/c and the GAIL has not only carried the said item into P & L a/c but also paid tax on the income ultimately earned by it on account of the transaction in between the assessee and GAIL and such receipts were included in the relevant return of income submitted by GAIL in both the assessment years under appeal.

11. This, as observed hereinabove, not merely the recipient had shown the said transaction as sale in their relevant records but also have paid due tax.

12. In our view, the predominant purpose of the contract for supply of gas was for sale of goods and therefore, the contract was outside the purview of s. 194C as well as s. 194J of the Act. Considering the invoice raised by the GAIL vis-a-vis reading of the clauses, referred to supra, in our view, by no stretch of imagination, it can be said that the transaction was for technical services or a contract. The price paid by the company is sale price for gas and not for availing any type of services from the GAIL. The transaction charges are one of the element of price as per clause entered into by and between the two parties and not charges for any distinct services and it was the agreement in between the said two parties that the seller agrees to deliver and sell to the buyer the gas at the delivery point and the buyer agrees to purchase and take delivery of such gas and pay in accordance with the terms and conditions in this agreement. Thus, the very nature of the agreement clearly shows that it was not in the nature of works contract or technical services. Delivery at the place of buyer

does not mean that it would convert transaction as in the nature of contract or technical services.

13. On perusal of above and on a plain reading, it provides that under s. 194C there should be a contract in between two parties and work includes (a) advertising (b) broadcasting (c) carriage of goods or passengers by any mode of transport other than railways (d) catering (e) manufacturing or supplying a product.... Thus, on reading the clauses as entered into by and between the parties, in our view, the agreement is not in the nature of a contract as the assessee and GAIL have not entered into any of the work, referred to hereinabove. On perusal of a reading of s. 194J r/w Expln. 2 of s. 9(1)(vii) (supra), it provides that the predominant purpose to fall in "technical services" should be consideration for the rendering of any managerial, technical or consultancy services whereas on reading of the clauses entered into by the parties, we can safely come to the conclusion that it is an agreement to sale/ purchase of gas in between the two companies and intention of both has been as that of sale and purchase and we cannot import any reasoning to hold that it can fall in the category of technical services, it would be too much to stretch the plain and simple reading of technical services in the matter under consideration.

14. In the case of Commissioner of Income Tax Vs. Dabur India Ltd., , the Delhi High Court had an occasion to consider as to whether supply of corrugated boxes was to be made with labels printed on them and the question raised was as to whether the supply of boxes was a contract for supply of chattel and, as such, outside the purview of s. 194C of the IT Act and after considering the evidence on record, it held that printing of the labels on the corrugated boxes did not require any special skill or involve any confidence or secrecy and held that the predominant object underlying the contract was one for sale of the goods which took the contract out of the purview of s. 194C of the Act.

15. In view of the above discussion, we are of the opinion that the Tribunal committed no error in coming to the conclusion that the case was not covered under s. 194C/ 194J of the Act. It may be that the transportation component of gas was paid separately by the assessee to GAIL. Here also the transportation charges did not depend on the consumption of quantity of gas but was of fixed monthly charges to be borne by the assessee as part of the agreement between the parties. The ownership of the gas vested in GAIL till it was transported and delivered to the assessee''s premises at the outlet of the gas metering station. The pipeline was laid down by GAIL and was permitted to be utilized for further onward transportation of gas to other consumers.

16. It would also be appropriate to consider the above issue in the context of what is sale under the VAT Act. We have already quoted herein above the definition of VAT, definition of sale and sale price under the VAT Act.

17. The Hon''ble apex Court, in the case of Hindusthan Sugar Mills Vs. State of Rajasthan and Others, , while examining as to whether freight was part of the

sale price or excluded out of the purview of sale price, after considering the issue at length, was of the view that "any sum charged for anything contained by the dealer in respect of the goods at the time of/or before the delivery thereof, is to be regarded as part of the ''sale price'', even if it does not fall within the first part of the definition."

18. We are also of the view that the judgment rendered by the Hon''ble apex Court in the case of Hindustan Coca Cola Beverage (P) Ltd. (supra) is squarely applicable in the instant case as the recipient (GAIL) had duly disclosed the turnover as sale in their books of accounts and as per the P & L a/c already placed before the AO. It is already admitted by the AO that such P & L a/c and other necessary information was placed by the assessee of GAIL in the present case so as to prove that the recipient has not only disclosed the turnover but also paid due taxes, if any, and therefore, the judgment of the Hon''ble apex Court is applicable. We fail to understand on the face it as to how the AO could distinguish the said judgment which we feel was not proper on the part of the AO. The judgment of the Hon''ble apex Court, being law of the land, is required to be followed in letter and spirit by all.

19. The circular of the Central Board, which has been referred by the Tribunal, Bearing No. 13 of 2006, dt. 13th Dec., 2006 (supra), in our view, also clarifies the situation envisaged in the present case and considering the circular as well as the facts available on record, we have no hesitation in holding that the agreement of supply of gas by GAIL to the assessee, in the instant case, is a simpliciter transaction of sale and purchase and cannot be termed to be an agreement for work/providing of technical services. The Tribunal has rightly come to the conclusion and, in our view, it is based on appreciation of evidence and facts and no question much less substantial question of law can be said to emerge out of the said order of the Tribunal and we do not find any infirmity or perversity in the order of the Tribunal so as to call for any interference of this Court. In our view, no substantial question of law arises out of the order passed by the Tribunal. Consequently, both the appeals, being devoid of merit, are hereby dismissed in limine.