(2006) 11 AHC CK 0028

In the Allahabad High Court

Commissioner, Trade Tax — APPELLANT

Vs

Oswal Agra Mills Ltd. — RESPONDENT

Date of Decision : 08-11-2006

Acts Referred:
Uttar Pradesh Trade Tax Act, 1948 — Section 11, 3F

Citation : (2009) 20 VST 629

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Judgement

Rajes Kumar, J.—Present revision u/s 11 of the U.P. Trade Tax Act, 1948 (hereinafter referred to as, "the Act") is directed against the order of the Tribunal dated June 16, 1999 relating to the assessment year 1995-96.

2. The assessing authority had levied the tax on the amount received from M/s. Sudarshan Freight Carrier, Shahjahanpur u/s 3F of the Act on the ground that the opposite party had transferred the right to use 113 trucks to M/s. Sudarshan Freight Carrier, Shahjahanpur. The opposite party filed appeal before the Deputy Commissioner (Appeals), Trade Tax, Moradabad. The Deputy Commissioner (Appeals), Trade Tax, Moradabad vide order dated December 8, 1998 allowed the appeal and deleted the tax levied u/s 3F of the Act. Commissioner of Trade Tax filed appeal before the Tribunal. The Tribunal by the impugned order, rejected the appeal.

3. Heard learned Counsel for the parties.

4. Learned Standing Counsel submitted that even though, the Tribunal has observed that, the counsel for the opposite party submitted that though, the trucks were transferred, still held that the present case did not come within the purview of Section 3F of the Act, is erroneous. He submitted that merely because, under the agreement, it has been agreed that the payment towards the insurance charges and other expenses namely road tax., etc., would be paid by the opposite party, it cannot be said that there was no transfer of right to use the

vehicles within the purview of Section 3F of the Act, inasmuch as, there was a transfer of possession of vehicle by the present dealer to the opposite party. He submitted that the assessing authority had categorically recorded the finding that the opposite party had transferred the possession of the vehicle to M/s. Sudarshan Freight Carrier, Shahjahanpur for use which has not been set aside by the first appellate authority and the Tribunal. The learned Counsel for the opposite party submitted that as per the agreement, opposite party had only provided the vehicles for transportation of the goods and the possession of the vehicles has never been transferred and thus, the present case is not covered u/s 3F of the Act.

5. In Writ Petition (Civil) No. 183 of 2003, Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, , the larger Bench of the apex court considered the scope of transfer of right to use the goods. The honourable justice Ruma Pal, J. in her judgment has considered the decision of the apex court in the case of State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, the observations of the Constitution Bench of the apex court in the case of 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, and other decisions of the apex court and held as follows (page 126 of 3 VST : page 123 of 145 STC):

In the State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, it was also held:

Handing over of possession is not sine qua non of completing the transfer of the right to use any goods, as was held by a Constitution Bench of this Court in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, ...Once DOT connects the telephone line of the assigned number of the subscriber to the area exchange, access to other telephones is established. There cannot be denial of the fact that giving such an access would complete the transfer of the right to use the goods.

With respect, the decision in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, cannot be cited as authority for the proposition that delivery of possession of the goods is not a necessary concomitant for completing a transaction of sale for the purposes of Article 366(29A)(d) of the Constitution. In that decision the court had to determine where the taxable event for the purposes of sales tax took place in the context of Sub-clause (d) of Article 366(29A). Some States had levied tax on the transfer of the right to use goods on the location of goods at the time of their use irrespective of the place where the agreement for such transfer of right to use such goods was made. Other States levied tax upon delivery of the goods in the State pursuant to agreements of transfer while some other States levied tax on deemed sales on the premise that the agreement for transfer of the right to use had been executed within that State (vide paragraph 2 of the judgment as reported). This court upheld the third view namely merely that the transfer of the right to use took place where the agreements were executed. In these circumstances the court said that:

No authority of this Court has been shown on behalf of respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods. We are, therefore, of the view that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written contract is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed.

(emphasis her italicised ours)

In determining the situs of the transfer of the right to use the goods, the court did not say that delivery of the goods was inessential for the purposes of completing the transfer of the right to use. The emphasized portions in the quoted passage evidences that the goods must be available when the transfer of the right to use the goods takes place. The court also recognised that for oral contracts the situs of the transfer may be where the goods are delivered (see para 26 of the judgment).

In our opinion, the essence of the right under Article 366(29A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise.

In State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., it was claimed by the sales tax authorities that the transaction by which the owner of certain machinery had made them available to the contractors was a sale. The court rejected the submission saying that:

...the transaction did not involve transfer of right to use the machinery in favour of contractors....The effective control of the machinery even while the machinery was in use of the contractor was that of the respondent-company, the contractor was not free to make use of the machinery for the works other than the project work of the respondent or....(page 116 of STC; 315 of SCC)

But in the case of Aggarwal Brothers Vs. State of Haryana and Another, when the assessee had hired shuttering to favour of contractors to use it in the course of construction of buildings it was found that possession of the shuttering materials was transferred by the assessee to the customers for their use and therefore, there was a deemed sale within the meaning of Sub-clause (d) of clause (29A) of

Article 366. What is noteworthy is that in both the cases there were goods in existence which were delivered to the contractors for their use. In one case there was no intention to transfer the right to use while in the other there was.

But if there are no deliverable goods in existence as in this case, there is no transfer of user at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. Of course the toll payer will use the road or bridge in one sense. But the distinction with a sale of goods is that the user would be of the thing or goods delivered. The delivery may not be simultaneous with the transfer of the right to use. But the goods must be in existence and deliverable when the right is sought to be transferred.

Therefore whether goods are incorporeal or corporeal, tangible or intangible, they must be deliverable. To the extent that the decision in State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, held otherwise, it was, in our humble opinion erroneous.

In the same case honourable Dr. A.R. Lakshmanan, J. held as follows (page 133 of 3 VST; 130 of 145 STC):

To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

(a) There must be goods available for delivery;

(b) There must be a consensus ad idem as to the identity of the goods;

(c) The transferee should have a legal right to use the goods--consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;

(d) For the period during which the transferee has such legal right, it has to be the exclusion to the transferor--this is the necessary concomitant of the plain language of the statute--viz., a ''transfer of the right to use'' and not merely a licence to use the goods;

(e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

6. I have perused the order of Tribunal and the authorities below. In my opinion, the order of the Tribunal is not sustainable. The Tribunal has not considered the terms of the agreement. For the application of Section 3F of the Act, relevant consideration is whether at any point of time, possession of the vehicles has been transferred for use or not. The transfer of possession is sine qua non for applicability of Section 3F of the Act. The transfer of possession may be at the time of agreement or on a later stage, but at some stage, there should be a transfer of possession to use the goods. The payment of insurance charges and other expenses by the present dealer under the terms of agreement is not the

relevant consideration. Perusal of order of the Tribunal reveals that the Tribunal has not considered the terms of the agreement and has not examined whether under the terms of agreement, the possession of the vehicles for use have ever been transferred to M/s. Sudarshan Freight Carrier, Shahjahanpur. In the circumstances, matter requires reconsideration by the Tribunal.

7. In the result, the revision is allowed.

8. Order of the Tribunal is set aside and the matter is remanded back to the Tribunal to decide the appeal afresh

