(2013) 04 AHC CK 0024

In the Allahabad High Court

Case No : Writ Tax No''s. 38 and 39 of 2006

Elmech Engineers APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 26-04-2013

Acts Referred:

Citation : (2014) 68 VST 108

Hon'ble Judges : Ram Surat Ram (Maurya), J;Prakash Krishna, J

Bench : Division Bench

Advocate : Ashok Kumar and Praveen Kumar, for the Appellant; C.B. Tripathi, Special Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Ram Surat Ram (Maurya), J.—Heard Sri Ashok Kumar, for the petitioner, Sri C.B. Tripathi, Special Counsel for State of U.P., for the respondents. Writ Tax No. 38 of 2006 has been filed for quashing the notice dated December 8, 2005 issued by the Deputy Commissioner of Trade Tax (respondent 3) u/s 21(2) of the U.P. Trade Tax Act, 1948 (hereinafter referred to as "the Act") for reassessment for the assessment year 2001-02 and for mandamus directing respondent 3 not to proceed with the reassessment proceeding in pursuance of the aforesaid notice and to pass any order. In Writ Tax No. 39 of 2006 similar notice for reassessment for the assessment year 2002-03 and reassessment proceeding has been challenged. Since in both the cases common questions of law and fact are involved between the same parties as such both the writ petitions were consolidated and heard together and are decided by a common judgment. In this judgment we are noticing the facts of Writ Tax No. 38 of 2006.

2. The petitioner was a partnership firm and engaged in the business of execution of works contract. During the assessment year 2001-02, the petitioner has executed the works contract of installation of diesel generating sets and supply of the spare parts to Bharat Sanchar Nigam Ltd. according to its specifications. The petitioner filed its trade tax return, which was assessed by the

assessing officer, by the order dated October 16, 2004, in which the assessing officer has treated the work of the petitioner as "works contract" and assessed the trade tax liability u/s 3F of the Act, read with rule 44B of the Trade Tax Rules excluding the price of the generating sets and the spare parts used by the petitioner in execution of the works contract. The petitioner was not satisfied with some part of the assessment order, as such an appeal, (i.e., Appeal No. 1334 of 2004) was filed from the aforesaid order, before the Joint Commissioner (Appeals), Trade Tax, Kanpur, which was pending. During pendency of the appeal, the assessing officer initiated proceedings for reassessment u/s 21(2) of the Act and forwarded the papers for sanction of the reassessment proceedings. On which the Additional Commissioner, Grade I, Trade Tax (respondent 2) issued a notice dated August 4, 2005 to the petitioner calling his explanation/reply. The petitioner submitted his reply to the aforesaid notice on September 7, 2005, however, respondent 2 by order dated September 27, 2005 granted sanction for reassessment. In pursuance of the order dated September 27, 2005, the assessing officer issued notice dated December 8, 2005 for reassessment for assessment year 2001-02. The petitioner has challenged the reassessment proceedings on the ground that all the necessary facts had been disclosed by the petitioner and considered by the assessing officer, in the assessment order in which he had found that the business of the petitioner was of works contract and as such he had not levied trade tax on the price of the materials used by the petitioner in execution of the works contract, according to the provisions of section 3F of the Act; reassessment proceedings is nothing but the change of the opinion of the assessing officer; the matter was still pending before the appellate authority as such reassessment proceedings could not have been started; judgment of the apex court in State of Andhra Pradesh Vs. Kone Elevators (India) Ltd., , relied upon in the notice for reassessment, is not applicable in the case of the petitioner. There was neither concealment of any fact on the part of the petitioner nor ignorance/negligence on the part of the assessing officer and there was no escaped assessment as such reassessment proceeding was illegal.

3. In the counter-affidavit filed on behalf of the respondents, it has been stated that during the assessment year 2001-02, the petitioner received payment of Rs. 6,11,01,227 for supply of generator sets to Bharat Sanchar Nigam Ltd. In the balance sheet, commissioning expenses of Rs. 10,82,101 was shown. The price of the generator sets purchased by the petitioner was shown as Rs. 5,89,93,249.96. Thus it is evident that the dominant object of the contract was to supply the generator set and not for installation of generator sets. Its installation was an incidental work. However the assessment order was passed accepting the transaction as works contract and price of the generator sets escaped assessment. The generator sets were movable property and its installation under the contract comes within the meaning of "sale" as defined under the Act. As the price of the generator sets escaped assessment, as such, proceedings for reassessment have been started u/s 21 of the Act.

4. We have considered the arguments of the counsel for the parties and

examined the records. In order to appreciate the controversy involved in the writ petition, the relevant provisions of the Act are quoted below:

2. (aa) ''business'', in relation to business of buying or selling goods, include--

(i) ...

(ii) the execution of any works contract or the transfer of the right to use any goods for any purpose whether or not for a specified period;

(iii) ...

but does not include any activity in the nature of mere service or profession which does not involve the purchase or sale of goods;

...

(c) ''dealer'' means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes--

(i)-(iv) ...

(v) every person who acts within the State as an agent of a dealer residing outside the State, and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as--

(A) a mercantile agent as defined in the Sale of Goods Act, 1930; or

(B) an agent for handling of goods or documents of title relating to goods; or

(C) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or such payment;

(vi) a firm or a company or other body corporate, the principal office or headquarters whereof is outside the State, having a branch or office in the State, in respect of purchases or sales, supplies or distribution of goods through such branch or office;

(vii) . . .

(viii) every person who carries on business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration:

...

(d) ''goods'' means every kind or class of movable property and includes all materials, commodities and articles involved in the execution of a works contract, and growing crops, grass, trees and things attached to, or fastened to anything permanently attached to, the earth which under the contract of sale are agreed to be severed but does not include actionable claims, stocks, shares, securities or postal stationery sold by the Postal Department;

...

(h) ''sale'' with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration, and includes--

(i) ...

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

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

5. u/s 2(h) of the Act "sale" is defined to mean any transfer of property in goods for cash or deferred payment or for other valuable consideration including transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. u/s 2(i) of the Act "turnover" is defined to mean the total amount for which goods are supplied or distributed by way of sale by a dealer on his own account or on account of others for cash or deferred payment or for any other valuable consideration. u/s 2(ii) of the Act the expression "turnover of purchases" is defined to mean the total amount of purchase price paid or payable by a dealer in respect of purchases of goods made by him after stipulated production. u/s 2(m) of the Act the expression "works contract" is defined to include any agreement for carrying out building construction, manufacture, processing, fabrication, erection, installation, repair or commissioning of movable or immovable property for cash, deferred payment or in other valuable consideration.

6. The charging section in the Act is section 3, which, in so far as it is relevant for our purposes, is quoted hereunder:

3. Liability to tax under the Act.--(1) Subject to the provisions of this Act, every dealer shall, for each assessment year, pay a tax at the rates provided by or u/s 3A or section 3D on his turnover of sales or purchases or both, as the case may be, which shall be determined in such manner as may be prescribed.

3F. Tax on the right to use any goods or goods involved in the execution of works contract.--(1) Notwithstanding anything contained in section 3A or section 3AAA or section 3D but subject to the provisions of sections 14 and 15 of the Central Sales Tax Act, 1956, every dealer shall, for each assessment year, pay a tax on the net turnover of--

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

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

at such rate not exceeding twenty per cent as the State Government may, by notification, declare and different rates may be declared for different goods or different classes of dealers.

(2) For the purposes of determining the net turnover referred to in sub-section (1), the following amounts shall be deducted from the total amount received or receivable by a dealer in respect of a--

(a) transfer referred to in clause (a) of sub-section (1) whether such transfer was agreed to during that assessment year or earlier,--

(i)-(iii) ...

(b) ...

7. Thus the liability pay trade tax u/s 3 is on every dealer, for each assessment year, at the rates provided by or under various sections of the Act. Sub-section (1) of section 3F commences with a non obstinate clause, excludes the operation of section 3A, section 3AAA and section 3D but is subject to the provisions of sections 14 and 15 of the Central Sales Tax Act, 1956. It imposes on every dealer, for each assessment year, the liability to pay a tax, inter alia, on the net turnover of transfer of "the right to use any goods", for any purpose, whether or not for a specified period, for cash, deferred payment or other valuable consideration at such rate, as may be prescribed by the State Government and transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The net turnover in respect of a transfer referred to in clause (a) of sub-section (1), has to be determined after making deductions enumerated in sub-section (2) read with rule 44C of the U.P. Trade Tax Rules.

8 Admittedly in the assessment order, the price of the generator sets has been deducted from total turnover of the petitioner although it ought to have been included u/s 3F(1)(b) of the Act. Thus it is proved that it was the case of escaped assessment.

9. The counsel for the petitioner submitted that all the necessary facts had been disclosed by the petitioner and considered the assessing officer, in the assessment order. After considering the entire facts he had found that the business of the petitioner was a works contract and as such he had not levied trade tax on the price of the materials used by the petitioner in execution of the works contract, according to the provisions of section 3F of the Act. There was neither concealment of any fact on the part of the petitioner nor ignorance/ negligence on the part of the assessing officer and there was no escapement of assessment as such reassessment proceeding was illegal. The reassessment proceedings is nothing but the change of the opinion of the assessing officer. The provision relating to reassessment is given u/s 21 of the Act which is quoted hereunder:

21. Assessment of tax on the turnover not assessed during the year,--(1) If the assessing authority has reason to believe that the whole or any part of the turnover of dealer, for any assessment year or part thereof, has escaped assessment to tax or has been under-assessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or reassess the dealer to tax according to law:

Provided that the tax shall be charged at the rate at which it would have been charged, had the turnover not escaped assessment or full assessment as the case may be.

Explanation I.--Nothing in this sub-section shall be deemed to prevent the assessing authority from making an assessment or full assessment to the best of its judgment.

Explanation II.--For the purposes of this section and of section 22, ''assessing authority'' means the officer or authority who passed the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

Explanation II.--Notwithstanding the issuance of notice under this sub-section, where an order of assessment or reassessment is in existence from before the issuance of such notice, it shall continue to be effective as such, until varied by an order of assessment or reassessment made under this section in pursuance of such notice.

10. The arguments of the counsel for the petitioner is not liable to be accepted in view of decision of Division Bench of this court in General De Confiteria India Ltd. Vs. State of U.P. and Others, , in which it has been held that section 21 of the Act empowers for reassessment notwithstanding the change of the opinion.

11. The counsel for the petitioner next submitted that the judgment of the apex court in State of Andhra Pradesh Vs. Kone Elevators (India) Ltd., , relied upon in the notice for reassessment, is not applicable in the case of the petitioner.

12. In any case, on the basis of subsequent judgment reassessment proceeding cannot be started. We find that although in the notice, the case of State of Andhra Pradesh Vs. Kone Elevators (India) Ltd., has been referred, but u/s 3F(1)(b) of the Act the price of the generator sets has to be added in total turnover of the petitioner.

13. Much was argued that relied upon decision in the case of State of Andhra Pradesh Vs. Kone Elevators (India) Ltd., is not applicable to the facts of the present case and the assessing authority had examined the question with regard to the works contract and rightly taxed the petitioner u/s 3F of the Act. A bare perusal of the assessment order would show that the assessing authority has noticed only this much that the copies of certain documents such as contract and

tender agreement, etc., were produced which show that the work of supply, installation, commissioning, loading and unloading were included therein. But the assessing authority failed to take note of the fact that the supply of generators and commissioning expenses were shown at Rs. 10,82,101. While the petitioner has shown the purchase of generator for Rs. 5,89,93,249.96, which gives the commissioning expenses to 1.77 per cent of the total amount of supply Rs. 6,11,01,227. The attention of the assessing authority escaped this aspect of the case which is vital and goes to the root of the matter. In the case of State of Andhra Pradesh Vs. Kone Elevators (India) Ltd., the apex court has laid down test to find out as to whether a particular transaction is supply of goods or of works contract. It is important to note that in the case of State of Andhra Pradesh Vs. Kone Elevators (India) Ltd., , the assessee therein was required to install the lift as per requirement of the customer and the customer was required to make the site ready for the installation of the lifts. The apex court has held that the assessee therein divided the execution of the contract into two parts, namely, work to be initially done in accordance with the specifications laid down by the assessee and "the supply of lift by the assessee". The "work part" in the contract was assigned to the customer and the supply part was assigned to the assessee. Here, the "work part" as well as "supply part" were assigned to the petitioner. It is not necessary for us to dwell upon the issue any further as it may prejudice the case of either party. Suffice it to say that there is material before the respondents to form a belief that the turnover of the petitioner has escaped the assessment. The other aspect of the case is that the assessing authority while framing the assessment order has overlooked the judgment of the apex court on the issue given in the case of M/s. Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh, . The principle laid down therein has been reiterated by the apex court in the case of State of Andhra Pradesh Vs. Kone Elevators (India) Ltd., . The law interpreted by the apex court and the High Court is retrospective in the sense that the courts only interpret the law and the interpretation put by the judges will be operative from the date of the very enactment of law and not from the date of judgment. This matter has been examined with some detail in General De Confiteria India Ltd. Vs. State of U.P. and Others, .

14. Thus it is a case of escaped assessment. In view of the different provisions provided under the Act, even if the contract of the petitioner is taken as a works contract, then also trade tax was payable on the sale of the movable goods supplied under the contract. In view of the aforesaid discussion we do not find any merit in the writ petitions. Accordingly the writ petitions are dismissed.

