

(2012) 03 GAU CK 0004

In the Gauhati High Court

Case No : Writ Petition (C) No's. 519 of 2012, 3648, 3649 and 3650 of 2009, 3770 of 2010, 1028 of 2011 and 514 of 2012

Gammon India Ltd.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 13-03-2012

Acts Referred:

Assam Value Added Tax Act, 2003 — Section 11, 47, 47(1)(b)(i)

Citation : (2013) 58 VST 308

Hon'ble Judges : A.K. Goel, C.J.;A.C. Upadhyay, J

Bench : Division Bench

Advocate : G.N. Sahewalla and Dr. B.P. Todi, K. Kalita, A Nath and A. Todi, for the Appellant; K.N. Choudhury, Additional Advocate-General, Assam with Rakesh Dubey, Government Advocate, Assam, for the Respondent

Judgement

A.K. Goel, C.J.—This order will dispose of W. P. (C) No. 519 of 2012, W. P. (C) No. 1028 of 2011, W. P. (C) No. 514 of 2012, W. P. (C) No. 3770 of 2010, W. P. (C) No. 3648 of 2009, W. P. (C) No. 3649 of 2009 and W. P. (C) No. 3650 of 2009 as all the writ petitions involve common question of law relating to the legality of deduction of tax at source out of the payments to be made to the petitioner-dealers for the Works executed by them. In W. P. (C) No. 519 of 2012; the petitioner is a dealer registered under the provisions of the Assam Value Added Tax Act, 2003 (in short, "the Act") and is executing works at the instance of railway authorities (respondent Nos. 7 to 10) including the work of construction of diversion between station Gogamukh and Dhemaji. The work includes earthwork in excavation, embankment and cutting, mechanical compaction, reinforced cement concrete, supply and placing of boulders hand packed of approved quantity, casting and supplying of pre-stressed concrete slabs/pre-cast RCC ballast retainer, supplying, fabricating and providing high tensile steel strands, construction of RCC cast in situ bored vertical piles, supply of TMT reinforcement bars, supply of cement of 43/53 grade and other ancillary works, etc. According to the petitioner, the said work involves mostly labour component

and use of construction material on which VAT has already been paid. However, respondent Nos. 7 to 10 started making deduction at source on the gross value bill of the petitioner at the rate of 12.5 per cent u/s 47 of the Act which provides for deduction of tax at prescribed percentage of "taxable turnover". The "taxable turnover" u/s 11 of the Act was very wide so as to include charges towards labour, services and other charges and sale in the course of inter-State trade and outside the State or in the course of export or import. Deduction of tax at source has to have the reference to the tax liability and cannot be de hors thereof. There was no machinery for determination of even the approximate turnover in absence of which deduction of tax at source from the total value of the works contract u/s 47 of the Act was illegal. Facts in W. P. (C) No. 1028 of 2011 and W. P. (C) No. 514 of 2012 are identical.

2. In W. P. (C) No. 3648 of 2009, the petitioner is executing works like construction of flyover bridge, laying of pipeline for various Government Departments and is registered with the sales tax authorities as a dealer. It is also executing work of construction of new Brahmaputra bridge at Guwahati at the instance of respondent No. 4, the national highway authority. The said work involves huge amount of labour and services apart from use of goods. In accordance with the provisions of the Act and the Rules, the petitioner applied in form 30 to get benefit of lower deduction in accordance with section 47(1)(b)(i) read with rule 28(2)(a) and such a certificate dated December 10, 2008 in "form 31 was duly issued to the petitioner, according to which, the probable tax liability of the petitioner was equal to 2.42 per cent of the contract value. Accordingly, the petitioner sought for deduction of tax at source at that rate: However, vide notice dated July 6, 2009 lower deduction certificate dated December 10, 2008 was cancelled. According to the petitioner, rule 28, - as-, amended on February 22, 2010, modifies the existing provision to seek certificate of deduction of tax at lower amount or "no deduction of tax" only when a running bill for a completed portion of the work becomes due for payment. According to the petitioner, such a limitation was, not valid and such certificate should be available even before the running bill becomes due. In absence thereof, a dealer may be liable to deduction of tax to much higher extent than its liability, which was not permissible. Mere fact that refund could be subsequently claimed was no justification for excess recover, as held in Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, . In W. P. (C) No. 3770 of 2010, W. P. (C) No. 3649 of 2009 and W. P. (C) No. 3650 of 2009 facts are similar.

4. Reply has been filed on behalf of the State in W. P. (C) No. 3648 of 2009 stating that section 47 of the Act providing for deduction of tax at source was a machinery provision and was to be read with the charging provision. The said provision was incidental to effectuate the levy. Recovery permitted under the said provision was on tentative basis. The lower tax deduction certificate issued to the petitioner was based only on the value of the material component with addition of 10 per cent profit and the same was liable to be reviewed and tax liability of the petitioner was much higher. The Rules had to be read in the light of the

statutory provision and deduction of tax equal to the tentative liability was permissible. The petitioner could be given hearing on the issue of cancellation of certificate earlier granted.

5. We have heard learned counsel for the parties.

6. There is no dispute between the parties on the legal issue that the competence of the State Legislature, even in respect of a machinery provision, was limited to allow deduction of tax as per tentative tax liability and deduction of tax at source could not be provided for de hors tax liability. Reference, in this regard, may be made to the judgments of the honourable Supreme Court in *Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another*, *Steel Authority of India Ltd. Vs. State of Orissa and Others* etc. etc., and *Rapti Commission Agency Vs. State of U.P. and Others*, . The issue was also dealt with in a judgment of the Punjab and Haryana High Court in *Larsen and Toubro Limited Vs. State of Haryana and others*, , to which one of us (the Chief Justice) was a party.

7. The learned counsel for the State has drawn our attention to the judgments of this court in *Allied Traders and Others Vs. State of Assam and Others*, and *Mes Builders Association of India Vs. Union of India (UOI) and Others*, wherein similar view was taken by reading down the provision in question so as to allow deduction equal to probable tax liability. Identical matter has also been dealt with, in the context of Meghalaya Value Added Tax Act, 2003, vide order dated March 12, 2012 in W. P. (C) No. 986 of 2012 (*Tata Consultancy Services Ltd. v. State of Meghalaya*).

8. Since the principle of law is settled and even accepted by learned counsel for the parties, we are not quoting the statutory provisions or the observations in the earlier judgments.

9. Only question that is to be determined is how application of statutory provisions can be made consistent with mandate of law permitting recover)" of tax due, without" recovering excess amount, which may not be due.

Section 47 provides for deduction at the rate of 12.5 per cent of the "taxable turnover". To arrive at tentative taxable turnover of the assessee under the Act, the authority deducting the tax cannot act mechanically and has to make tentative determination of the tax liability as per law. Since no higher authority to oversee such determination is envisaged under the Act, and determination of tentative tax liability remains operative till final assessment is made, it is necessary that time gap between the final assessment and tentative assessment is minimum, so that in case where huge amount is deducted, which may not be found due, the assessee does not suffer unnecessary loss. Some difference in the perception, of the authority deducting the tax and that of the assessing authority under the Act is not ruled out but the grievance in this regard can be redressed to a great extent if the time taken by the assessing authority is not unreasonable long.

10. Since the statutory provision, as read down, does not by itself provide for deduction of more amount than the tax liability, as earlier held in the two judgments of this court, referred to above and we have directed expeditious assessments, where there is dispute of liability, there is no ground to interfere at this stage. While the Rules have to be read consistent with the statutory mandate, we do not find the Rules to be irreconcilable with the statute. Issuing lower liability or no liability certificate with reference to running bills is not shown to be against the Act.

11. In view of above, the writ, petitions can be disposed of with a direction that the deduction should be made by determining taxable turnover as understood in law, after consideration of the view point of the dealers, within a period of one month from the date the amount becomes payable. If there is dispute as to the amount to-be deducted, assessment, should be made under the Act, as far as possible, within three months from the date of deduction. If excess amount is found to have been deducted, the same must be refunded at the earliest in accordance with the statutory provisions and the time in making refund should not normally exceed three months. This time-limit will operate till an appropriate direction is issued by the concerned authorities in accordance with law. As regard the issue of cancellation of certificate issued to the petitioner in W. P. (C) No, 3648 of 2009, we make it clear that the said order will abide by such order as may be passed after due hearing to the petitioner within three months from today.