

(2003) 03 GAU CK 0044
In the Gauhati High Court
Case No : WP (C) No. 7038 of 2002

HLS Asia Ltd.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 28-03-2003

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 2(19), 2(33), 27

Citation : (2003) 2 GLR 341 : (2003) 132 STC 217

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : B.P. Todi and D. Das, for the Appellant; B.J. Talukdar and S.N. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

D. Biswas, J.—The question to be answered in this petition is whether services rendered in wire line logging and perforation activities consisting of electronic/seismic scanning of subterranean strata and rock formation in Oil fields is sale within the meaning of Section 2(33) of the Assam General Sales Tax Act, 1993, hereinafter called the Act.

2. The petitioner, is a public limited company engaged in contract, business with the Oil India Limited and it renders high professional and technical services in prospecting, extraction and production of oil, and also engage themselves in wire line logging activities. The petitioner company executed a contract with the OIL in the year 1995 for wire line logging and perforation activities. On completion thereof, another contract was also executed on 10.9.1999 for similar type of work.

3. The dispute relates to the subsequent contract. The OIL wanted to deduct sales tax at source u/s 27 of the Act of 1993 as per terms of the contract and this has been disputed by the petitioner company. The petitioner's case is that they are the owners of the high, tech equipments used in the above services and

the possession thereof was never parted with. The OIL was never permitted to exercise any possession and control over the equipments which were used by technically qualified and experienced professionals of the petitioner-company. The wire line logging and perforation is done by release of high tech equipments deep down into the subterranean region through holes drilled into the oil fields for generating electronic/seismic impulses. The impulses are processed through special software and recorded on magnetic tapes. Hence, according to the petitioner, the services rendered to the OIL cannot be brought within the fold of the definition of sale within the meaning of Section 2(33) of the Act of 1993. On this premises, the petitioner-company has challenged the proposed deduction of the sales tax at source by the OIL from the bills/invoices submitted by it. According to the petitioner-company, the contract for deduction of sales tax at source is contrary to law-and, therefore, cannot be enforced.

4. It is unfortunate that the State has not filed any affidavit though the matter pertains to the revenue of the State. The OIL in their affidavit submitted that clause 7.14 of the contract provides for deduction of 5% as tax under the Act or at applicable rate from rental invoices to be submitted by the petitioner and, accordingly, the contractor is to include 5% as tax in their rental invoices. This amount charged as tax will be deducted by the OIL from the rental invoices and credited to the account of the State. It is further mentioned that the petitioner-company have been charging 8.8% over and above their bills for hiring charges of their equipments and tools as tax. The agreement which is in force for the last three years was acted upon till recently. It is pleaded that the OIL has no option but to insist for compliance of the Act of 1993 with regard to levy of sales tax and deduction thereof at source.

5. Dr. Todi, learned senior counsel for the petitioner during the course of argument tried to justify the contention of the petitioner-company that the services rendered by it in wire line logging and perforation activities cannot be construed as sale within, the meaning of Section 2(33) of the Act. Dr. Todi further submitted that there being no transfer of goods in the property and the possession of high-tech equipments used in the wire logging and perforation activities having been retained exclusively at the disposal of the petitioner-company, the services rendered to the OIL cannot be brought within the fold of the definition of sale. According to him, the contract between the parties can be at best regarded as a licence which is not taxable under the provisions of the Act. In order to substantiate the above contentions, Dr. Todi relied upon the decisions in Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala, Capt. B.V. D'Souza Vs. Antonio Fausto Fernandes, and Murlidhar Aggarwal and Another Vs. State of Uttar Pradesh and Others,

6. Mr. S.N. Sarma, learned senior counsel submitted that the case at hand is one of breach of contract and, therefore, no writ would lie in the instant case. That apart, Mr. Sarma further submitted that the contract is binding between the parties and, therefore, the OIL cannot, but deduct the tax charged by the

petitioner-company in its invoices at source as per provisions of Section 27 of the Act. Mr. Sarma, learned senior counsel, relied upon the decisions in Food Corporation of India and others Vs. Jagannath Dutta and others, Allied Traders and Ors. v. State of Assam and Ors. 2002 (1) GLT 482 , The Associated Cement Company Ltd. Vs. The Commissioner of Income Tax, Bihar, Patna and another, and McDowell & Co. Ltd. v. Commercial Tax Officer 154 (ITR) 149 of the Apex Court as well as of this Court in support of his submission.

7. The dispute relates to taxability of the services rendered by petitioner company. Hence, it would be apposite to deal with the question first.

8. Sale has been defined in Sub-section (33) of Section 2 of the Act which reads as follows :

"(33) "sale" with all the grammatical variations and cognate expressions means any transfer of property in goods by any person for cash, deferred payment or other valuable consideration, and includes -

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

(ii) any 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 in hire purchase or system of payment by instalments or under a financial lease ;

(iv) any transfer of the use of any goods under any operating lease ;

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

(vi) any 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 or service is for cash, deferred payment or other valuable consideration;

and such delivery, transfer or supply of any goods shall be deemed to be sale of those goods by the person making the delivery, transfer or supply and a purchase of those goods by the person to whom such delivery, transfer or supply is made, but does not include a mortgage, hypothecation, charge or pledge ;"

9. It would appear from the above definition that transfer of property, in goods is the prime consideration in deciding the question whether a particular transaction is sale within the meaning of Sub-section (33) of Section 2. Clauses (ii) and (iv) to Sub-section (33) of Section 2 provide that transfer of property in goods or in some other form in the execution of works-contract and transfer or use of any goods under an operating lease are also regarded as sale for the purpose of levy of sales tax.

10. Section 27 of the Act makes it obligatory on the part of every person

responsible for making any payment or discharging any liability on account, of any amount payable for the transfer of property in goods (whether as goods or in some other form) involved in a works contract or for transfer of rights to use any goods specified in Schedule VI for any purpose to deduct tax at source. Schedule VI lists a number of items which, however, does not include specifically wire line logging and perforation activities in oil fields. It is therefore, necessary to ascertain the nature of the services rendered by the petitioner-company in order to determine whether any payment made for such services is exigible to sales tax. For this purpose we may refer to the salient features of the contract. Annexure -1 is the copy of the contract. Section-I therein provides the general conditions of contract and Section-II deals with the wire line services and logging and the scope of the work. Section-III provides the special conditions of contract. Clause 1.1 of Section-III provide for association of company's (OIL's) personnel for overall coordination and operational management at location. Clause-1.2 provides that company's (OIL's) representatives shall have free access to all the equipments of the contractor during operation for the purpose of observing/ inspecting the operations performed by the contractor. Clause-2 provides for engagement of experienced personnel by the petitioner-company, etc. The services rendered is in the form of data processing relatable to prospecting, extraction and production of oil as against which the OIL would provide rental and operational charges to the petitioner-company as per schedule of rates in Section-IV of the contract.

11. To make the position further clear, we may quote herein below the following conditions of the contract:

"7.13 The equipments/tools to be furnished by the CONTRACTOR under this contract is the contractor's property and shall always remain in the possession of the contractor with the exclusive right to use of such equipments/tools by the CONTRACTOR for providing services under this contract."

"17.2 The CONTRACTOR, following award of the contract and mobilization of the crew and equipment, will be required to provide 24 hours service as and when required to provide the logging services for the COMPANY."

12. The provisions of the aforesaid two clauses read with clauses 1.1, 1.2 and 2.0 make it clear that the equipments and tools to be furnished by the contractor shall be exclusively used for the services of the OIL and cannot be used for any other purpose. Clause 17.2 provides that the petitioner-company will be required to provide 24 hours service to the OIL by mobilizing the crew and the equipments. The provisions of payment of monthly rental charges on equipments also indicate that the equipments provided by the petitioner in wire line logging and perforation activities were exclusively meant for use of the OIL and the petitioner-company had no right to use it in any way other than the terms of the contract. As against, this, the petitioner-company agreed to receive monthly rental charges. It is, therefore, necessary to consider whether the contract at hand is a lease as defined u/s 2(19) of the Act thereby rendering it exigible to

sales tax as per provisions of Clause (iv) of Sub-section (33) of Section 2 of the Act of 1993.

13. Section 2(19) of the Act reads as follows :

"2(19) "lease" means any agreement or arrangement whereby the right to use any goods for any purpose is transferred by one person to another whether or not for a specified purpose for cash, deferred payment or other valuable consideration without the transfer of ownership and includes a sublease but does not include any transfer on hire purchase or any system of payment by instalments ;".

14. Conditions of the contract, as enumerated above, clearly indicate that the petitioner-company entered into an agreement/arrangement whereby the right to use all the equipments for the purpose of oil logging and perforation was transferred to the OIL on payment of rental charges. In my considered opinion, the contract in the instant case is a lease within the meaning of Section 2(19) of the Act and, as such, is within the fold of the definition of "sale" as defined in Section 2(33) (iv) of the Act. Hence, the petitioner-company having engaged itself in the services of the OIL within the meaning of Section 2(33) (iv) is a dealer as defined in Section 2(10). Chapter-III of the Act of 1993 provides for levy of taxes. Section 8(1)(f) levies the taxes payable in respect of any operating lease as specified in Schedule-VII at the rate or rates as specified in the Serial No. 3 of the Schedule-VII.

15. Dr. Toddi, learned counsel argued that the contract between the parties can at best be termed as a licence and not a lease as defined in Section 2(19) of the Act. The learned counsel relied upon judgment of the Hon'ble Supreme Court in Khalik Ahmed Bashir Ahmed, In re. (1998) 1 SCC 155. The decision referred in the aforesaid judgment was with reference to the definition of lease of immovable property u/s 105 of the Transfer of Property Act, 1882. In the instant case, the interpretation of the document has to be made with reference to the definition, of "lease", as per provisions of Section 2(19) of the Act of 1993. The definition in Section 2(19) quoted above speaks of an arrangement whereby the right to use any goods for any purpose is transferred by one person to another, and it does not include within its fold the concept of possession. Once it is shown that the right to use any goods is transferred by one person to another for exclusive use, it would, become "lease" within the meaning of Section 2(19) of the Act. The equipments supplied by the petitioner-company were required to be used for the OIL only and not for any other purposes. This implies that the equipments provided by the petitioner-company were exclusively meant for use by the OIL on payment of charges. The petitioner-company after having placed the equipments at the work site was not entitled to use it for any other purpose or to withdraw the same at their sweet will. The equipments were required to be pressed into service under the supervision of the officers of the OIL. The operation is subject to inspection and supervision of the officers of the OIL. A close scrutiny of the terms and conditions clearly indicate that the element of

implied possession over the equipments by the OIL is discernible in the instant case. It is mainly because the equipments pressed into service at the location in possession of the OIL could not be removed or otherwise used by the petitioner-company without concurrence of the OIL. The OIL, as per agreement, is to pay rental charges both for the equipments and the crew. The decision in Khalik Ahmed Bashir Ahmed (supra) is, therefore, distinguishable on facts and cannot be followed in the instant case. For the identical reasons, the decisions in Murlidhar Aggarwal and Another Vs. State of Uttar Pradesh and Others, and in Capt. B.V. D'Souza Vs. Antonio Fausto Fernandes, appear to be of no assistance to the writ petitioner.

16. The judgments rendered in the context of special statute with regard to immovable properties cannot be superimposed in a revenue dispute arising out of the Act of 1993 wherein the term "lease" has been defined in a different language on a different context.

17. Clause 7.14 of the contract requiring the OIL to deduct 5% AGST or at the rate as may be applicable has been challenged in this petition. The aforesaid clause 7.14 provides as follows :

"7.14 Company shall deduct 5% AGST or as applicable from rental invoice of the contractor and accordingly the contractor should include 5% AGST or as applicable on rental component separately in their rental invoice which will be deducted by the COMPANY while releasing payment against rental invoice and will deposit the same to Govt. treasury.

The CONTRACTOR shall duly comply with all the statutory requirement as envisaged in the said AGST Act. In the event of non-compliance of the statutory requirement as per the AGST Act, consequences arising out of the same will be at the sole responsibility of the contractor. Before claiming the payment against the final invoice the contractor have to provide documentary evidence to the effect that they have duly complied with the statutory requirements as per the AGST Act,"

18. In view of the discussion hereinbefore, the clause 7.14 requiring the OIL to deduct AGST at source cannot be said to be contrary to the provisions of law, the contract between the parties being lease within the meaning of Section 2(19) of the Act.

19. The decisions relied upon by Shri Sarma, learned counsel have been taken into consideration. In view of the clear substantive provisions of the Act of 1993 and undisputed factual matrix pertaining to the terms and conditions of the contract, it is considered redundant to refer to those decisions in detail.

20. In the facts and circumstances of the case and for reasons recorded above, the agreement in question has to be termed as "sale" within the meaning of Section 2(33)(iv) read with Section 2(19) of the Act. Therefore, clause 7.14 of the Contract which provides for deduction of sales tax at source cannot be

repudiated as illegal and bad in law.

21. Mr. Sarma, learned counsel for the OIL, argued that the petition is not maintainable as no writ would lie to resolve the controversy arising out of breach of contract. The question raised in the petition is not with regard to controversy over breach of the terms of the contract only. An important question of law with regard to taxability of the services rendered by the petitioner-company by providing equipments and operational crew has been raised. Hence, the petition has been entertained for resolution of the dispute.

22. In the result, the writ petition is dismissed.