
(2007) 03 GAU CK 0025
In the Gauhati High Court

Indian Oil Corp. Ltd. and Another

APPELLANT

Vs

Prasanna Welding Industries and Others

RESPONDENT

Date of Decision : 19-03-2007

Acts Referred:

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

Citation : (2009) 4 GLR 525 : (2007) 7 VST 101

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Amitava Roy, J.—By this application, the respondent No(s) 3 and 4 in W.P. (C) No. 3883 of 2006 seek a review of the judgment and order dated September 20, 2006 in W.P. (C) No. 3883 of 2006 Reported in 2007 7 VST 76.

2. I have heard Dr. A.K. Saraf, Senior Advocate, assisted by Mr. D. Baruah, Advocate, for the review applicants, Mr. S. Nath, learned Counsel for the petitioner and Mr. D. Saikia, learned Standing Counsel, Finance Department.

3. To appreciate the rival submissions the writ petitioner's case, in short, needs narration at the outset. The Indian Oil Corporation, Digboi, (for short, referred to as "the IOC") vide work orders No. (1) 17278163 dated August 12, 2005 and (2) 17411869 dated May 18, 2006 entrusted to the petitioner the work of general cleaning and miscellaneous jobs at plant area, etc., and of maintenance of DCU at Digboi Refinery. After the completion of the works, the petitioners submitted their bills for payment. The IOC, however, deducted tax under the Assam Value Added Tax Act, 2003 (hereafter referred to as, "the Act") on the total value of the works. The petitioner No. 2 was registered under the Act for which a certificate to the said effect under the Assam Value Added Tax Rules, 2005 (hereafter referred to as, "the Rules") was duly issued by the appropriate authority. According to the petitioners, they paid lumpsum amount of tax under the Act.

4. They have asserted that the maintenance works executed by them did not

constitute a sale under the Act and did not involve a transfer of property under the Act and, therefore, no tax was payable thereunder. They maintained that they were entitled to tax relief envisaged u/s 47(1)(b)(i) of the aforementioned statute and, therefore, they had on June 5, 2006 submitted an application to the concerned respondents for issuing an exemption certificate thereunder. Their grievance is that in spite thereof no such exemption has been granted and the respondents have been deducting sales tax at source from the gross value of their bills.

5. The office having submitted a report of service on all the respondents based on a notice submitted on behalf of the petitioners to the above effect, the petition was heard. Reiterating the pleaded facts, the learned Counsel for the petitioner, in support of the reliefs prayed, relied on the decision of this court in *Allied Traders and Others Vs. State of Assam and Others*, Reported as *Arunodoi Construction Co. (P) Ltd. v. State of Assam* 2002 127 STC 561 (Gau). The learned Standing Counsel, Finance Department, submitted that the ratio of the above reported decision applied to the facts of the present case.

6. The writ petition in the above premise was disposed of by the judgment and order dated September 20, 2006 *Prasanna Welding Industries v. State of Assam* 2007 7 VST 76 (Gau), with the following operative directions.

In the view of the matter, this petition is closed with a direction to the respondent-IOC to take an appropriate decision on the petitioner's application u/s 47(1)(b)(i) of the Act taking note of the decision rendered in *Allied Traders* 2002 1 GLT 4821 and the prescription of section 47(1)(b)(i) of the Act and, thereafter compute and realise the tax realisable, if any, in law. The petition stands disposed with the above observation. No costs.

7. The review applicants have contended that the notice of the writ proceeding meant for them had been served on a wrong counsel and that they had no knowledge thereof till the receipt of the aforementioned judgment and order from the writ petitioners. They have maintained that as is apparent from the writ petition the petitioners had applied for payment of tax under the composition scheme in terms of Section 20 of the Act read with Rules 13(13) and 17(9) of the Rules and that the Composition Permission No. DIG/Comp/02 dated April 4, 2006 had been issued in their favour. In that view of the matter, the petitioners having opted for composition of their tax liability ; they were obliged to discharge the same at the rate prescribed by the relevant notification issued u/s 20 computable on the gross turnover and consequentially were not entitled to any benefit u/s 47(1)(b)(i) of the Act. Moreover, in view of the definition "prescribed authority" provided in Section 2(37) of the Act, the applicant IOC had no competence to decide any application u/s 47(1)(b)(i) and, therefore, the direction contained in the judgment and order to the above effect needs reconsideration.

8. Though no written response by the writ petitioners has been offered to the review application, a counter by the Joint Commissioner of Taxes, Assam, has

been filed relying on the submissions made in the affidavit-in-opposition on behalf of the Finance Department in *Barman Enterprise v. State of Assam* [W.P. (C) No. 3 of 2007]. Therein, resisting the challenge to the deduction of tax at source by the railway authority from the gross value of the bills of the petitioner, the Department of Finance questioned the maintainability of the writ petition for non-exhaustion of the alternative remedy u/s 47(1)(b)(i) of the Act read with rule 28(2) of the Rules. The respondents therein affirmed that unless such a certificate was obtained, the authority concerned had no option but to deduct tax at source on the entire amount of the bill. It was contended that the railway authority was not competent to determine the taxable turnover of the petitioner and that for availing the benefit of paying lower amount of tax or tax exemption in respect of the works contract in question, the petitioner was to apply for a certificate of deduction of tax at source or no deduction before the prescribed authority under the Act and the Rules.

9. Dr. Saraf while abiding by the pleaded grounds in the review application buttressed his arguments referring to Sections 2(37), 20 and 47(1)(b)(i) of the Act and Rule 13(13), Rule 17(9) and rule 28(2) of the Rules. The learned Senior Counsel urged that in view of Section 2(37) of the Act defining "prescribed authority" the IOC had no competence to entertain any application u/s 47(1)(b)(i), it not being such authority and therefore the direction contained in the judgment and order under review requiring it to consider the petitioners' representation under the above provision ought to be recalled. The writ petitioners having exercised their option to avail the benefit of composition of tax and the permission under the related "composition scheme for works contract" having been issued in their favour they are estopped from invoking section 47(1)(b)(i), he urged. In support of his submissions, Dr. Saraf relied on the decision of the Karnataka High Court in *T.H. Venkate Gowda v. Commissioner of Commercial Taxes in Karnataka, Bangalore* 2007 5 VST 553.

10. Mr. Nath, in reply, has argued that the permission to pay the composition amount notwithstanding the petitioners having submitted an application u/s 47(1)(b)(i) before the appropriate tax authority, a direction be issued for disposal thereof on merits keeping further deduction of tax from the gross value of their bills in abeyance.

11. The learned Standing Counsel, Finance Department, has contended that considering the scheme of the Act, the prescribed authority being solely competent to grant the certificate u/s 47(1)(b)(i) for reduced or no deduction of tax, it cannot be denied the said prerogative only as the dealer/contractor concerned had also opted to pay the tax by way of composition calculated at the rate fixed by the Government.

12. The rival submissions have been duly considered. A brief reference to the provisions of the Act and the Rules involved is considered expedient.

13. "Prescribed Authority" as defined in Section 2(37) means any person

appointed to assist the Commissioner under Sub-section (2) of Section 3 to whom all or any of the powers of the Commissioner for the levy and collection of tax conferred by or under this Act or Rules framed thereunder has been delegated by the Commissioner under Sub-section (9) of that section.

14. The "taxing authorities" for carrying out the purpose of the Act have been enumerated in Section 3. Sub-section (9) thereof authorises the Commissioner of Taxes to delegate any of his powers under this Act and the Rules to any officer by notification in the official Gazette. u/s 20, the Government is empowered by notification published in the official Gazette subject to such conditions and restrictions as may be specified therein, to permit any retail dealer whose gross turnover calculated from the commencement of any year first exceeds within such year the taxable quantum but does not exceed such amount as may be mentioned in such notification to pay at his option, in lieu of the tax payable under the Act an amount by way of composition calculated at the rate that may be fixed by the Government in the notification, the outer limit whereof would be five percentum of the turnover. Rule 13(13) requires that every dealer, who opts for composition scheme u/s 20 or a casual dealer should apply for registration in form 4 and would be granted a certificate in form 5 and assigned a General Registration Number (GRN) which would be mentioned in the certificate of registration. Such a dealer would be liable to pay tax clearly as is specified in Rule 17(9).

15. Section 47 engrafts special provision relating to deduction of tax at source in certain cases. The prescribed authority on an application made under Sub-section (1)(b)(i) thereof, if satisfied on an application made by any contractor that any works contract is separable and involves both transfer of property in goods and labour and services or involves only labour and services and accordingly justifies deduction of tax on a part of the sum payable in respect of any works contract or, as the case may be, justifies no deduction of tax at all, he would after giving the contractor a reasonable opportunity of being heard, grant him such certificate as may be appropriate. The procedure for the above exercise as outlined in Rule 28(2), inter alia, prescribes the form in which such application has to be filed and the one in which the certificate ought to be granted. When such a certificate is produced by the contractor before the person responsible for payment, the latter would, unless the certificate is cancelled or modified by the prescribed authority, make deduction of tax in accordance with the said certificate.

16. A cumulative reading of the above provisions renders it manifest that the prescribed authority signifies any person appointed to assist the Commissioner of Tax to whom all or any of his powers for the levy and collection of tax has been conferred by the Act or the Rules by a notification u/s 3(9). In the above view of the matter, the IOC can, by no means, be the prescribed authority to entertain an application u/s 47(1)(b)(i) of the Act.

17. Section 20 of the Act makes it optional for any retail dealer, if he so chooses,

to pay an amount by way of composition of tax calculated at the rate as fixed by the Government in the notification referred to therein in lieu of the tax payable under the Act. Such an option is exercisable, however, on the fulfilment of the preconditions detailed in the section and the rate to be applied for quantifying the amount would not exceed five per cent of the gross turnover referred to therein.

18. This provision when placed in juxtaposition with Section 47 appears to be an alternative to the latter. Whereas u/s 47(1)(b)(i) on an application filed by a dealer/contractor subject to the satisfaction of the prescribed authority a certificate quantifying lesser amount of tax or granting exemption therefrom is permissible, he, in his discretion, may choose to incur the liability of paying a computed amount following composition of tax at a prescribed rate. No element of compulsion to avail the benefit of Section 20 or 47(1)(b)(i) is discernible in the said provisions. On the other hand, on electing to submit to the incident of composition of tax as envisaged in Section 20, the dealer/contractor undertakes to discharge the consequential liability voluntarily. In that view of the matter, in my opinion therefore, resort to Section 47(1)(b)(i) of the Act by the said dealer/contractor for deduction of tax or discharge from such liability is not comprehensible. These two provisions are mutually exclusive.

19. In T.H. Venkate Gowda 2007 5 VST 553 (Karn), the petitioner, a registered dealer under the relevant sales tax law, had executed certain civil works of the Government of Karnataka during the assessment year 1996-97 for which he received Rs. 31,85,983 as consideration. He opted for composition assessment u/s 17(6) of the Karnataka Sales Tax Act and filed his return. The assessing authority ascertained out of the total receipt an amount of Rs. 16,58,117 to be exigible to tax at four per cent u/s 17(6) of the Act. The assessment order having been received, the assessee being aggrieved for the issue to the jurisdictional High Court, it was, inter alia, contended by the petitioner that levy of tax u/s 17(6) was not allowable in respect of receipts relating to pure labour contracts not involving the transfer of property in goods. Drawing sustenance from the decision of the apex court in State of Kerala v. Builders Association of India 1997 104 STC 134, it was held that the assessee having opted for composition assessment u/s 17(6) of the Act it was not open to bifurcate the contract and the tax thereon for the purpose of payment of tax. It held the view that the assessee having voluntarily and with full knowledge of the features of the alternate method of taxation opted to be governed by it, he could not be heard to question subsequently the levy of tax by the authorities.

20. Having regard to the scheme of Sections 20 and 47 of the Act and the purport and purpose thereof, I feel persuaded to subscribe to the above view. A dealer or a contractor choosing to incur the tax liability u/s 20 of the Act, would be estopped from applying u/s 47(1)(b)(i). The parallel exercise, if permitted, would render Section 20 otiose.

21. Reverting to the facts, it is apparent from the permission for composition

(annexure 3 to the writ petition) that thereby the petitioner was authorised to pay tax by lump sum by way of composition in lieu of the impost payable under the Act and the Rules. The composition permission discloses the General Registration Number (GRN) as well. This document, therefore, conclusively demonstrates that the petitioner had opted to shoulder the tax liability u/s 20 of the Act and that the statutorily prescribed requisites being present the composition permission was granted to him on compliance with the legal formalities. In that view of the matter, no further application u/s 47(1)(b)(i) is maintainable before the prescribed authority.

22. The points raised in the review application being of substance, the judgment and order dated September 20, 2006 reported in 2007 7 VST 76 warrants reconsideration. The stand of the respondent-State as outlined in the affidavit in W.P. (C) No. 3 of 2007 does not merit dilation as the same is not of much consequence qua the questions raised to be answered.

23. In the result, the application is allowed. The judgment and order dated September 20, 2006 passed in W.P. (C) No. 3883 of 2006 Reported in 2007 7 VST 76. is hereby recalled. In view of the conclusions minuted hereinabove, the petition is adjudged to be devoid of merit and is accordingly dismissed. Needless to say, while exacting the tax payable by the petitioner, the respondent authorities would scrupulously conform to the provisions of the Act and the Rules. No costs.