
(2009) 08 P&H CK 0095
In the Punjab And Haryana At Chandigarh

Jarnail Singh

APPELLANT

Vs

Bharat Sanchar Nigam Limited and Others

RESPONDENT

Date of Decision : 13-08-2009

Acts Referred:

Constitution of India, 1950 — Article 366

Citation : (2009) 156 PLR 427 : (2010) 30 VST 146

Hon'ble Judges : M.M. Kumar, J;Jaswant Singh, J

Bench : Division Bench

Judgement

M.M. Kumar, J.—This order shall dispose of CWP Nos. 21461 of 2008 and 2022 & 6487 of 2009, as common question of law and facts are involved. However, the facts are being referred from 21461 of 2008.

2. The petitioner is aggrieved by the action of the respondent" in deducting Sales Tax/Value Added Tax from the works contract carried out by it, especially when no transfer of goods was involved. The petitioner has further prayed :hat Clause 14(a) of the agreements, dated 26.5.2006, 13.3.2007, 14.3.207, 15.2.2008 and CWP No. 21461 of 2008 23.2.2008 (Annexures P-1 to P-6 respectively), which prescribes deduction of Sales Tax @ 2% from the running bills of the contractor, may be declared as illegal and settled principles of law. Still further, refund of the entire deductions along with interest till the date of payment has been claimed.

3. Brief facts of the case are that the petitioner is a proprietorship concern and carrying on the business of performing various kinds of labour jobs. It has entered into a number of agreements with the Bharat Sanchar Nigam Limited (BSNL)- respondent No. 1 during the years 2006 to 2008 for repair/replacement of faulty underground cables and outdoor plants etc. in outer area of Ludhiana SSA. Copies of the agreements have been placed on record as Annexures P-1 to P-6. In all the agreements, there is a common clause 14(a), which reads thus:

14(a) Sales tax @ 2% will be deducted from the running bills of the contractor.

4. It has been claimed by the petitioner that the work being carried out by it

under the agreement involves only excavation of trenches, opening, cleaning, jointing of cables, resetting of DPs etc. No material/goods is to be supplied by it to the BSNL-respondent No. 1 while performing the aforementioned skilled/unskilled labour jobs.

5. It has been claimed that in the year 2005, the Punjab General Sales Tax Act, 1948 (for brevity, "PGST Act") was replaced by the Punjab Value Added Tax Act, 2005. (for brevity, "the Act"), which was made effective from 1.8.2005. Despite the said change, the BSNL-respondent No. 1 continued deductions of Sales Tax from the running bills of the petitioner in terms of clause 14(a) of the agreements. The deductions made from 1.4.2005 to 1.4.2008 are tabulated as under:

Period of deduction	Amount (in Rs.)	1.4.2005 to 31.3.2006	30,099.00	1.4.2006 to 31.3.2007	1,93,313.00	1.4.2007 to 31.3.2008	2,82,814.00	1.4.2008 to 31.8.2008	2,33,757.00	-----	Total	7,39,983.00	-----
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6. Reference has also been made to the 46th Amendment Act, 1982, whereby the Parliament has inserted a definition, namely, clause 29A in Article 366 of the Constitution, which reads thus:

366. Definitions - In this constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:

(29A) "tax on the sale or purchase of goods" includes:

(a) xxx xxx xxx

(b) a tax on the transfer of property in goods (whether a goods or in some other form) involved in the execution of a works contract).

(c) to (f) xxx xxx xxx

7. On the basis of the above amendment, the Punjab General Sales Tax (Amendment) Act, 1997 was legislated and Section 10C was incorporated in the PGST Act with immediate effect, vide notification dated 1.7.1997. Sub-section (1) of Section 10C of the PGST Act contemplates that every person responsible for making payment to any dealer for discharge of any liability on account of valuable consideration payable for the transfer of property in goods (whether goods or in any other form) in pursuance of a works contract shall, at the time of making such payment to the contractor either in cash or in any other manner, deduct an amount equal to two per centum of such sums towards part or, as the case may be, full satisfaction of the tax payable under the PGST Act on account of such works contracts.

8. Reference has also been made to Section 6 of the Act, which is the charging section. Gross turnover is defined in Section 2 (m) of the Act, to include aggregate of the amounts of sales/purchase. It is submitted that before Section 6 of the Act is attracted, there has to be some sale or purchase. In the present

case, it is not the case of the respondents that any sale or purchase is involved in executing the contract in question. It has been pleaded that since in execution of above job/contract, no transfer of goods or sale of goods is involved, no tax was attracted. Reliance has also been placed on the judgments of this Court rendered in the cases of Keshob Plants v. BSNL 1 C.W.P. No. 19579 of 2002, decided on 13.8.2008; Deepak Kumar v. Union of India and Ors. C.W.P. No. 12203 of 2000, decided on 21.9.2001 and Freedom Info Systems v. BSNL and Ors. CWP No. 1222 of 2008, decided on 12.11.2008, wherein it has been held that if in a works contract, no sale of goods was involved, no sales tax could be allowed to be collected merely on the ground that the same could be refunded later.

9. In the written statement filed on behalf of respondent No. 1 the stand taken is that the BSNL-respondent No. 1 has rightly deducted sales tax @ 2% from the running bills of the petitioner strictly as per the terms and condition contained in para 14(b) of the agreements entered into between the parties. It has also been asserted that respondent No. 1 is entitled to make deductions of 2% of the payment to be made to the petitioner u/s 27 of the Act. Section 27 of the Act envisages deduction only where payment is made in a contract for transfer of property or goods in pursuance of work contract, which admittedly, is not the situation here.

10. Initially no written statement on behalf of respondent Nos. 2 and 3 was filed despite grant of various opportunities and imposition of cost of Rs. 3,000/- on 11.5.2009, which was enhanced to Rs. 5,000/- on 13.7.2009. Faced with this situation, a direction was issued to the Secretary, Department of Excise and Taxation, Punjab and the Excise and Taxation Officer, Ludhiana, to appear in person along with the relevant record and to explain why the written statement was not filed on behalf of respondent Nos. 2 and 3. On 20.7.2009, a reply in the shape of affidavit of Shri Naresh Sharma, Excise and Taxation Officer, Ludhiana-II, dated 16.7.2009, was filed in the Court. Along with the reply a separate affidavit of Shri Naresh Sharma and a communication dated 17.7.2009 issued by the Financial Commissioner, Taxation addressed to all the Deputy Excise and Taxation Commissioners, Assistant Excise and Taxation Commissioners and Excise and Taxation Officers in the State of Punjab, were also placed on record.

11. A reading of communication dated 17.7.2009, sent by the Financial Commissioner, reveals that sanction to defend the case on behalf of respondent Nos. 2 and 3 was accorded on 21.2.2009 and the office of ETC, DETC (Legal) and AETC, Ludhiana, were directly communicated to file parawise reply to the instant petition after getting it vetted. Thereafter, series of letters, as per interlocutory orders passed by this Court, were sent by the learned Advocate General, Punjab, including the one granting last opportunity. There was no explanation tendered by the Excise and Taxation Officer in respect of the period from January 2009 to June 2009 for not filing written statement although some explanation was made from June 2009 onwards. Financial Commissioner has stated that action against

the errant officer is being taken separately on administrative side.

12. In pursuance to the stand taken by the Financial Commissioner, an affidavit of Shri H.K. Nagpal, Additional Secretary, Excise and Taxation Department, Government of Punjab, placing on record preliminary inquiry report dated 27.7.2009, concluding that Sarvhri J.P. Singh, Assistant Excise and Taxation Commissioner, Naresh Sharma, Excise and Taxation Officer, P.K. Sharma, Assistant Excise and Taxation Commissioner, have been found wanted in discharge of their duties. In pursuance to the findings recorded in the preliminary inquiry, the aforesaid officers have been proceeded against under the Punjab Civil Services (Punishment and Appeal) Rules, 1970. Mr. Piyush Kant Jain, Addl.AG, Punjab, has stated that the matter would be taken to a logical end.

13. In the reply filed on behalf of respondent Nos. 2 and 3 the stand taken is that the PGST Act remained effective upto 31.3.2005 instead of 31.7.2005 as stated in para 4 of the writ petition. Similarly, the Act came into force w.e.f. 1.4.2005 instead of 1.8.2005. It has been further asserted that the BSNL-respondent No. 1 has rightly deducted sales tax @ 2% from the running bills of the petitioner because u/s 10-C of the PGST Act, a contractee was required to deduct TDS @ 2% from the contractors and similar provisions has been made u/s 27 of the Act for deduction of tax from the amount payable to the works contractors. It has been submitted that the petitioner could have approached the Commissioner or the Designated Officer and get a certificate for non deduction of tax as provided in clause 10 of Section 27 of the Act. However, instead of approaching the Commissioner or the Designated Officer the petitioner has filed the instant petition after four years. With regard non supply of any material by the petitioner to the BSNL-respondent No. 1, it has been pointed out that some material would certainly exchange hands during a period of four years because it is own case of the petitioner that it is doing the work of repair of cables etc. under the contract agreements and while carrying out those works goods viz. cable, cement, bajri, sand and bricks etc. would be certainly used.

14. Having heard learned Counsel for the parties and perusing the paper book with their able assistance we are of the considered view that there is merit in these petitions and the same deserves to succeed. The BSNL-respondent No. 1 cannot make any deduction from the payments to be made to the petitioners. No tax can be collected in the absence of a statutory provision merely because of agreement between the parties. Judgments relied upon by the petitioners are clearly applicable and support their case.

15. We see no force in the argument raised by the learned Counsel for the respondents that under Sub-section (10) of Section 27 of the Act, in case of any dispute, an application can be made by the contractor for issuance of a certificate that no tax was liable to be deducted. In view of admitted facts in the present case, it is not necessary to require the petitioner(s) to resort to the said remedy, which of course is an alternative remedy, which the petitioner(s) could have resorted to.

16. Accordingly, we declare that the BSNL-respondent No. 1 is not entitled to make any deduction out of the payments to be made to the petitioner(s) u/s 27 of the Act without any transfer of property in goods being involved.

17. The petitioners would be at liberty to take their remedies for refund of the payments already made. If any such application is made, respondent No. 3 shall take a decision thereon within one month from the date of receipt thereof.

18. We further direct that disciplinary proceedings be concluded against those who have been found wanted in discharge of their duties expeditiously preferably within a period of four months from the date of receipt of a copy of this order. A copy of the order be given to the learned Additional Advocate General under the signature of the Bench Secretary at the earliest possible.

19. The petitions are disposed of accordingly.