

(2011) 09 OHC CK 0019

In the Orissa High Court

Case No : Writ Petition (C) No. 4377 of 2008

Larsen and Toubro Limited, Engineering Construction and
Contracts Division (ECC)

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 15-09-2011

Acts Referred:

Constitution of India, 1950 — Article 141, 366(29A)
Orissa Sales Tax Act, 1947 — Section 29(2)
Orissa Value Added Tax Act, 2004 — Section 10(1), 11(2), 2(33)
Orissa Value Added Tax Rules, 2005 — Rule 6

Citation : (2011) 09 OHC CK 0019

Hon'ble Judges : V. Gopala Gowda, J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : V. Raman, M/s. Satyajit Mohanty, R.R. Swain, P.K. Muduli and M. Banaji, for the Appellant; R.P. Kar for Revenue, for the Respondent

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—This Writ Petition has been filed with a prayer to declare Section 11(2)(c) of the Orissa Value Added Tax Act, 2004 (for short, "OVAT Act") as well as Rule 6(e) of the Orissa Value Added Tax Rules, 2005 (for short, "OVAT Rules") unworkable for the reasons stated in the writ petition.

2. Mr. V. Raman, learned Senior Advocate appearing on behalf of the Petitioner submits that while Section 11(2)(c) of OVAT Act provides for deduction towards labour, service charges and other like charges, Rule 6(e) of the OVAT Rules provides for deduction towards labour and service charges only from the gross turnover to arrive at the taxable turnover in respect of works contract. Both these provisions do not provide for other deductions prescribed by the Hon'ble Supreme Court in the case of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, . The Hon'ble Supreme Court in the case of State of Jharkhand and Others Vs. Voltas Ltd., East Singhbhum, held that deduction of labour and other charges is inadequate and it is necessary for the State

Legislature to make provision for each and every deduction prescribed by the Hon''ble Supreme Court in Gannon Dunkerley's case (supra). Failure of State Legislature to make provision for deductions set out in Gannon Dunkerley's case (supra) renders the provisions of Section 11(2)(c) as well as Rule 6(e) unworkable.

3. Per contra, Mr. Kar, learned Standing Counsel for the Revenue submits that it is nobody's case that no rule is provided under the OVAT Rules prescribing deductions from the gross turnover to arrive at the taxable turnover. Rule 6(e) provides such deduction with certain restrictions. Therefore, it cannot be said that the OVAT Rules is completely silent about the deductions from the gross turnover in relation to works contract to determine taxable turnover. It is further submitted that under Article 141 of the Constitution of India the law declared by the Hon''ble Supreme Court is binding on every court within the territory of India. Therefore, the deductions prescribed in Gannon Dunkerley'' case (supra) if brought to the notice of any Assessing Officer he will permit deduction as provided in the said judgment and there is absolutely no basis for the Petitioner to apprehend that the Assessing Officer shall not allow permissible deductions from gross turnover while determining taxable turnover in relation to works contract. Merely because Rule 6(e) of the OVAT Rules does not provide for deductions in detail in line with judgment of Hon''ble Supreme Court in Gannon Dunkerley's case (supra), that cannot render any action invalid. In support of his contention, Mr. Kar placed reliance upon the decision of the Hon''ble Supreme Court in Jantia Hill Truck Owners Association v. Shailang Area Coal Dealer and Truck Owner Association and Ors. 2009 (5) Supreme 326, wherein the Hon''ble Supreme Court held that even in a case where the statute provides for certain things to be done, subject to the Rules, any action taken without framing the Rules would not render the action invalid. If a statute is workable even without framing of the Rules, the same has to be given effect to. The law itself except in certain situations does not envisage vacuum.

4. On rival contentions raised by the parties, the only question that falls for consideration by this Court is as to whether Section 11(2)(c) read with Rule 6(e) should provide for various deductions as set out/prescribed by the Hon''ble Supreme Court in Gannon Dunkerley's case (supra) for the purpose of determining taxable turnover in case of a works contract.

5. To deal with the above question, it is necessary to know what is contemplated in Section 11(2)(c) of OVAT Act and Rule 6(e) of OVAT Rules. The said provisions are extracted below:

11. Levy of tax on sale.-

(1) xx xx xx

(2) For the purposes of Sub-section (1), the expression "taxable turnover of sales? shall mean, in relation to a dealer liable to pay tax on sale of goods under Sub-section (1) of Section 10, that part of the gross turnover of sales during any

period which remains after deducting there from-

(a) xx xx xx

(b) xx xx xx

(c) in case of turnover of sales in relation to works contract, the charges towards labour, services and other like charges subject to such conditions and restrictions as may be prescribed:

Provided that where the amount charged towards labour, services and other like charges in such contract are not ascertainable from the terms and conditions of the contract or the books of account maintained for the purpose, the amount of such charges shall be calculated at the prescribed rate;

(underlined for emphasis)

Rule. 6(e). Determination of taxable turnover.-

Xx xx xx

(e) in case of works contract, the expenditure incurred towards labour and service, subject to the condition that evidence in support of such expenses are produced to the satisfaction of the Commissioner:

Provided that where a dealer executing works contract, fails to produce evidence in support of expenses towards labour and service as referred to above or such expenses are not ascertainable from the terms and conditions of the contract or the books of accounts maintained for the purpose, expenses on account of labour and service shall be determined at the rate specified in the Appendix.

6. Section 11(2)(c) provides for computation of taxable turnover of sales. In case of works contract it provides that the taxable turnover of sales shall mean that part of the gross turnover of sales during any period which remains after deducting there from the charges towards labour, services and other like charges subject to such condition and restriction as may be prescribed. However, Rule 6(e) of the OVAT Rules provides that to determine the taxable turnover of sales in case of works contract expenditure incurred towards labour and services shall be allowed subject to the condition that the evidence in support of such expenditure is to be produced to the satisfaction of the Commissioner. Thus, even though Section 11(2)(c) provides for deductions towards "other like charges" besides labour and service charges, the Rules do not provide any such deductions. When the statute provides that something is to be prescribed in the Rules then that thing must be provided in the Rules with a view to making the provision workable and valid.

7. By now, it is no more res integra that in view of Article 366(29-A)(b), State Legislatures are competent to impose tax on transfer of property in goods involved in execution of works contract. In Gannon Dunkerley's case (supra), the Hon'ble Supreme Court held that the value of goods involved in execution of

works contract will have to be determined by taking into account the value of the entire works contract and deducting there from the charges towards labour and services which would cover: (a) labour charges for execution of the works; (b) amount paid to a subcontractor for labour and services; (c) charges for planning, designing and architect's fees; (d) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract; (e) cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract the property which is not transferred in the course of execution of a works contract; (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services; (g) other similar expenses relatable to supply of labour and services; (h) profit earned by the contractor to the extent it is relatable to supply of labour and services. The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

8. It is further held by the Hon''ble Supreme Court in Gannon Dunkerley's case (supra) that in cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would be permissible for the State Legislature to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts. This judgment has been followed by the Hon''ble Supreme Court in Voltas Ltd.'s case (supra).

9. Needless to say that the law declared by Hon''ble Supreme Court is the law of the land and binding on everybody. Perusal of Rule 6(e) of the OVAT Rules reveals that it provides only deduction on account of labour and service charges from the gross turnover to arrive at the taxable turnover. This is even not in conformity with Section 11(2)(c) of the OVAT Act which provides deduction towards labour, service charges and also "other like charges". Unfortunately, Rule 6(e) does not talk of any "other like charges". It only provides for labour and service charges which are to be deducted from the value of works contract but does not provide for anything towards "other like charges". This is required because only value of goods sold in execution of works contract can be taxed under the VAT Act. The various deductions as provided/set out in the decision of the Hon''ble Supreme Court in Gannon Dunkerley" case (supra) are not confined

to labour and service charges only. Therefore Rule 6(e) must provide various deductions set out/prescribed by the Constitution Bench of the Hon"ble Supreme Court in Gannon Dunkerley's case (supra).

10. We are unable to accept the contention of Mr. Kar that in view of the fact that various deductions are provided by the Constitution Bench of the Hon"ble Supreme Court in Gannon Dunkerley's case (supra) neither the taxing authority nor the Assessee-dealer faces any difficulty in allowing/availing such deductions from the gross turnover irrespective of the fact that such deductions are not provided in Rule 6(e) of the OVAT Rules.

11. Law is well settled that in the field of taxation, law must be certain, clear and unambiguous. In the matter of taxation, either the statute or the Rules framed under the statute must cover the entire field. The Hon"ble Supreme Court in the case of Govind Saran Ganga Saran v. Commissioner of Sales Tax [1985] 60 STC 1 held as under:

.... The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity.

Thus, if the measure of tax is not provided either under the Act or under the Rules, the levy itself becomes uncertain and such uncertainty proves fatal to the validity of the taxing statute.

12. Apart from the above, it is well settled principle of law that statutory authorities are bound to abide by the Act and Rules.

In Sirsi Municipality by its President Sirsi Vs. Cecelia Kom Francis Tellis, , the Hon"ble Supreme Court observed that rules or the regulations are binding on the authorities.

13. The Hon"ble Supreme Court in Jantia Hill Truck Owners Association's case (supra), upon which Mr. Kar placed reliance, held that if a statute is workable even without framing the Rules the same has to be given effect to. Law itself except in certain situations does not envisage vacuum. In the present case, Section 11(2)(c) of the OVAT Act provides that in case of works contract charges towards labour, service and "other like charges" as prescribed are to be deducted from gross value of works contract to arrive at taxable turnover. The word "prescribed" according to Section 2(33) of the OVAT Act means prescribed by rules. Thus, it is left open to the Rule making authorities to prescribe "other like charges" of course subject to conditions and restrictions, but in the present case, Rule is also silent about "other like charges". Therefore, it cannot be said that

Section 11(2)(c) is workable. Hence, Jantia Hill Truck Owners Association's case (supra) is of no help to Mr. Kar.

14. this Court in *Larsen and Toubro Limited v. State of Orissa and Ors.* (2008) 12 VST 31 (Ori) held that after decision in the case of *Gannon Dunkerley's case* (supra) the entire law on works contract has got changed and it is the governing judgment in the works contract. Law laid down in that case by the Hon''ble Supreme Court is binding on all the courts in India which is the mandate of Article 141 of the Constitution of India. In the said judgment, this Court further held that Section 2(e) and Section 29(2)(e) of the Orissa Sales Tax Act, 1947 make it clear that Rules are contemplated under the Act for the purpose of ascertaining deduction in the case of taxable turnover in respect of works contract; but necessary Rules have not been framed. In the absence of any statutory prescription for calculation of taxable turnover the Act remains unworkable.

15. Therefore, absence of provisions for various deductions in Section 11(2)(c) and Rule 6(e) in line with the judgment of the Hon''ble Supreme Court in *Gannon Dunkerley's case* (supra) certainly creates uncertainty, so far levy of tax on works contract is concerned. To avoid such uncertainty, the State Government is directed to amend Rule 6(e) to bring in line with judgment of the Hon''ble Supreme Court in *Gannon Dunkerley's case* (supra) vis-a-vis Section 11(2)(c) of the OVAT Act. Till such amendment is made to Rule 6(e) of the OVAT Rules, the Commissioner of Sales Tax is directed to issue suitable instructions to all the taxing authorities to allow various deductions from the gross turnover to arrive at the taxable turnover in respect of works contract in terms of decision of the Hon''ble Supreme Court in *Gannon Dunkerley's case* (supra).

16. With the aforesaid observations/directions, the writ petition is allowed.