
(2011) 12 GAU CK 0008
In the Gauhati High Court
Case No : Writ Petition (C) No. 5854 of 2010

Larsen and Toubro Ltd.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 21-12-2011

Acts Referred:

Assam Value Added Tax Act, 2003 — Section 11, 40, 69, 69(2)
Constitution of India, 1950 — Article 14, 226, 366(29A)

Citation : (2013) 60 VST 554

Hon'ble Judges : Adarsh Kumar Goel, C.J;C.R. Sharma, J

Bench : Division Bench

Advocate : N. Venkatraman, A. Todi and A. Nath, for the Appellant; K.N. Chaudhury, Additional Advocate-General, Assam and R. Dubey, Standing Counsel, Finance and Taxation, for the Respondent

Final Decision : Dismissed

Judgement

Adarsh Kumar Goel, C.J.—This petition seeks declaration that sections 11 and 69 of the Assam Value Added Tax Act, 2003 (the Act) and rule 10 of the Assam Value Added Tax Rules, 2005 are void and also seeks quashing of assessment order dated September 6, 2010 (annexure 6 to the writ petition) passed by the Assistant Commissioner of Taxes, Central VAT Audit Cell, Guwahati (respondent No. 3). The case of the petitioner is that it is engaged in the execution of works contract for which it is assessed to tax under the provisions of the Act and the Rules. For the assessment year 2005-06, order of assessment dated December 4, 2007 was passed entitling the petitioner to refund of Rs. 2.15 crores but the assessment was reopened vide notice dated March 19, 2009 and on reassessment the impugned order dated September 6, 2010, has been passed, creating a huge demand from the petitioner which was illegal and arbitrary.

2. The writ petition has been opposed by filing a reply by the Additional Commissioner of Taxes, Guwahati, resisting the contentions raised and pointing out that alternative remedy of appeal was available against the order of

assessment. Section 11 of the Act provides for measure of the taxable turnover. The identical provision has been upheld by the honourable Supreme Court in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, . Reassessment was permissible u/s 40 of the Act when there was escapement of tax as in the present case, in the manner mentioned in the notice of reassessment.

3. We have heard Mr. N. Venkatraman, learned counsel appearing for the petitioner, and Mr. K.N. Choudhury, learned Additional Advocate-General, Assam, appearing for the respondents.

4. The learned counsel for the petitioner has raised two contentions. First relates to the validity of section 69(2) of the Act to the extent of providing for laying down the conditions for the contractor not liable to pay tax again when such tax has been already paid by the sub-contractor and rule 39, according to which the contractor was required to produce documentary evidence of payment of tax by the sub-contractor with a declaration from the sub-contractor. The second contention is that the impugned order was arbitrary and thus violative of article 14 of the Constitution insofar as proviso to section 11 has been involved thereby making addition to the declared value of turnover even when the contractor has maintained proper accounts. It is submitted that it was wrongly assumed that the contractor had not maintained accounts merely because a particular voucher was not produced or because the establishment charges on procurement and supply of material and those referable to labour and other services had not been apportioned with a view to clearly indicate the cost of the material which alone was exigible to value added tax under entry 54 of List II of the Seventh Schedule to the Constitution read with article 366(29A). Reliance has been placed on *State of Andhra Pradesh and Others Vs. Larsen and Tourbo Ltd. and Others*, and *Media Communications Vs. Government of Andhra Pradesh*, .

5. The learned counsel for the State has submitted that section 69(2) and rule 39(1) are machinery provisions and provide for the manner in which the levy of tax was to be effectuated when the contractor as well as subcontractor were engaged in executing works contract. It was further submitted that the validity of assessment order could be gone into in departmental appeal as it involved going into the question whether the proviso to section 11 could be involved in the circumstances of the present case.

6. We have considered the rival submissions. We are of the view that no interference is called for under article 226 of the Constitution, at this stage.

7. As regards the issue of validity of rule 39 referable to section 69(2) is concerned, we do not find any illegality therein. The relevant provisions of section 69(2) and rule 39(1) are as under:

69. Liability of contractor and sub-contractor to tax.--(1) . . .

(2) If the contractor proves in the prescribed manner that the tax has been paid

by the sub-contractor on the taxable turnover of the goods involved in the execution of the works contract, executed by such sub-contractor, the contractor shall not be liable to pay tax again on the taxable turnover of such goods.

39. Liability of contractor or sub-contractor to tax.--(1) A contractor shall not be liable to pay tax under sub-section (2) of section 69, if he produces documentary evidence as to the payment of tax on the taxable turnover of the goods involved in execution of works contract, by the sub-contractor along with a declaration from such subcontractor to this effect.

8. The above provisions only require production of documentary evidence of payment of tax with a declaration from the sub-contractor. There can be no difficulty in giving documentary evidence of tax or a declaration from the sub-contractor. No doubt the format of declaration has not been prescribed but in absence thereof, declaration from sub-contractor giving relevant particulars to connect the payment of tax to the turnover can certainly be furnished. The judgments relied upon do not help the petitioner.

9. The judgment of the honourable Supreme Court in State of Andhra Pradesh and Others Vs. Larsen and Tourbo Ltd. and Others, , has no applicability to the present case as the observations relied upon are in respect of a provision for tax being levied twice in respect of same transactions which is not the case here. As regards the judgment of Media Communications Vs. Government of Andhra Pradesh, , observing that if sub-contractor was registrable there was no purpose in requiring the contractor to prove that turnover of sub-contractor was included in his return and such information could be seen from the record of the tax return, we are of the view that the said observation could not be read as laying down that Legislature had no competence to require furnishing proof of payment of tax and declaration by sub-contractor where contractor pleads that he was not liable to pay tax on that ground.

10. As regards the plea of arbitrariness of the order of assessment we are of the view that the petitioner has the alternative remedy of raising all contentions against the said order before the concerned departmental authority in a statutory appeal.

11. Thus, no ground is made out for interference in exercise of writ jurisdiction. The writ petition is dismissed. It is made clear that this order will not debar the petitioner from filing statutory appeal, in accordance with law.