(2017) 02 AHC CK 0189

In the Allahabad High Court

Case No : Trade Tax Revision No. 744 of 201

M/S Adhishasi Abhiyanta R.E.S. APPELLANT

Vs

C.C.T. Lucknow RESPONDENT

Date of Decision : 09-02-2017

Acts Referred:

Citation : (2017) 95 UPTC 349

Hon'ble Judges : Ashwani Kumar Mishra, J.

Bench : Single Bench

Advocate : N.C. Gupta, Advocate, for the Applicant; C.S.C, for the Opposite Party

Final Decision : Dismissed

Judgement

Ashwani Kumar Mishra, J.—This revision has been filed by the M/s Executive Engineer, Rural Engineering Service, Division Mainpuri, questioning the correctness of the order passed by the tribunal dated 28.6.2011, whereby the assessee has been held liable for payment of differential of tax under section 3G(3) of the U.P. Trade Tax Act.

2. From the materials placed, it appears that a contract was awarded by the assessee in favour of a contractor for raising certain construction, for its benefit. An agreement was entered into between the parties. Schedule ''C'' of the contract, which is relevant for present purposes, reads as under:-

"1- lhesaV ,oa LVhy ftl rjg dk fofHkUu lkbVksa esa miyC/k gksxk ogh b''kw fd;k tk;sxk vkSj bl fd;s x;s eky dk ewY; igys b''kw fd;s x;s fcy ls dkV fy;k tk;sxkA

2- ftl lkbV ij fturs eky dh vko'';drk gksxh ogha ds fy;s b''kw fd;k tk;sxkA

3- tks eky vko'';drk ls vf/kd dkUV~sDVj dks tkjh gks tk;sxk og dkUV~sDVj dks okil djuk gksxk vU;Fkk b''kw ewY; dh nks xquk dh nj ls dVkSrh dh tk;sxhA

4- ;fn LVksj esa eky ugha gksxk rks Bsdsnkj vf/k''kklh vfHk;Urk dh vuqefr ls cktkj ls [kjhn ldsaxsA

5- [kkyh lhesaV cSx Bsdsnkj LVksj esa okil tek djsaxs vU;Fkk 2@& izfr cSx dh nj ls dVkSrh dh tk;sxhA"

3. The assessee purchased cement and other building materials on concessional rates invoking the provisions contained under section 3G(1) of the Act. Such goods thereafter were transferred to the contractor, for being utilized for the purposes of construction to be raised for the assessee. According to the assessee, transfer of such goods did not amount to sale, as the goods upon which concessional tax was paid had been utilized for the benefit of government corporation only. The assessing authority, however, treated the transfer of goods by the department to the contractor as sale, and consequently, invoked the provisions of sub-section (2) of section 3G, and ultimately, an order was passed under subsection 3G(3) of the Act. This order has been challenged by filing departmental appeals, which have failed, giving rise to filing of the present revision.

4. Sri N.C. Gupta, learned counsel for the revisionist contends that since goods have been utilized for the purposes of the government corporation, which was entitled to the protection under section 3G(1) of the Act, as such, liability of additional tax raised upon the assessee is bad in law. It is stated that the mere adjustment in the accounts, as per the terms of the agreement, of the value of goods did not amount to sale, and therefore, sub-section (2) and (3) of section 3G could not be invoked. In support of such contention, learned counsel has relied upon decision of this Court in M/s Oil and Natural Gas Commission, Dehradun v. Commissioner of Sales Tax: 1992 UPTC 170, M/s Modi Xerox, Rampur v. Commissioner of Sales Tax: 1992 UPTC 717, The Commissioner, Sales Tax, U.P. v. S/s U.P. Avas Evam Vikas Parishad, Kanpur: 2003 NTN (23) 978, as well as a decision of this Court in The Commissioner of Sales Tax, U.P. Lucknow v. S/s Maha Prabandhak Jal Sansthan: 2000 NTN (17) 777.

5. Per contra, learned Standing Counsel submits that the issue is no longer left res integra, inasmuch as the question involved herein stands concluded by the judgment of the Apex Court in M/s N.M. Goel & Co. v. Sales Tax Officer, Rajnand Gaon and another: 1990 UPTC 865, as subsequently followed in Rashtriya Ispat Nigam Ltd. v. State of Andhra Pradesh: 1998 UPTC 727, and Karya Palak Engineer CPWD Bikaner v. Rajasthan Taxation Board, Ajmer and other: 2004 UPTC 1178. Learned Standing Counsel has further placed reliance upon a Division Bench judgment of this Court in M/s Bharat Pumps and Compressors Ltd. Naini Allahabad v. State of U.P. and another: 1995 UPTC 256.

6. I have heard learned counsel for the parties, and examined the materials placed on record. It is to be noticed that the transaction which has given rise to the controversy involved is not disputed. It is admitted that construction materials were purchased by the government entity for its construction activity upon concessional rates of tax. Such construction materials were made available to the contractor, for being utilized in connection with the construction work to be undertaken for the benefit of government entity. Schedule ''C'' to the contract

has already been extracted above, according to which, the cement and steel was to be made available at the site, as per the requirement of construction to be made for the government entity, and the amount equivalent to the goods supplied would be adjusted from the dues payable to the contractor. It was also contemplated that in case goods over and above what was required was obtained, then contractor was liable to be penalized. The question that arises for consideration in the facts of the present case thus is as to whether such arrangement, permitting utilization of construction materials by contractor and adjustment of its consideration in the contractor''s account, would constitute an act of ''sale'', so as to bring it within the clutches of sub-section (2) of section 3G or not?

7. The judgments which have been relied upon by learned counsel for the revisionist essentially follows the reasoning given in M/s Oil and Natural Gas Commission (supra), which distinguishes the earlier judgment delivered by the Apex Court in M/s N.M. Goel & Co. (supra) on the ground that there is no completed transaction of sale involved in such contract. Para 15 of the judgment in M/s Oil and Natural Gas Commission (supra), which is relied upon, reads as under:-

"15. Learned Standing Counsel, on the other hand, has placed reliance on the decision of the Supreme Court in M/s N.M. Goel & Company v. Sales Tax Officer, 1990 UPTC 865 (SC): 1988 STI Vol. 17-140, and on the basis of the said decision contended that the transaction made by the assessee amounts to sale and was exigible to sales tax. Learned counsel for the assessee contended that the ratio laid down in M/s N.M. Goel & Company (supra) is not applicable as it was a case of M.P. Entry Tax Act. It has been further stated that Clause 10 of the contract in the case of M/S N.M. Goel & Company (supra) clearly establishes that there was complete transfer of property inasmuch as the materials which remain unused was not required to be returned by the contractor and it was to be returned only after the contractor requires it to return otherwise the contractor shall be the absolute owner of the material supplied to him. Such is not the position in the instant case as in the case in hand the contractor was on the completion of the contract, duty bound to return the unused material, i.e. cement, iron, and steel etc. to the assessee-Commission failing which he was liable for criminal breach of trust and penalty to the extent of twice the amount in view of clause 33 of the contract referred to above. Moreover, a perusal of the judgment of the Supreme Court in M/s N.M. Goel & Company (supra) indicates that the Supreme Court has held that the question whether a particular transaction would be a sale or not would depend on the facts and circumstances of each case. In this connection I would like to refer a passage from the aforesaid decision of the Supreme Court:

"The question in each case was one about the true agreement between the parties and the terms of the agreement must be deduced from a review of all the attendant circumstances. But from the mere passing of title to goods either as integral part of or independent of goods, it could not be inferred that the goods were agreed to be sold, and the prices were liable to sales tax. Whether a contract for service or for execution of work involved a taxable sale of goods must be decided on the facts and circumstances of each case. The burden in such a case lay upon the taxing authorities to show that there was a taxable sale, and that burden was not discharged by merely showing that property in the goods which belonged to the party performing service or executing the contract stood transferred to the other party."

For the facts stated above I am of the definite view that the ratio laid down in N.M. Goel and Company (supra) is clearly distinguishable from the present case and is wholly inapplicable.

Similarly, the view is reiterated in M/s Modi Xerox, Rampur (supra).

8. Learned Standing Counsel on the other hand has heavily relied upon the judgment of the Apex Court in M/s N.M. Goel & Co. (supra). Similar question had arisen for consideration in the said decision and the relevant clause 10 of the contract was taken note of in para 3 of the judgment, which reads as under:-

"Clause 10. If the specification or Schedule of terms provides for the use of any special description of materials to be supplied from Engineer-in-charge''s Stores, or if it is required that the Contractor shall use certain stores to be provided by the Engineer-in-charge as shown in the Schedule of materials hereto annexed, the contractor shall be bound to procure and shall be supplied such material and stores as are from time to time required to be used by him for the purposes of the contract only, and the value of the full quantity of materials and stores to supply at the rates specified in the said Schedule of materials may be set off or deducted from any sums then due or thereafter to become due to the contractor under the contract or otherwise, or against or from the Security deposit, or the proceeds or sale thereof if the same is held in Government securities, the same or a sufficient portion thereof being in this case sold for the purpose. All materials so supplied to the contractor shall remain the absolute property of Government and shall not be removed on any account from the site of the work, and shall be at all times open to inspection by the Engineer-in-charge. Any such materials remaining unused and in perfectly good condition at the time of the completion or determination of the contract shall be returned to the Engineer-in-charge at a place directed by him, if by a notice in writing under his hand he shall so require; but the contractor shall not be entitled to return any such materials unless with such consent and shall have no claim for compensation on account of any such materials so supplied to him as aforesaid not being used by him or for any wastage in or damage to any such materials. Provided that the contractor shall in no case be entitled to any compensation or damage on account of any delay in supply or non-supply thereof all or any such materials and stores. Provided further that the contractor shall be bound to execute the entire work it the materials are supplied by the Government within the scheduled time for completion of the work plus 50 per cent thereof (scheduled time plus 6 months if the time of completion of the work exceeds (12 months) but it a part only of the materials has been supplied within the aforesaid period, then the contractor shall be bound to do so much of the work as may be possible with the materials and stores supplied in the aforesaid period. For the completion of the rest of the work, the contractor shall be entitled to such extension of time as may be determined by the Engineer-in-charge whose decision in this regard shall be final."

9. The Apex Court in such circumstances examined as to whether transfer of goods to the contractor would amount to sale or not? Paragraph 11 of the judgment in M/s N.M. Goel & Co. (supra) reads as under:-

"11. Therefore, from the above decisions it follows that in order to be sale taxable to duty, not only the property in the goods should pass from the contractor to the Government, or the appellant in this case but there should be an independent contract-separate and distinct-apart from mere passing of the property where a party purchases or procures goods from the Government. Mere passing of property from the contractor to the Government would not suffice. There must be sale of good. The primary object of the bargain judged in its entirely must be viewed. In the instant case, clause (10) is significant as we have set out hereinbefore. For the purpose of performance, the contractor was bound to procure materials. But in order to ensure that quality materials are procured, the PWD undertook to supply such materials and stores as from time to time required by the contractor to be used for the purpose of performing the contract only. The value of such quantity of materials and stores so supplied was specified at a rate and got set off or deducted from any sum due or to become due thereafter to the contractor. Mr. Virmani, appearing for the appellant submitted before us that in the instant case, there was no such independent and separate sale. But we are unable to accept. Though, in a transaction of this type there is no inherent sale; a sale inheres from the transaction. Clause (10) read in the proper light indicates that position."

10. Similar view was reiterated by a subsequent bench of the Apex Court in Rashtriya Ispat Nigam Ltd. (supra). In Karya Palak Engineer, CPWD, Bikaner (supra) again the Hon''ble Supreme Court examined a similar situation wherein pursuant to a contract, the goods obtained on concessional tax had been transferred to the contractor for being utilized for the benefit of government entity. A defence was setup before the Apex Court that the transfer in the facts and circumstances did not amount to a completed transaction of sale. This contention, however, was rejected in para 21 of the judgment, which reads as under:-

"21. In the instant case also by the use or consumption of material supplied in the work of construction, there was passing of property and by virtue of receipt of value of such transferred property by way of adjustment in bills the consideration has also passed which in our opinion satisfies the definition of ''sale'' in the local Sales Tax Act."

11. From the aforesaid judgment, it is clear that the condition required to be fulfilled, so as to legitimately invoke provisions of sub-section (2) of section 3G of the Act, is that goods have passed on for consideration. While interpreting the contract of similar nature, as arises in the facts of the present case, the Hon''ble Supreme Court found that the goods had actually passed on to the contractor and that the adjustment of account in the bills amounted to passing of consideration as well. The ingredients necessary therefore have been found to exist in a contract of this nature. Viewed in light of the principles of law laid down by the Apex Court, it is to be observed that in the present case also the goods have been transferred to the contractor and the amount payable for such goods have been adjusted from the account of the contractor. The contract of sale therefore is complete. The provisions of sub-section (2) of Section 3G of the Act therefore gets attracted. The order passed by the assessing authority under sub-section (3) of section 3G of the Act thus cannot be questioned.

12. The other judgment relied upon by learned counsel for the revisionist in The Commissioner, Sales Tax, U.P. v. S/s U.P. Avas Evam Vikas Parishad, Kanpur (supra), is clearly distinguishable on the facts of the present case inasmuch as the goods obtained on concessional rates were found to have been utilized by the government entity itself and there was no transfer to the contractor of goods, is of no help for the revisionist''s cause.

13. The last submission advanced by Sri Gupta that the proceedings are not assessment proceedings, is also an aspect concluded by the Division Bench of this Court in M/s Bharat Pumps and Compressors Ltd. Naini Allahabad (supra), wherein while interpreting section 3G(3) of the Act, following observations have been made in para 17:-

"As we have held above, the amount payable by such dealer is specified for which neither any assessment is required nor any discretion is left on the assessing authority, while passing orders under Section 3B read with Section 3G(3). The moment declaration of certificate is found to be wrong or false the assessing authority will make demand from such dealer under it. Passing of any order under Section 3B or Section 3G(3) may constitute to be an order but cannot be termed as an assessment order in our considered opinion."

14. In view of the discussions aforesaid, reference is answered by holding that the demand of differential of tax imposed by the department, and affirmed by the tribunal, is in accordance with law, and the challenge laid to it fails. Revision is accordingly dismissed.