

(2012) 02 KAR CK 0057
In the Karnataka High Court
Case No : S.T.A.NO. 91 of 2009

M/S Ibex Engineering Pvt. Ltd.

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Central Sales Tax Act, 1956 — Section 5 (1)

Karnataka Value Added Tax Act, 2003 — Section 4, 4 (1) (a), 4 (1) (b), 64 (1)

Citation : (2012) ILR (Kar) 2137 : (2012) 49 VST 302

Hon'ble Judges : H.S.Kempanna, J;D.V.Shylendra Kumar, J

Bench : Division Bench

Advocate : M N Shankare Gowda, for the Appellant; K.T.Vedamurthy - Hcgp, for the Respondent

Final Decision : Dismissed

Judgement

Shylendra Kumar J.

1. This appeal by the dealer, registered under the provisions of the Karnataka Value Added Tax Act, 2003 (for short hereinafter referred to as "the Act"), u/s.66(1) of the Act of the common order dated 6.5.2009 passed by the Addl. Commissioner of Commercial Taxes Zone-1, Bangalore, exercising his revisional jurisdiction u/s.64(1) of the Act revising the Appeal order VAT/AP Nos.1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554 & 1555/07-08 dated 7.7.2008. Insofar as the present appeal by the dealer is concerned, it is mainly for setting aside the order of the Commissioner two aspects; such as, the correctness of the order of the Commissioner and insofar as it relates to the Commissioner taking the view that the order passed by the Joint Commissioner exercising appeal jurisdiction is erroneous for the reason that the dealer/ assessee who had claimed certain sales in respect of what is known as moulds manufactured by it for the purpose of manufacturing a product which was exported to the foreign buyer and which was claimed as an export sale insofar as manufacture of mould is concerned, for which the dealer had received payment

in advance called as "tool development charges" amounts to a sale transaction attracting Section 4 of the Act for the reason that the goods i.e. the moulds were never actually exported, but remained with the dealer?

2. The second question is, as to whether the permanent wire tightener manufactured by the assessee is one classifiable within the scope of Entry No. 67 of Schedule 3 to the Act as aluminum extrusions or if it is not so fitting into this Entry, it has to be subjected to tax as residuary entry taxable at the general rate of tax in terms of Section 4(1)(b) of the Act.

3. It is because the Commissioner took the view that the value received by the dealer from its foreign business associate amounted to sale price of the moulds and being not an export, even as conceded by the appellant, it was to be subjected to tax u/s.4 of the Act and therefore, restored such action of the Assessing Authority which had been set aside by the Appellate Authority and even in respect of the levy of tax on permanent wire tightener as one covered under the residuary entry in terms of Section 4(1)(b) of the Act as against the Appellate Authority's view that permanent wire tighteners should have been subjected to tax at the rate as is applicable in respect of Entry 67 Schedule 3 to the Act and with reference to Section 4(1) (a) of the Act, the claim of the assessee was found to be not tenable by the Commissioner and order passed by the appellate authority was set aside and here again the original assessment was restored. The assessee is in appeal on these two aspects.

4. Though two other issues have been raised in this appeal, we are informed by Sri.Shankare Gowda, learned counsel for the appellant/dealer that insofar as the claim in respect of input tax rebate, for purchase of certain items and the rate of tax in respect of the injection moulds are concerned, the Commissioner himself having set aside the order of the Appellate Commissioner, insofar as these two aspects are concerned, but having remanded the matter relating to these aspects to the Assessing Authority, the assessee is pursuing the matter before the First Appellate Authority as the Assessing Authority has taken a view against the assessee/dealer.

5. Insofar as the first question such as taxing the so called export sale of the moulds which the assessee claimed that as the payment received from the foreign associate as "tool development charges" is concerned, submission of Sri.Shankare Gowda, learned counsel for the appellant is, this levy of tax is not only sustainable as, in fact, the moulds had never been moved out of the premise of the dealer, that the moulds were being used in the very premises of the dealer where it had been manufactured for the purpose of producing the dies for which the foreign associate has placed orders and therefore, even assuming that there was no export sale either, no tax under the Act could have been levied. In support of this submission, learned counsel would submit that delivery of goods is an essential ingredient of sale of goods; that while the assessee even assuming had received payment by way of "tool development charges", there being no physical delivery of goods or movement of the goods from the premises

of the assessee to the foreign buyer or any one else, legally also there cannot be a transaction in the nature of sale and the amount received by way of tool development charges from the foreign buyer cannot be characterised as sale price of any product.

6. In support of his submission Mr.Shankare Gowda, learned counsel for the assessee, places reliance on a judgment of the Division Bench of the Madras High Court in the case of The State of Tamilnadu Vs. Tvl. Govel Plastic Pvt. Ltd., Madras, Drawing attention to this decision Mr.Shankare Gowda would point out that an attempt on the part of the Revenue in that case in the revision petition before the High Court to contend that a transaction wherein payment received from a business associate who was outside the State towards the cost of making dies and tools as in the present situation was held to be not attracting tax in terms of the provisions of the Central Sales Tax Act, 1956, as the said goods had never moved out of the State to attract levy of such tax under the Act.

7. However, Mr.Shankare Gowda, would lay specific emphasis on the observation of the learned judges of the Madras High Court that

2. Learned Government Advocate tried to suggest that there was, in fact a turnover which was created by the sale and, therefore, the finding of the appellate authority was incorrect In our opinion, the argument is basically incorrect because the transaction cannot be said to be a "sale" much less within the parameters of Section 3 of the Central Sales Tax Act 1956, as there is no movement of the goods at all The goods have remained with the assessee alone because they are the dies and tools and it is from those dies and tools that the finished products are manufactured. Since such dies never moved out of the factory premises of the assessee, there will be no question of tax liability.

and therefore, submits that on fact the present case being not much difficult, there is no tax liability in respect of a payment received by the dealer by way of tool development charges etc.

8. While on this aspect submission is that even assuming the payment received towards tool development charges should be taken as sale price of the mould without conceding the stand of the assessee, then also the rate of tax at which the transaction should have been subjected to can only be at 4% and not at 12.5% in terms of a circular issued by the Commissioner of Commercial Taxes wherein it is indicated as under :

Moulds" with Central Excise Tariff sub-heading 8454 and 8480 fall under Sl.No.31 and 34 of Notification No.FD 316 CSL 2005 (1), dated 05.08.2005 and are taxable at 4%.

and therefore, draws our attention to the copy of this clarification produced along with the memorandum of appeal.

9. Insofar as the levy of tax as a residuary item and at the general revision tax in respect of the value of permanent wire tightener is concerned submission is, it

comes within the scope of Entry 67 Schedule 3 to the Act attracting tax at 4% as wire tightener is of aluminum metal/aluminum extrusion as it is a product of aluminum, but only described as permanent wire tightener for identification or convenience sake and therefore, urges that the Additional Commissioner was not right in revising the order of the Joint Commissioner.

10. On the other hand, Sri.Vedamurthy, learned Govt. Pleader, supports the order of the Commissioner. It is pointed out that the Commissioner has given proper reasonings; that the commissioner did examine the entire records and found that the dealer had, in fact, manufactured by casting mould not merely for the customers abroad, but also for local customers and by using its own raw-materials and inputs for consideration paid by the buyers and most of the time the said goods are also delivered to the local buyers, but it is also found that the said goods or moulds are used by the dealer many a items for the manufacture of engineering goods according to the specification of the very buyers of the moulds and the dealer was also receiving price for the moulds from the customers. It is because of this position that the Addl. Commissioner took the view that it is taxable under the provisions of the Act.

11. It is also pointed that insofar as the permanent wire tighteners are concerned, it is a product by this name and manufactured by the dealer and it is also sold in the market by that name and it is not sold as any aluminum extrusion, but as "permanent wire tightener" and therefore, the goods cannot get into the general description in the nature of forms of aluminum as in Entry 67 of Schedule 3 to the Act.

12. We have looked into the order passed by the Addl. Commissioner and the records, considered the submissions made at the bar and the authority.

13. Insofar as the first aspect is concerned, while an export, sale which comes within the scope of Section 5(1) of Central Sales Tax Act, 1957 is qualified for exemption under the Act and even as provided in the manner of computation of taxable turn over u/s.2 (34) of the Act, if so qualifies if there is an export actually or as deemed u/s.5 of the Act, in the instant case, there is no dispute that the goods never moved out of the assessee's premises and therefore, never crossed the customs frontiers of India. The assessee nevertheless described the sale transaction in favour of the foreign buyer as an "export sale" and therefore, claimed exemption. If the export part does not take place only the sale part remains and if there is a sale which even the assessee admitted or claimed to be as an export sale, it remains a sale and therefore cannot escape the liability for taxation unless it is an inter-state sale or export sale.

14. There being a sale but neither export nor inter state and the assessee having claimed there is a sale, the transaction definitely attracts levy of tax within the scope of Section 4 of the Act. The mere fact that the buyer may be outside India does not in any way detract from the transaction to be taken as a local sale as the goods can be delivered on behalf of the foreign buyer to any person available

locally. In the instant case, though it is contended the goods never left the premises of the assessee and therefore, no sale in the eye of law, we find it difficult to accept this submission for the reason that the assessee has received payment and the moment the goods have come into existence, the payment is with reference to the goods so finished and the transaction gets completed and therefore, the assessee holds the goods on behalf of the buyer. May be in the present case, it was convenient and beneficial for the buyer to leave it in the premises of the assessee for its own purpose viz. for the manufacture of components to its specifications using the mould. That does not mean there is no sale or no delivery etc. Delivery can be actual or symbolic and the delivery in the instant case is definitely symbolic as once the goods have become the property of the foreign buyer and the assessee has not only held on behalf of foreign buyer but also has acted on the instructions of the buyer for by using the goods to further manufacture other goods for the use and benefit of the foreign buyer.

15. Insofar as the reliance placed on the judgment of the Madras High Court is concerned, we find that the issue there was, as to whether the transaction was an inter-state sale, attracting levy of tax u/s.3 of the CST Act. That is not the question here and more over an observation that there is no question of tax liability in that case is an observation in general and not an issue raised as the issue there was whether the transaction attracted tax u/s.3 of the CST Act and not a question of charge under the local state Sales Tax Act.

16. We find that the view taken by the Addl. Commissioner on this aspect in restoring the assessment order by setting aside the order- is perfectly justified as, the moment the assessee had received the payment and payment is appropriated with reference to the identified goods the sale has taken place,

17. The alternative argument advanced by Sri.Shankare Gowda regarding the rate of" tax on the mould which the assessee cannot be taxed as there is no sale at all is concerned, we find that it was not an issue before the Assessing Authority or the first appellate authority. However, though Mr.Shankare Gowda, has drawn our attention to the discretion of the Commissioner on this aspect of the matter, as contained in Para 9 of the order, we find that the commissioner has held the clarification relied upon by the dealer was not applicable to the present case for the reason that the clarification was only in respect of the goods purchased and used as capital goods, which are the goods which are covered as actual goods as per the notification No.FD 316 CSL 2005 dated 5.8.2005.

18. On facts the Commissioner found that in the present case the particular goods were not used as capital goods because the dealer was not using something that he purchased as actual goods, but something that was sold to a buyer though outside India, but retained on their behalf and used for the purpose of the buyer.

19. It is not a situation of a dealer using the actual goods he had purchased for producing a product which is assessable under the Act. This is a case of the

goods of another person being used by the dealer for manufacturing as item to the specification of the buyer. It is true that the Commissioner took the view that the rate at 4% was not applicable and we find it is perfectly valid in the facts and circumstances that the clarification does not apply to the case of the present dealer.

20. So far as the second aspect is concerned, the question is only as to whether the permanent wire tightener can be brought within the scope of Entry 67 of the Act. We have noticed the entry reading as under :-

Entry No.67:- Non-ferrous metals and alloys: Ingots, slabs, blocks, billets, sheets, circles, hoops, strips, bars, rods, rounds, squares, flats and other extrusions of aluminium, brass, bronze, copper, cadmium, lead and zinc, metal powders, metal pastes of all types and grades, metal scraps and waste

The word or phrase "aluminum extrusion" is one of many forms. Aluminium metal amongst many items described under this Entry and what one can notice here is that several items in this Entry are one fitting into a basic presentation of Aluminium metal as a commodity either in moulds or in billets or in aluminium extrusion etc., though it is contended by Sri.Shankare Gowda that the permanent wire tightener of aluminum metal is also to be considered as another "extrusion of aluminum" such as for extrusion of aluminum sheets etc., we are unable to accept this submission for the simple reason that the product itself is identified as permanent wire tightener, is marketable in that name and is sold in the market. In fact, the assessee also has described that and sells it as permanent wire tightener and not as aluminum extrusion or any form of aluminum. May be the mould used is aluminum, but that in no way detracts from the end product which is distinctly identified as a product and not merely as a form of aluminum in which the aluminum metal can be sold. It is for this reason we reject the argument that it should have been brought within the scope of Entry 67 Schedule 3 to the Act. These two aspects having gone against the assessee, there is no need for interference in the appeal and accordingly the appeal is dismissed.