
(2014) 02 AHC CK 0053
In the Allahabad High Court
Case No : Writ Tax No. 68 of 2014

M/s. International Hospital Pvt. Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 06-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226 366 366(29A) 366(29-A) 366(29-A)
Kerala Value Added Tax Act, 2003 — Section 6
Uttar Pradesh Value Added Tax Act, 2008 — Section 2(ac) 55

Citation : (2014) 2 ADJ 474 : (2014) 3 ALJ 645 : (2014) 201 ECR 439 : (2014) 71 VST 139

Hon'ble Judges : Dhananjaya Yeshwant Chandrachud, C.J.; Dilip Gupta, J

Bench : Division Bench

Advocate : Rahul Agarwal, Bharat Ji Agrawal and Rashi Misra, for the Appellant;

Judgement

1. In these proceedings under Article 226 of the Constitution, the petitioner has sought to question the legality of an order of the Deputy Commissioner, Commercial Tax dated 27 September 2013 insofar as it brings to tax, under the provisions of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as the Act), stents and valves used by the petitioner as an intrinsic and integral element in the performance of a heart procedure at a super-speciality hospital.

2. The petitioner has set up a super-speciality integrated hospital at Noida. Patients who are required to undergo treatment are admitted to the hospital and are treated as indoor patients. According to the petitioner, whenever a stents or a valve is required to be implanted in a patient, neither the hospital nor its pharmacy sells the implants directly to the patient. In other words, the implants are used during the course of a surgical procedure and there is no "sale" when such a procedure is performed on the patient. During the course of assessment proceedings for the AY 2008-09, notices were issued to the petitioner by the Deputy Commissioner, Commercial Tax proposing to impose tax on the value of stents and valves used for providing medical services. In the reply which was submitted by the petitioner, reliance was placed on a judgment of the Supreme

Court in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, and on a judgment of a Division Bench of the Jharkhand High Court in Tata Main Hospital Vs. The State of Jharkhand and Others, in support of the submission that the use of stents and valves in the course of angioplasty or surgical procedure is incidental to the medical service which is provided by the hospital and the stents and valves would not be taxable under the Act.

3. An order has been passed by the Deputy Commissioner, Commercial Tax on 27 September 2013 by treating the purchase of stents and valves by the Hospital as being from unregistered dealers and bringing them to tax @ 12.5% and also subjecting to tax, at the same rate, the use of the stents and valves in the medical services provided by the Hospital. The order has been challenged in the writ proceedings.

4. At the hearing of these proceedings, a preliminary objection has been raised by the learned Standing Counsel to the maintainability of the writ petition on the ground that an appeal would be maintainable against the order of assessment under the provisions of Section 55 of the Act. We shall revisit this issue, as the essential aspects of the case would be dealt with during the course of the judgment, but at the present stage, it would be material to note that for the purposes of the petition, there is no dispute on the governing facts. The only issue which arises for consideration is a question of law, namely as to whether a "sale" within the meaning of Section 2(ac) of the Act takes place when a stent or valve is implanted in a patient in the course of a surgical procedure in the hospital.

5. The contention of the Revenue is that the contract between the patient and the hospital is a divisible contract in which the sale element involving the "sale" of the stent or valve to the patient is distinct from the surgical procedure and hence, the Firm is assessable to tax.

6. On the other hand, the assessee has relied upon the judgment of the Supreme Court in Bharat Sanchar Nigam Ltd. (supra) and on the judgment of the Jharkhand High Court in Tata Main Hospital (supra) against which a SLP has been dismissed by the Supreme Court.

7. Entry 54 of the State List to the Seventh Schedule of the Constitution provides for a tax on the sale and purchase of goods. For the purpose of these proceedings, it would not be necessary to advert in detail to the legislative history leading to the introduction of Article 366(29-A) in the Constitution by the 46th Amendment since that has been the subject matter of a considerable amount of judicial pronouncement. In The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., and in the decisions which followed it, the expression "sale" was given a restricted meaning as contained in the Sale of Goods Act. The 46th Amendment to the Constitution was brought into force so as to provide a deeming definition of what will constitute tax on the sale and purchase of goods. Article 366(29-A) provides as follows:-

366. (29-A) "tax on the sale or purchase of goods" includes-

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other value consideration;
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

8. The six clauses of Article 366(29-A) of the Constitution incorporate situations in which the Constitution now envisages that it would be open to the States to divide the contract into two separate contracts, the first involving sale of goods and the second a supply of labour or service. Prior to the 46th Amendment, the conventional position as elucidated in *State of Madras v. Gannon Dankerley & Co. (Madras) Ltd.* (supra) and the decisions which followed it, was that a works contract does not involve the transfer of property in goods since there is one indivisible contract in the performance of which the goods which are utilized and annexed since they form part of the overall transaction. This position has now undergone a change after introduction of Article 366(29-A) of the Constitution. In the case of those contracts which fall within the description of one of the six clauses of Article 366(29-A), the Constitution by a deeming fiction renders the contract divisible so as to empower the State Legislature to bring to tax the sale element involving the sale of goods.

9. The issue in the present case relates to a contract between a patient and a hospital where an individual gets admitted as an indoor patient for the purposes of a surgical procedure under medical supervision. Admittedly, neither of the six clauses of Article 366(29-A) of the Constitution are attracted to the rendering of such a service and hence, the deeming definition under which a contract is regarded as a contract for the sale of goods is not attracted. According to the hospital, where a patient comes to get admitted for a surgical procedure like an

angioplasty, the contract is indivisible, in the course of which medical service is rendered to the patient. The issue as to whether a service of this nature would fall within the ambit of the expression "sale" has to be determined with reference to the definition of that expression in Section 2(ac) of the Act. Section 2(ac) defines the expression "sale" as follows:

2. (ac) "sale" with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) by one person to another, for cash or for deferred payment or for any other valuable consideration and includes,--

(i) a transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) the delivery of goods on hire purchase or any other system of payment by instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) the supply of goods by an association or body of persons (whether incorporated or not) to a member thereof for cash, deferred payment or other valuable consideration;

(vi) the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration, and such delivery, transfer or supply of any goods under sub-clause (i) to sub-clause (vi) above shall be deemed to be sale of those goods by the person making the delivery, transfer or supply and a purchase of those goods by the person to whom such delivery, transfer or supply is made.

10. Sub-clauses (i to vi) of Section 2(ac) of the Act correspond to sub-clauses (a to f) of Article 366(29-A) of the Constitution. Those clauses are not attracted. Hence, the only issue is as to whether any element of sale is involved by the transfer of property in goods by one person to another for cash, deferred payment or other valuable consideration in the course of the execution of a contract for the implantation of a stent or valve in the performance of a surgical procedure.

11. In *Bharat Sanchar Nigam Ltd.* (supra), the principal issue which fell for consideration before the Supreme Court was the nature of a transaction by which mobile phone connections are enjoyed. In the course of the judgment, the Supreme Court dwelt on the provisions of Article 366(29-A) of the Constitution and held that the amendment allows specific composite contracts, namely, works

contracts [sub-clause (b)]; hire purchase contracts [sub-clause (c)] and; catering contracts [sub-clause (e)] by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax. In the case of those contracts, which fulfil the description of a deemed sale in sub-clauses (a to f) of Article 366(29-A), the 46th Amendment allowed the State Legislature to bring to tax the sale element in the execution of such contracts. Specifically in the context of hospital services, the Supreme Court dealt with the issue in the course of the judgment as follows:-

44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses (b) and (f) of clause (29-A) of Article 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Article 366(29-A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the Sales Tax Authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking, with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

12. The Supreme Court held that the reason why hospital services would not involve a sale for the purposes of Entry 54 of List II is that in the case of a composite contract to which Article 366(29-A) has no application, unless the transaction in truth represents two distinct and separate contracts and is discernible as such, the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. Consequently, in the case of those composite contracts other than those prescribed in Article 366(29-A) of the Constitution, the test which was formulated by the Supreme Court is as follows:-

45....The test therefore for composite contracts other than those mentioned in Article 366(29-A) continues to be: Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is "the substance of the contract". We will, for the want of a better phrase, call this the dominant nature test.

13. position that in the case of a patient who enters the hospital for the purpose of a surgical procedure like an angioplasty, there is no intent between the parties to the agreement namely, the hospital and the individual that there would be a sale of a stent or valve by the hospital to the patient. The substance of the

contract is not a contract for sale of the stent or valve that is used in the course of the surgical procedure. The contract, in substance, is an agreement in which the patient enters the hospital and is administered treatment in the form of a medical procedure, like an angioplasty. An intrinsic and integral element of that procedure, is the implantation of a stent or valve in the heart of the patient. True, the patient may have a choice of the nature of the stent or valve to be implanted, or in the nature of medicated stent or valve or otherwise, or in regard to the quality of the stent or valve which is implanted but even if that is so, that would not dilute the essential nature of the transaction, which is the performance of a medical procedure.

14. After the Forty-sixth amendment to the Constitution, the issue whether a contract which falls within the description of one of the sub-clauses of Article 366(29A) involves a dominant intention to transfer property in goods has ceased to be material. That is because as a result of the introduction of clause 29A into Article 366, a deeming fiction has been introduced by which contracts comprised in sub-clause (a) to (f) become separable and divisible into a contract for materials and a contract for services. For instance, a works contract within the meaning of sub-clause (b) of clause 29A has been rendered divisible consequent upon the constitutional amendment. In the leading judgment of the Supreme Court in *Larsen and Toubro Limited and Another Vs. State of Karnataka and Another*, a Bench of three learned Judges has held that the dominant nature test has no application to contracts of the nature contemplated in Article 366(29A). Speaking for the Bench, Hon"ble Mr. Justice R.M. Lodha held thus:

The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

15. Again, the judgment in *Larsen and Toubro* holds thus:

Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by the Forty-sixth Amendment has been brought on a par with a contract containing two separate agreements and the States now have power to levy sales tax on the value of the material in the execution of works contract.

16. Hence, where a transaction fulfills the description of one of the sub-clauses

of clause 29A of Article 366, the dominant nature of the transaction has lost its significance since by a constitutional fiction the contract is rendered divisible.

17. Admittedly, the present case does not involve the application of one of the sub-clauses of Article 366(29A). The deeming provisions of clause 29A are not attracted.

18. The view which we are inclined to take is also the view which was taken by the Division Bench of the Jharkhand High Court in Tata Main Hospital (supra) against which a SLP was dismissed by the Supreme Court. The issue which fell for consideration before the Division Bench was whether the supply of medicines, surgical items, vaccines, X-ray items etc. which were supplied to the indoor patients admitted in the hospital for treatment and for which the hospital realised charges fell within the purview of the expression "sale" as defined in Section 2(t) of the Bihar Finance Act, 1981. The expression "sale" in Section 2(t) of the Bihar Finance Act, 1981 is *pari materia* to Section 2(ac) of the Act. After advertent to the judgment of the Supreme Court in Bharat Sanchar Nigam Ltd. (supra), the Division Bench held as follows:-

26. The transaction of supply of Medicines, vaccines, surgical items, x-ray films and plates etc. to the indoor patients in course of treatment in TMH does not come within the purview of the definition of sale as envisaged u/s 2(t) of the Bihar Finance Act for the following reasons:-

(i) Supply of those articles are part and parcel of the treatment and they are essentially required for the treatment of the patients.

(ii) Supply of those articles are incidental to the Medical service being rendered by the TMH to the patients.

(iii) Those articles are not being sold to the patients but the cost price of the same being adjusted against the head pharmacy and are not being separately charged item wise.

(iv) Charge under the head pharmacy is part of composite charge realized by the TMH towards the treatment of those indoor patients.

19. A petition for Special Leave to Appeal (Civil) No. 3652 of 2008 was dismissed by the Supreme Court against this judgment on 10 March 2008.

20. The Assessing Officer, in the present case, has relied upon a judgment of a learned Single Judge of the Kerala High Court in Aswini Hospital Pvt. Ltd. v. C.T.O. Thrissur and others 2013 NTN (Vol. 51) 29. The judgment of the learned Single Judge of the Kerala High Court was in a batch of petitions filed by private hospitals and by their association, disputing the liability of the hospitals to get themselves registered as a dealer under the Kerala Value Added Tax Act and to pay tax under the Act for medicines and consumables sold to the patients.

21. The learned Single Judge of the Kerala High Court noted that the issue was covered by an earlier decision of the Kerala High Court in P.R.S. Hospital Vs.

State of Kerala, . It would be necessary to note here that in the course of that judgment, the Kerala High Court dealt with the issue as to whether the supply of medicine is only an incidental transaction. In that context, it was observed that in the course of treatment, except probably in surgical treatment, nobody can have a doubt that medicines account for the main cost along with the consultancy charges of the doctor, expenditure in diagnosis etc. The issue which fell for consideration before the Kerala High Court in that case was essentially different and was whether Section 6 of the Kerala Value Added Tax, which authorises levy of tax on medicine and other consumables, was unconstitutional. The judgment of the Supreme Court in *Bharat Sanchar Nigam Ltd. (supra)* was explained by observing that it did not lay down a principle that in all circumstances, every transaction that takes place in a hospital is a service and outside the purview of taxation. Hence, if in a hospital, medicines and other consumables are sold to a patient and bills are raised, such transaction would not be outside the purview of the Kerala Value Added Tax Act. On the other hand, it was clarified that, if in an individual case, a particular transaction is not a sale, it was open to the hospital to contest the matter in accordance with law and that would not mean that the whole hospital industry in the State would remain outside the discipline of the Kerala Value Added Tax Act.

22. In the present case, the limited issue is as to whether an element of sale is involved when a stent or valve is implanted in the course of a surgical procedure which is performed in a patient as an indoor patient in a hospital. We clarify that this is not a case where the petitioner is contending that the sale of medicines at the pharmacy in the hospital is not assessable to tax. The only issue is as to whether the definition of the expression "sale" in Section 2(ac) of the Act is attracted where a stent or valve is implanted in a patient in the course of a surgical procedure. Plainly, in our opinion, there is no element of sale. The fact that in the bill which is raised on the patient, the hospital recovers, apart from the cost of the surgery, charges towards drugs and other consumables would not render the transaction of the implantation of a stent or valve a "sale" within the meaning of Section 2(ac) of the Act. We clarify that we have dealt with only the aforesaid factual situation and our judgment as aforesaid does not deal with any other factual situation which is not before the Court.

23. Before concluding, we may reiterate that since the basic facts before the Court were not disputed and the only issue that fell for consideration was as noted above, we do not consider it appropriate and proper to relegate the petitioner to pursue the alternative remedy under the Act. The existence of an alternative remedy is a matter of discretion under Article 226 of the Constitution and as the essential facts are not in dispute in the present case and the question raised is a question the law relating to construction of the provisions of the Act, we have considered it fit and appropriate to entertain the petition on merits.

24. For these reasons, the petition is allowed and the order of the Deputy Commissioner, Commercial Tax dated 27 September 2013, insofar as it imposes

tax under the U.P. Value Added Tax Act, 2008 on stents or valves used by the petitioner in providing medical services to its indoor patients, is quashed and set aside.

25. There shall be no order as to costs.