
(2004) 09 AP CK 0132

In the Andhra Pradesh High Court

Case No : Tax Revision Case No. 105 of 1994

Onaway Engineering Private Ltd.

APPELLANT

Vs

State of A.P.

RESPONDENT

Date of Decision : 03-09-2004

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 5E
Constitution of India, 1950 — Article 366

Citation : (2006) 146 STC 634

Hon'ble Judges : P.S. Narayana, J; Bilal Nazki, J

Bench : Division Bench

Advocate : P. Srinivasa Reddy, for the Appellant; Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Bilal Nazki, J.—This is a revision filed against an order of the Sales Tax Appellate Tribunal, Hyderabad, dismissing the appeal filed by The petitioner.

2. The petitioner operated a crane in the years 1985-86 for rendering services to Hindustan Shipyard Limited (HSL). He entered into an agreement with HSL on September 11, 1985. He was to be paid Rs. 4,35,000 per month which was inclusive of fuel, lubricants, operation and maintenance of cranes at the HSL. During the year 1985-86 the petitioner received Rs. 47,85,000 towards charges for operating the crane. Of this amount, Rs. 39,15,000 represents the receipts after July 1, 1985. The C.T.O., Gajuwaka, assessed the petitioner on the basis of the said receipts u/s 5-E of the Andhra Pradesh General Sales Tax Act, 1957 which provides for levy of tax on the amounts received in respect of transfer of right to use goods which is a deemed sale. Aggrieved by this assessment order, the petitioner filed an appeal before the Appellate Deputy Commissioner (C.T.), Kakinada, contending that there was no transfer of right to use the crane as the petitioner had only undertaken to operate the crane with men and material provided by it. The Appellate Deputy Commissioner agreed with the petitioner's

contention that the crane was in possession of the petitioner and operated by it, but he held that these features could not alter the transaction that the right to use goods was transferred to HSL, therefore the transaction was accessible to tax u/s 5-E of the APGST Act. He, however, held that the expenses incurred for the operations could not be taxed as taxable rentals for goods. He remanded the matter to the assessing authority for quantifying the relief. Aggrieved by the order of Appellate Deputy Commissioner, the petitioner filed T.A.No. 135 of 1991 before the Sales Tax Appellate Tribunal contending that there was no transfer of right to use goods. The Tribunal dismissed the appeal. Therefore, the revision.

3. The following questions of law have been framed in this revision:

(1) (a) Whether the Tribunal is correct in holding that there is transfer of right to use goods when admittedly there is no physical transfer of the crane to HSL?

(b) Whether the Tribunal ought to have seen the transfer of right to use goods is possible only when the physical possession is given to the customer in view of decisions in State Bank of India and Others Vs. State of Andhra Pradesh, and 20th Century Finance Corporation Limited v. State of Maharashtra 1989 75 STC 217 (Bom) ?

(2) Whether the Tribunal erred in relying on certain clauses in the agreement in isolation to the exclusion of clauses indicating that the crane was physically in control of the petitioner and operated at its risk and expense ?

(3) Whether the petitioner is liable to tax on the transaction in question ?

(4) In any event whether the petitioner is not liable to tax on receipts prior to September 13, 1985 in view of decision in State Bank of India and Others Vs. State of Andhra Pradesh, ?

4. A copy of the agreement has been annexed to the revision. The terms and conditions of the agreement have been laid down in para (6).

Para (6)(i) of the agreement reads as under:

Operation of the crane would be under the control, directions and supervision of HSL. The crane will not be subject to undertake any function beyond its normal specifications.

Para (6) (vii) of the agreement reads as under:

HSL shall not sublet, transfer, sell, mortgage or assign crane, its usage or any interest in the equipment without prior written permission of OClause Such requests by HSL should be given to OClause minimum one week in advance.

5. The learned Counsel for the petitioner submits that this agreement makes it clear that the right of use was not transferred and right of use must be transferred in order to attract the Section 5-E of the APGST Act. In this connection, he relies on judgments of this Court reported in State Bank of India v. State of Andhra Pradesh 1988 70 STC 215 and Rashtriya Ispat Nigam Ltd. v.

Commercial Tax Officer, Company Circle, Visakhapatnam 1990 77 STC 182. Before coming to these judgments, it will be profitable to reproduce Section 5-E of the APGST Act. Section 5-E of the APGST Act lays down:

5-E. Tax on the amount realised in respect of any right to use goods.--Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realised or realisable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of five paise in every rupee of the aggregate of such amount realised or realisable by him during the year:

Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than Rs. 1,00,000.

6. In *State Bank of India v. State of Andhra Pradesh* 1988 70 STC 215 this Court was dealing with a matter concerning bank lockers. The bank lockers were held to be not assessable to tax u/s 5-E of the APGST Act on the ground that the lockers were not goods as they were not movable and they were immovable as they were imbedded. The contention which was upheld by the court was that the hire charges collected by the banks for running the lockers were collected as consolidated charges for a variety of services and facilities provided, of which the use of the locker was a small part. Therefore, in our view, this judgment is not at all applicable to the facts of the present case.

7. In *Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam*, this Court was dealing with a similar case and noted the following arguments of the parties:

...the learned Counsel for the petitioner, submits that under the terms and conditions of the contract, the contractor is provided with the facility of using the machinery if the same is available with the petitioner and there is no transfer of the right to use the machinery and for this purpose he relies on clauses 1, 5, 7, 13 and 14 of the contract to show that there is no transfer; while the learned Government Pleader submits that clauses 10 and 12 clearly show that there is a transfer of right and, therefore, tax is validly levied.

8. The Court was of the opinion,

In our view, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction. From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purposes of execution of the work of the petitioner and there is no transfer of right to use as such in favour of the contractor. We have reached this conclusion because the effective control of the machinery even while the machinery is in the use of the

contractor is that of the petitioner-company. The contractor is not free to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be responsible for the custody of machinery while the machinery is on the site does not militate against the petitioners' possession and control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of the right to use the machinery in favour of the contractor. As the fundamental requirement of Section 5-E is absent, the hire charges collected by the petitioner from the contractors are not exigible to sales tax.

9. In 20th Century Finance Corpn. Ltd. v. State of Maharashtra 2000 119 STC 182, though the Supreme Court was mainly dealing with fixing situs of deemed sale if goods are located within the State at the time of use, but while drawing conclusions, it also held that the transaction of transfer of right to use goods cannot be termed as contract of bailment as it was deemed sale within the legal fiction and engrafted under Clause (29A) of article 366 of the Constitution of India. Therefore, this Court will not have to see whether the contract entered between the parties was in effect of bailment or not, but whether the goods had been transferred for any purpose mentioned in clause (29A) of article 366 of the Constitution of India. Going by the provisions of the agreement, we find that the crane was in effect transferred for the purposes of rendering service to HSL. The period of hire was given as twelve months. The rent was fixed at Rs. 4.35 lakhs per month and it was termed as hire charges. The provisions of the agreement, if read together, leave no room for doubt that the crane was given on hire and the possession was transferred for its utilisation by the HSL and therefore, in our view, the order of the Tribunal would not need any interference. The revision is accordingly dismissed.