
(2010) 03 MP CK 0016

In the Madhya Pradesh High Court

Case No : Writ Petition No. 15798 to 15800, 15855 and 15854 of 2006

Pawan Kumar Jain

APPELLANT

Vs

Commercial Tax Officer and others

RESPONDENT

Date of Decision : 25-03-2010

Acts Referred:

Madhya Pradesh Commercial Tax Act, 1994 — Section 9B

Citation : (2010) 3 MPLJ 157

Hon'ble Judges : Sushma Shrivastava, J;A.K. Mishra, J

Bench : Division Bench

Advocate : Mukesh Agrawal, for the Appellant; Purushendra Kaurav, Dy. AG, for the Respondent

Final Decision : Dismissed

Judgement

Arun Mishra, J.—Writ petitions have been preferred by the assesseees raising the question whether section 9-B of the M. P. Commercial Tax Act, 1994 is applicable to the works contract, if yes, then what is the mode of determination of commercial tax.

2. Facts are being referred to from W.P. No. 15798/2006. Petitioner is engaged in the business of construction works of Central Public Works Department and Telecom Departments. In the course of the execution of the works contracts, buildings material like Gitti, Sand, Cement, Timber, Plywood, aluminum, steel, bricks etc. are used Iron, steel and cement is supplied by the respective government departments for whom the work is executed.

3. The assessment under Madhya Pradesh Commercial Tax Act, 1994 (hereinafter referred to as the "Act") for the period 1-4-2000 to 31-3-2001 was completed. Order (P/1) dated 28-1-2004 was passed. The main dispute raised before the Assessing Officer was whether Value Added Tax (VAT) as contained in section 9-B of the Act is leviable on material consumed in the process of works contract. The submission of the petitioner before the Assessing Officer was that section 9-B is

not applicable. VAT has been imposed u/s 9-B on purchases of all the materials including cement. u/s 9-B VAT is levied on the resale of goods. In the execution of work, cement, iron/steel, aluminum section, plywood, paint and timber are not used as such Cement is mixed with gitti, sand along with iron steel and it becomes concrete in the construction work. Other items are also not used as such, but, are converted in the form of door, windows etc. The timber used as shuttering material is not transferred in the works contract but after it is used is taken out and is again used. Thus, there is no resale of these goods as original identity of these goods is lost when used in works contract. The resale ordinarily means sale of goods in the same form in which they were purchased without subjecting them to any process. Though there is sale as defined u/s 2(t)(ii) of the Act, but, it is not a resale for levy of VAT u/s 9-B of the Act, value of these goods cannot be subjected to VAT u/s 9-B. It is further submitted that the expenditure incurred on account of labour etc. cannot form a part of the contractual transfer price, simply because they are not valuable consideration for any goods. Revision was preferred against the assessment order. Revision has been dismissed vide order (P/5) dated 21-3-2006. Aggrieved by the assessment order and order passed in revision, writ petitions have been preferred. Facts and grounds in other cases are similar.

4. Shri Mukesh Agrawal, learned counsel appearing on behalf of the petitioners has submitted that there is circular issued by the Commissioner pointing out that the items consumed in the works contract cannot be said to be covered in the resale as provided u/s 9-B of the Act said circular is binding on the assessing authority. It is also submitted that section 9 is invoked at point when goods are purchased by the petitioners, thus, u/s 9-B on resale tax could not have been levied on the petitioners. He has relied upon the decisions to be referred later.

5. Shri Purushendra Kaurav, learned counsel appearing on behalf of the State has supported the orders. It is submitted that section 9-B is independent provision, the definition of sale in section 2(t)(ii) has to be read together with section 9-B of the Act and it leaves not an iota of doubt that even when the goods are consumed in any form in works contract the tax has to be paid on it in case of resale. Thus, tax has been rightly exacted. There is no infirmity in the order. Circular of the Commissioner which is contrary to the provisions of law cannot be said to be binding on the Court. Circular was also not referred to before the assessing authority as well as in the course of revision by the assessee.

6. The main question for consideration is whether the resale takes place in a case where the goods are used in the similar or other form in the execution of the works contract can be subjected tax to section 9-B of the Act. Section 2(t)(ii)

defines sale thus :

2. Definitions. - (t) Sale with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or for other valuable consideration and includes - (ii) a transfer of

property in goods whether as goods or in some other form, involved in the execution of a works contract;

Section 9-B of the Act is as follows:

9-B. Levy of tax in special circumstances - (1) Every dealer liable to pay tax under this Act, whose turnover in the year preceding the commencement of the Madhya Pradesh Vanijyik Kar (Sanshodhan) Adhiniyam, 1998 exceeds rupees ten lacs and every other dealer whose turnover in a year first excess rupees ten lacs shall, from the commencement of the aforesaid Act or from the date on which the turnover exceeds rupees ten lacs, as the case may be, be liable to pay tax on the resale of any goods specified in Part II to VI of Schedule II at the rate of 4 per cent in case of declared goods and 8 per cent in case of other than declared goods on such part of his turnover in respect of the said goods which remains after deducting therefrom - (i)....." (ii) sale price of such goods at the hands of the registered dealer from whom they have been purchased;

(iii) the amount arrived at in accordance with the provisions of sub-clause (v) of clause (w) of section 2.

(2) Every dealer who is liable to pay tax under sub-section (1) shall continue to be so liable until the expiry of two consecutive years during each of which his turnover has not exceeded the limits specified in subsection (1) and on the expiry of such period his liability to pay tax shall cease.

It is apparent that in case there is transfer of goods in any form involved in the execution of the works contract is a case of resale and tax has to be paid u/s 9-B which provides levy of the tax in special circumstances. The applicability of the provision depends on the turnover. It is not in dispute that the goods are specified in Part II to VI of Schedule II. The resale as provided in section 9-B has to be considered with the definition of sale. The sale in section 2(t)(ii) includes transfer of property in goods "whether as goods or in some other form". The submission raised by the petitioners that as the goods are not used in same form then it would not amount to resale cannot be accepted in view of above provision. In our opinion, the tax has been rightly levied u/s 9-B of the Act.

7. Coming to circular dt. 1-5-1997 issued by the Commissioner relied upon by the petitioners: in the aforesaid circular it was mentioned that resale as provided in section 9-B covers sale of good made in the same form in which form it has been purchased. It is further provided that in case such goods are used in process of construction, it would not amount to resale. We are not able to succumb the aforesaid interpretation adopted by the Commissioner. In view of provision of section 2(t)(ii) read with section 9-B of the Act circular cannot override the statutory provision nor interpretation made contrary to intentment of the statutory provision can be said to be binding. The Apex Court in Commissioner of Sales Tax, U.P. vs. Indra Industries, (2002) 35 7KN 91 has laid down that circular issued by sales tax authorities is not binding on Courts, it is binding on the taxing authority.

8. Section 68 has also been referred to by the counsel appearing on behalf of the petitioners. Section 68(1) provides that if any question is raised by a dealer in respect of the "rate of tax" on any goods, the Commissioner shall, within six months from the date of receipt of the application made by the dealer for this purpose in the prescribed manner and on payment of such fee as may be prescribed, make an order determining the rate of tax on such goods in accordance with such procedure as may be prescribed. The said provision is with respect to rate of tax, moreover the determination cannot be binding to nullify statutory intentment. This Court has held in *India Marshal Oil Engines vs. State of M.P.*, (2001) 26 LTD 1 (MP) that Order, determining rate of tax by Commr. Without examining the case of that particular commodity in light of relevant entries and without rendering any finding, is not sustainable. Similarly, in *Somani Bros. vs. Commr. of Sales Tax. M. P.*, (2001) 26 LTD 13 (MP) this court held that Rate of tax, determined by Commr. Without examining that the particular commodity in the light of relevant entries and factual material filed by the petitioner cannot be said to be sustainable. Even determination of rate of tax cannot be said to be binding overlooking the factual matrix and legal aspects, in the instant case, circular of Commissioner was rightly not relied upon before the assessing authority as well as in the course of revision. In our opinion, circular does not lay down the correct position and is of no utility to buttress the submission raised by the petitioners in view of provision of 2(t)(ii) read with section 9-B of the Act.

9. The learned Counsel on behalf of petitioners has relied upon the decision of the Apex Court in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, . The decision is of no help to the petitioners, question arose before the Supreme Court of competence to tax deemed sale in the course of inter-State. At the same time with respect to value of the goods involved in the execution of the contract it was observed that measure of tax may be arrived at by reducing from value of works contract expenses incurred on labour and other services, where account books are not maintained or not reliable, percentage of value of works contract may be taken for deduction. In the instant case no factual matrix has been laid down so as to examine determination of value of work contract and consequent tax liability in the light of the decision of the Apex Court with respect to levy of tax after making certain deduction.

9A. Reliance has also been placed on the decision of the Apex Court in *Ram Singh and Sons Engineering Works vs. Commissioner of Sales Tax. U.P.*, 1979 43 STC 195 in which question arose whether contract is for work and labour or contract of sale, distinguishing tests were laid down. It was held that as soon as the crane comes into being, it is the property of the customer and there is, therefore, no transfer of property in it by the manufacturer to the customer as a chattel. In the instant case, question involved is that of resale. Thus decision is of no help to espouse the submission raised by the petitioners" counsel.

10. In view of the aforesaid discussion, we find no merits in the writ petitions.

Writ petitions being devoid of merits deserve dismissal and are hereby dismissed.
However, parties are left to bear their own costs as incurred.