

(2023) 07 PAT CK 0078

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 10444 Of 2012

PCM Cement Concrete Pvt. Ltd

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 28-07-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Bihar Value Added Tax Act, 2005 — Section 40, 41

Citation : (2023) 07 PAT CK 0078

Hon'ble Judges : K. Vinod Chandran, CJ; Partha Sarthy, J

Bench : Division Bench

Advocate : Satyabir Bharti, Kishor Singh, Anshay Bahadur Mathur, Vikash Kumar

Final Decision : Allowed

Judgement

1. The writ petition is filed seeking a direction to the Respondents 2, 3, and 6 for refund of an amount of Rs. 38,22,897. It is the petitioner's contention that the said amounts were illegally deducted and recovered from the bills of the petitioner as advance Value Added Tax purportedly under the provisions of Section 40 and 41 of the Bihar Value Added Tax Act, 2005 (for brevity "VAT Act").

2. The petitioner argues that the VAT Act has absolutely no applicability since the manufacture and supply of the goods by the petitioner to the Railways was an inter-state sale; which is not exigible to sales tax within the State of Bihar either as a sale of goods or as a works contract.

3. We have heard Shri Satyabir Bharti, learned counsel for the petitioner and Shri Anshay Bahadur Mathur, learned counsel for the Respondents 1, 2, 3 and 6 and Shri Vikash Kumar, learned counsel for the State.

4. The petitioner entered into two separate agreements with the East Central Railway, the first of which is produced as Annexure-2 and the later one as Annexure-5 respectively dated 26.12.2008 and 19.05.2010. Annexure-2 agreement was entered into after the petitioner bid successfully in a tender and

pursuant to negotiations. The specific contract was for "Manufacturing and transportation of 6.1 m clear span pre-stressed concrete bridge slabs for MBC loading including RCC ballast retainers conforming to RDSO's Drawing No. BA-10221 (With latest alteration if any) including stacking and loading in to a Railway wagon/Road vehicle at the nearest Railway station/siding/Road under Chief Engineer/Con/NE. E.C. Railway MHX." Annexure-5 is a similar contract wherein the specification of the pre-stressed concrete bridge slab is indicated as 6.10 m and 5.48 m clear span with MBG loading 25MT including RCC ballast retainers. Therein also, the contract includes stacking and loading into a railway wagon/ load vehicle at the nearest railway station/siding etc. Pursuant to the contract, the goods were manufactured and transported on the strength of invoices, two of which are produced as Annexure-6 series along with the writ petition. Annexure-7 is the details of various bills and the deductions made thereunder on which a claim of refund is made.

5. Learned counsel Shri Satyabir Bharti relied on *Pandit Electrical Private Ltd. v. Union of India*; 2011 (2) PLJR 444, *State of Orissa and Anr. v. K.B. Saha and Sons Industries (P) Ltd and Ors.*; (2007) 9 SCC 97, *Commissioner, Delhi Value Added Tax v. ABB Limited*; (2016) 6 SCC 791 and *Kone Elevator India Private Limited v. State of Tamil Nadu*; (2014) 7 SCC 1 to contend that the transaction was a pure and simple sale of goods and that too an inter-state sale on which Central Sales Tax (for brevity "CST") has been paid by the petitioner which is added in the invoice raised against the respondents.

6. The learned counsel appearing for the Railways specifically refers to the counter affidavit dated 26.11.2014 filed on behalf of the respondent Railways. It is pointed out that Clause 34 of the contract document specifically speaks of recovery at source of sales tax for any work executed within the State of Bihar, Jharkhand, MP and UP; the rate of which is also specified as 4% of gross work value. It is the specific contention of the Railways that the work having been executed within the territory of Bihar, the deduction was only proper.

7. We have to first notice the agreements produced as Annexure-2 and Annexure-5, which are not disputed by the Railways. The essence of these, is specifically reduced to writing in its counter affidavit, which speaks only of manufacture and supply of certain goods. Definitely, these are not goods available in the market, but the petitioner has to manufacture it as per the specification of the Railways, at its manufacturing unit situated in West Bengal and the obligation of the petitioner is insofar as loading and stacking it in a Railway wagon or vehicle at the nearest railway station/siding/road under the Chief Engineer/Con/NE. The petitioner does not put/ lay the goods on the proposed construction of the Railways. The agreement is one of pure and simple manufacture and sale of goods; which does not constitute a works contract. We say this quite conscious of the fact that even if there is a works contract, as has been held in *Commissioner, Delhi Value Added Tax (supra)* there is no question of an inter-state supply pursuant to a sale being taxed within the State in which the

works contract is carried out, if the supply of goods originates from another State on the basis of a prior contract and is subjected to accretion in the works. Kone Elevator India Private Limited puts to rest any controversy as to what a works contract is. There should be a composite contract for supply of goods and labour, which is absent in the present case.

8. In the present case, the issue is simplified insofar as the sale being mere manufacture and supply of goods which is a sale simpliciter of the goods; which goods have also been transported in pursuance to a prior contract of sale which is the reason for the movement of the goods from one State to the other; herein from the State of West Bengal to the State of Bihar. A Constitution Bench of the Hon'ble Supreme Court in *State of A.P. v. National Thermal Power Corpn. Ltd.*; (2002) 5 SCC 203 reiterated the settled proposition that a sale in the course of inter-state trade has three essential ingredients. One, there must be a contract of sale incorporating stipulation, express or implied, regarding inter-state movement of goods. Two, goods must actually move from one State to another, pursuant to such contract of sale, the sale being the proximate cause of movement and last, such movement must be from one State to another State where the sale concludes. It is also held that a movement of goods which takes place independently after a contract of sale would not fall within the meaning of inter-state sale. Similarly, if the transaction of sale stands completed within the State and the movement of goods takes place thereafter, it would obviously be independent of the contract of sale and necessarily by or on behalf of the purchaser alone and, therefore, the transaction would not be having an inter-state sale element.

9. A Division Bench of the Hon'ble Supreme Court also examined the very same position in *Hyderabad Engg. Industries v. State of A.P.*; (2011) 4 SCC 705. Therein the appellant, a registered dealer within the State of Andhra Pradesh was engaged in the manufacture and sale of electrical and other consumer items and they entered into an agreement with another company for marketing and sale of their products. The appellant, pursuant to orders of sale issued by the other company, the agent, transported the products to the various depots belonging to themselves from where the agent collected the goods and delivered it to the ultimate purchaser. The assessee-appellant claimed it as a branch transfer. The Hon'ble Supreme Court found favour with the order of the Assessing Officer, which found it to be an inter-state sale exigible to tax under the CST Act. The Hon'ble Supreme Court after referring to a number of decisions on the point stated the principle thus in Paragraph 39, which is reproduced hereunder :-

39. "From the above decisions, the principle which emerges is—when the sale or agreement for sale causes or has the effect of occasioning the movement of goods from one State to another, irrespective of whether the movement of goods is provided for in the contract of sale or not, or when the order is placed with any branch office or the head office which resulted in the movement of goods, irrespective of whether the property in the goods passed in one State or the

other, if the effect of such a sale is to have the movement of goods from one State to another, an inter-State sale would ensue and would result in exigibility of tax under Section 3(a) of the Central Act on the turnover of such transaction. It is only when the turnover relates to sale or purchase of goods during the course of inter-State trade or commerce that it would be taxable under the Central Act.”

10. In the present case also the contract is one for manufacture and transportation of pre-stressed concrete slabs and RCC Ballast Retainers of precise and particular specification. There is no works contract involved and it is only a sale pure and simple of goods manufactured by the petitioner, who has been awarded the contract; which is only for manufacture and sale. The manufactured goods are loaded and stacked in a vehicle or railway wagon, by which it is transported into the site within the State of Bihar for accretion in the works of the Railways; which work or accretion is not the responsibility of the petitioner. The transaction is purely of an inter-state sale of goods and is not a works contract nor a sale of goods exigible to tax within the State of Bihar. The sale of goods as per Annexure-2 and Annexure-5 agreements constitute an inter-state sale not exigible to tax within the State of Bihar.

11. The Railways had made a deduction on the ground that it is a works contract; which we have negated. The Railways is bound to refund the illegal tax deduction made from the bills to the petitioner contractor. The Railways could definitely apply for refund from the Bihar Value Added Tax Department.

12. In this context, we have to notice Pandit Electrical Private Ltd. that the Railways in a similar transaction was held to have made deduction illegally in an inter-state transaction.

13. The learned Standing Counsel for the Railways pointed out that there is an arbitration clause in the agreement and that the jurisdiction of this Court cannot be invoked under Article 226, especially in a contractual matter.

14. We do not think that the dispute raised was one which was arbitrable, especially since it involved the consideration as to whether the transaction was an inter-state sale, works contract or sale of goods within the State of Bihar.

15. In the above circumstances we direct the refund, but, confined to the deductions made three years prior to the date of registration of the above writ petition which is on 14.05.2012; giving effect to the limitation as prescribed for recovery of money under the Limitation Act. The Railways shall refund the amounts with 6% interest within a period of 4 months from the date of receipt of the certified copy of this judgment. If the refund is not granted within that time then the interest shall run at the rate of 12% from the date of expiry of the 4 month period. The Railways can apply for refund or adjustment to future dues from the State of Bihar.

16. The writ petition is allowed with the above directions.