(2004) 03 MP CK 0078

In the Madhya Pradesh High Court

Case No : L.P.A. No''s. 169, 171 to 174, 179 of 2003 and 4, 6, 7, 19 of 2004

Prakash Mahavir (Joint Venture) APPELLANT

Vs

State of M.P. and others RESPONDENT

Date of Decision : 17-03-2004

Acts Referred:

Building and Other Construction Workers (Regulation of Employment and Conditions of Services) Act, 1996 — Section 2(i)
Building and Other Construction Workers Welfare Cess Act, 1996 — Section 2, 3

Citation : (2004) 2 MPLJ 383

Hon'ble Judges : S.S. Jha, J;A.K. Gohil, J

Bench : Division Bench

Advocate : R.D. Jain, with Miss Pragya Renwal and V.K. Bhardwaj, for the Appellant; K.B. Chaturvedi, Government Advocate, A.M. Naik with Vivek Khedkar, D.P. Singh, V.K. Jain and O.P. Saraswat, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Jha, J.

This judgment shall govern the disposal of all the appeals. In all the appeals, common question of law is involved.

Appellant-petitioner had challenged various orders, circulars and letters issued by the respondents. Under this documents, it is directed that one percent amount of cess shall be deducted from the payment of bills of the contractors under the provisions of Building and Other Construction Workers Welfare Cess Rules, 1998 (hereinafter, referred to "Cess Rules"). These rules have been framed under the provisions of the Building and Other Construction Workers Welfare Cess Act, 1996 (hereinafter, referred to "Cess Act"). Counsel for the appellant submits that in section 3 of the Cess Act, it is specified that cess for the purposes of the Building and Other Construction workers shall be at such rate not exceeding two percent but not less than one percent of the cost of construction incurred by an employer, as the Central Government may, by notification in the Official Gazette, from time to time specify. He submitted that this amount is to be recovered from the employer. Counsel for the appellant submitted that contractor is not the employer. Owners of buildings are the employer. He referred to Rule 4 of the Cess Rules and submitted that the amount of cess shall be payable by an employer on completion of construction/project. It is contended by counsel for the appellant that construction is in progress; unless construction is complete and its costs is determined, no cess can be recovered. Counsel for the appellant submitted that there is no provision for recovery of cess without completion of construction. Direction for deduction of the amount of cess from the bills of the contractor is contrary to law. He submitted that even if tax is assessed, then also after assessment of quantified liability, tax can be recovered. In support of this contention, he referred to the judgment in the case of Commissioner of Wealth Tax, Gujarat, Ahmedabad Vs. Kantilal Manilal and Others, . He submitted that section 3 of the Cess Act 1996 provides for imposition of tax on the cost of construction incurred by the employer. This taxable event is after completion of construction by the employer and referred to the judgment in the case of Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, . Section 2(i) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter, referred to "Regulation Act") has defined the word "employer". He submitted that contractor will not fall in the definition of employer and referred to the judgment in the case of M/s. Black Diamond Beverages and another Vs. Commercial Tax Officer, Central Section Assessment Wing, Calcutta and others, . Referring to section 2 of the Cess Act, he submitted that in the context of section 3 of the Cess Act, term "employer" will include only the owner who incurred the costs and not the contractor. In support of his contention, he referred to the following judgments. Printers (Mysore) Ltd. and Another Vs. Asstt. Commercial Tax Officer and Others, , Ichchapur Industrial Cooperative Society Ltd. Vs. Competent Authority, Oil and Natural Gas Commission and Another, and K.V. Muthu Vs. Angamuthu Ammal, .

Counsel for the appellant therefore, submitted that recovery of cess from the contractor is without jurisdiction. Unless work is complete, no cess can be deducted from the contractor without assessment. He further submitted that no cess is imposed on the cost of construction as the Act is enacted for the benefit of workers. Recovery of the tax on the basis of the rules which are contrary to the main Act is bad in law and he referred to the judgment in the case of M.C. Mehta Vs. Union of India (UOI) and Others, , Commissioner of Wealth Tax, Gujarat-III, Ahmedabad Vs. Ellis Bridge Gymkhana, and Municipal Corporation, Gwalior Vs. M.E.S. Builders'' Association and Another, . He submitted that single Bench has committed an error in holding that the respondents are entitled to recover the cess and no cess can be recovered from the contractor.

In reply, counsel for the respondents submitted that under the scheme of the Cess Act cess can be recovered from contractor. He invited attention to section

2(d) of the Cess Act and submitted that this section provides that words and expressions used herein but not defined, then definition given in the Regulation Act shall have the meanings respectively assigned to them in that Act. Shri K.B. Chaturvedi, Government Advocate then invited attention to section 2 of the Regulation Act wherein word "employer is defined under clause (i). He submitted that, cess can be recovered from the contractor. For this purpose, he referred to Rules 4(3) and 4(4) of the Cess Rules and submitted that definition of the word "employer" includes contractor and amount of cess can be recovered from the contractor before completion of work. Then he referred to Rule 7 which provides that after assessment, the Authority shall specify the amount of cess due and cess already paid by the employer or deducted at source and balance amount payable and the date consistent with the provision of rule 4, by which the cess shall be paid to the cess collector. Counsel for the respondents submitted that the order of recovery is proper.

In order to understand the rival contentions, it will be appropriate to reproduce definition of employer occurring in section 2(i) of the Regulation Act, which is reproduced below:

Employer in relation to an establishment, means the owner thereof, and includes.-

(i) in relation to a building or other construction work carried on by or under the authority of any department of the Government, directly without any contractor, the authority specified in this behalf, or where no authority is specified, the head of the department;

(ii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment;

(iii) in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor.

Section 2(j) relates to definition of "establishment". Section 3 of Cess Act relates to levy and collection of Cess. Sections 3 and 5 are reproduced below:-

3. Levy and Collection of Cess.- (1) There shall be levied and collected a cess for the purposes of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, at such rate not exceeding two percent, but not less than one percent of the cost of construction incurred by an employer, as the Central Government may, by notification in the Official Gazette, from time to time specify.

(2) The cess levied under sub-section (1) shall be collected from every employer in such manner and at such time, including deduction at source in relation to a building or other construction work of a Government or of a public sector undertaking or advance collection through a local authority where an approval of such building or other construction work by such local authority is required, as

may be prescribed.

(3) The proceeds of the cess collected under sub-section (2) shall be paid by the local authority or the State Government collecting the cess to the Board after deducting the cost of collection of such cess not exceeding one percent of the amount collected.

(4) Notwithstanding anything contained in sub-section (1) or sub-section (2), the cess leviable under this Act including payment of such cess in advance may, subject to final assessment to be made, be collected at a uniform rate or rates as may be prescribed on the basis of the quantum of the building or other construction work involved.

(5) Assessment of Cess.- (1) The officer or authority to whom or to which the return has been furnished u/s 4 shall, after making or causing to be made such inquiry as he or it thinks fit and after satisfying himself or itself that the particulars stated in the return are correct, by order, assess the amount of cess payable by the employer.

(2) If the return has not been furnished to the officer or authority under sub-section (2) of section 4, he or it shall, after making or causing to be made such inquiry as he or it thinks fit, by order, assess the amount of cess payable by the employer.

(3) An order of assessment made under sub-section (1) or sub-section (2) shall specify the date within which the cess shall be paid by the employer.

Section 11 provides for appeal if any employer is aggrieved by an order of assessment made u/s 5 or an order imposing penalty made u/s 9. Rule 4 of the Cess Rules provides for time and manner of collection which is reproduced below:-

(1) The cess levied under sub-section (1) of section 3 of the Act shall be paid by an employer within thirty days of completion of the construction project or within thirty days of the date on which assessment of cess payable is finalised, whichever is earlier, to the cess collector.

(2) Notwithstanding the provisions of sub-rule (1) where the duration of the project or construction work exceeds one year, cess shall be paid within thirty days of completion of one year from the date of commencement of work and every year thereafter at the notified rates on the cost of construction incurred during the relevant period.

(3) Notwithstanding the provisions of sub-rule (1) and sub-rule (2), where the levy of cess pertains to building and other construction work of a Government or of a Public Sector Undertaking, such Government or the Public Sector Undertaking shall deduct or cause to be deducted the cess payable at the notified rates from the bills paid for such works.

(4) Notwithstanding the provisions of sub-rule (1) and sub-rule (2), where the

approval of a construction work by a local authority is required, every application for such approval shall be accompanied by a cross demand draft in favour of the Board and payable at the station at which the Board is located for an amount of cess payable at the notified rates on the estimated cost of construction:

Provided that if the duration of the project is likely to exceed one year, the demand draft may be for the amount of cess payable on cost of construction estimated to be incurred during one year from the date of commencement and further payments of cess due shall be made as per the provisions of sub-rule (2).

(5) An employer may pay in advance an amount of cess calculated on the basis of the estimated cost of construction along with the notice of commencement of work u/s 46 of the main Act by a crossed demand draft in favour of the Board and payable at the station at which the Board is located:

Provided that if the duration of the project is likely to exceed one year, the demand draft may be for the amount of cess payable on cost of construction estimated to be incurred during one year from the date of such commencement and further payment of cess due shall be made as per the provisions of sub-rule (2).

(6) Advance cess paid under sub-rules (3), (4) and (5), shall be adjusted in the final assessment made by the Assessing Officer.

Rule 5 relates to transfer of the proceeds of the cess to the Board. Rule 6 provides for information to be furnished by the employer within thirty days of commencement of his work of payment of cess to the Assessing Officer in Form I. Rule 8 refers to return of overpaid cess. Thus, after final assessment, remedy of the party aggrieved by the assessment lies in filing appeal u/s 11 of the Cess Act. Employer is liable to furnish information under Rule 6 of the Cess Rules within thirty days of commencement of his work of payment of cess to the Assessing Officer in Form I appended to these Rules. He can also communicate to the Assessing Officer any change or modification in the information furnished by him within thirty days from the date of effecting modification or change. After assessment forms are submitted, the Assessing Officer shall proceed to assess the cess after scrutiny of such information and shall make order of assessment within a period not exceeding six months from the date of receipt of such information in Form I, indicating the amount of cess payable by the employer and endorse copy thereof to the employer. After assessment, if it is found that excess amount has been paid towards cess, he shall pass orders for return of overpaid cess. Any party aggrieved has remedy of appeal u/s 11 and the manner of filing appeal is provided under Rule 14 of the Cess Rules. Appellate Authority shall, after affording opportunity of hearing, decide the appeal. However, no further appeal shall lie against the appellate order. Every order passed in the appeal shall be final and shall not be called in question in any Court.

If we see the circular issued in the case of appellant-petitioner, one percent cess should be deducted. Section 3 of the Cess Act provides that cess should not be less than one percent and shall not be more than two percent. On bare definition of the word "employer" appellant-petitioner would fall in the definition of employer in sub-section 2(i)(iii) of the Regulation Act. Definition of employer includes in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor. Thus, contractor is employer in relation to a building or other construction work which is carried on through a contractor or by the employment of building workers supplied by the contractor. Therefore, we hold that contractor is an employer for the purposes of section 3 of the Cess Act and cess can be recovered from the contractor. Sub-section (2) of section (3) of the Cess Act provides that cess shall be collected from every employer, in such manner and at such time, including deduction at source (underlined (italics) by the Court). Section 4 of the Cess Act. Section 4 of the Cess Act refers to furnishing of returns by every employer as prescribed. Assessment will be carried out on the basis of the return furnished by the employer and orders will be passed. Rule 4(2) of the Cess Rules provides that where the duration of the project or construction work exceeds one year, cess shall be paid within thirty days of completion of one year from the date of commencement of work and every year thereafter. Sub-rule (3) provides that notwithstanding the provisions of sub-rule (1) and sub-rule (2) where the work is to be carried out by the Government or by a Public Sector Undertaking, such Government or Public Sector Undertaking shall deduct or cause to be deducted the cess payable at the notified rates from the bills paid for such works. Thus, the State Government or Public Sector Undertaking has power to deduct the cess payable from the bills paid for such work.

Next contention of the counsel for the appellant is that recovery shall be from the date of notification of Cess Rules. Cess Rules came into force with effect from 26th March, 1998 and no cess prior to this date could be recovered. This contention appears to be misconceived. Cess Act came into force with effect from 3rd November, 1995 and the Regulation Act came into force with effect from 1st March, 1996. Therefore, recovery for this period is proper and according to law. However, appellant-petitioner will be entitled for adjustment of cess so recovered after final assessment. In some of the appeal, Assessing Authority has passed the assessment order. Remedy of those appellants lies in filing appeal u/s 11 of the Cess Act. Where no final assessment has been made, petitions as filed are premature. The petition as filed has no merit.

We, therefore, hold that the Single Bench has not committed any error in dismissing the petitions. In the result, appeals have no merit and are dismissed without any order as to costs. Consequently, Misc. (Civil) Petitions for stay are dismissed.