

(2010) 11 OHC CK 0034

In the Orissa High Court

Case No : Writ Petition (C) No's. 1993 and 1994 of 2010

Prem Kumar and Co., A proprietorship Concern

APPELLANT

Vs

General Manager, East Coast Railway and Others

RESPONDENT

Date of Decision : 16-11-2010

Acts Referred:

Orissa Value Added Tax Act, 2004 — Section 16, 2(12), 2(57), 2(63), 50
Orissa Value Added Tax Rules, 2005 — Rule 60, 60(3)

Citation : (2011) 1 OLR 479 : (2011) 41 VST 118

Hon'ble Judges : V. Gopala Gowda, C.J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.N. Mahapatra, J.—These two Writ Petitions have been filed for a direction to opp. party-railway authorities restraining them from making any deduction towards value added tax from the payments made to the Petitioner, who is a Transport Contractor and to refund the amount of tax already deducted from the payments made to the Petitioner.

Since the parties are same in both the writ petitions and the facts and law involved in these petitions are one and the same, both the petitions are heard together and disposed of by this common judgment.

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present writ petitions are that the Petitioner is engaged in the business of transporting goods for remuneration. In pursuance of tenders issued by opposite party-Railway authorities, the Petitioner participated in the said tenders. Being found qualified, the opp. parties issued two work orders in favour of the Petitioner. The required agreements" were executed on 30.03.2009 and 04.12.2009 between the Petitioner and the Railway authorities. The nature of the work undertaken by the Petitioner is transportation of rails, PSC, sleepers, glued joints etc. from any place to the site of work including loading, unloading, rehandling and stacking as per direction of the Engineer-in-Charge. While making payment towards interim bills the Railway authorities deducted tax " 4% from

the said payment towards Value Added Tax (for short, "VAT") u/s 54 of the Orissa Value Added Tax Act, 2004 (for short, "OVAT Act") and also issued certificates for Tax Deducted at Source (for short, "TDS"). Being aggrieved, Petitioner has filed these writ petitions.

3. Mr. D.K. Dwibedi, learned Counsel appearing for the Petitioner submits that the Petitioner has been assigned with the job of transporting materials from one place to another for remuneration as fixed under the contracts and during execution of his assigned work, the ownership of the said material remains with the railways and at no point of time the same is either vested with or transferred to the Petitioner. Under the terms of contract, the Petitioner has been assigned with the work of transportation of rails, pre-stressed concrete, sleepers, glued joints etc. including loading, unloading from any place to the site of work. The rate includes all lead, lift, ascent, descent, crossing of one or more railway lines, if necessary cutting of rails from the available longer rail panel to suitable length of not less than 10 metres if required, labour, materials, all taxes, royalty, tools and plants, machineries and all other incidental charges etc. Thus, the Petitioner is merely a transporter and the activities carried on by him are not coming u/s 9 of the OVAT Act so as to make the Petitioner liable to pay tax under the said Act. The Petitioner is a bailee and his job is to transport the goods from one place to another/He is no way connected with sale or purchase of goods on behalf of the opp. parties. Neither he has any licence to sell or purchase the goods in any capacity. Therefore, the action of the opp. parties in deducting VAT from the payments made to him for undertaking transportation work is illegal and without any authority of law. The opp. parties may be directed to return the amount of tax deducted from the payments made to the Petitioner.

4. Mr. J. Sahoo, learned Counsel appearing for and on behalf of the opp. party-railway authority submitted that even if the Petitioner is a transport contractor by virtue of provisions contained in Section 54 of the OVAT Act, opp. parties are obliged under the statute to deduct VAT at the source from the payments made to the Petitioner. Mr. Sahoo referring to Sub-section (5) of Section 54 of the OVAT Act and Sub-rule (3) of Rule 60 of the Orissa Value Added Tax Rules, 2005 (for short, "OVAT Rules") submitted that even if the contract does not involve transfer of property in the goods and only involves labour and services, the Petitioner has to make an application to the Assessing Authority for grant of a certificate of no deduction/deduction of tax on part of a work at source and if the Assessing Authority is satisfied that the nature of the work is such which justifies deduction of tax on a part of the work or no deduction of tax, he may after giving the Petitioner, reasonable opportunity of hearing grant such certificate as may be appropriate. Where such a certificate is produced by a contractor before the deducting authority, until such certificate is cancelled by the assessing authority, the deducting authority shall either make no deductions tax or make the deduction of tax as the case may be, in accordance with the said certificate. Otherwise, the opp. party-railway authorities are obliged under the Act to deduct tax at source, " 4% from the payments made to the Petitioner.

Mr. Piyus Kumar Mishra, learned Counsel appearing for opposite party-railway authorities submitted that under Clause Nos. 63 and 64 of the General Condition of Contract," 2001 all disputes or differences between the parties have to be referred to the General Manager, who will appoint an Arbitrator to adjudicate the dispute. In the present case, the Petitioner without exhausting the said alternative remedy for solution of the dispute between the Petitioner and the railway authorities has approached this Court. Therefore, these writ petitions are not maintainable. Section 54 of the OVAT Act provides for deduction of tax at source by the deducting authority from the payments made to the works contractor, if the value of contract exceeds Rs. 50,000/-. The Petitioner is a works contractor who has undertaken the transportation work and as per the provisions of the OVAT Act, 4% of the OVAT was deducted and credited to the Sales Tax Officer, Sambalpur, A certificate to that effect for deduction of sales tax has also been issued. Any relaxation towards deduction is generally given by the sales tax authority. In the present case, no such direction has been received from the Sales Tax Department. The deduction of 4% sales tax is in conformity with the Agreement and there is no illegality in the deduction of sales tax as alleged by the Petitioner. As per the Notification No. 985 dated 26.08.1995 of the Finance Department, Government of Orissa, 4% tax is being deducted in all works contracts.

5. On rival contentions of the parties the questions that fall for consideration by this Court are as follows:

(i) Whether the transporter who is exclusively engaged in the activity of transporting the goods from one place to another including loading and unloading is a dealer as defined u/s 2(12) of the OVAT Act and is liable to pay tax under the OVAT Act?

(ii) Whether Section 54 of the OVAT Act and Rule 60 of the OVAT Rules authorize the Opp. Party-Railway Authorities to deduct tax at source from the payments made to the Petitioner for executing transport contract?

6. To deal with the first question, it is felt necessary to know what is contemplated u/s 2(12) of the OVAT Act which defines the term "Dealer" and Section 9 of the said Act which deals with "charge to tax and incidence.

Section 2(12) "Dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, delivering any goods on hire-purchase or any system of payment by instalments, transferring the right to use any goods or supply by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration and includes;

(Underline for emphasis)

(a) a casual dealer.

(b) a commission agent, a broker or a delcredere agent or an auctioneer or any

other mercantile agent, by whatever name called;

(c) a non-resident dealer or an agent of a non-resident dealer or a local branch of a firm or company or association or body of persons whether incorporated or not, situated outside the State;

(d) a person, who whether in the course of business or not,:

(i) sells goods produced by him by manufacture, agriculture, horticulture or otherwise; or

(ii) transfers any goods, including controlled goods whether in pursuance of a contract or not, for cash or for deferred payment or for other valuable consideration;

(iii) supplies, by way of or as part of any service or in any other, manner whatsoever, goods, being food or any other articles for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration.

"Dealer" as defined u/s 2(12) of the OVAT Act is a person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, delivering any goods on hire-purchase or any system of payment by instalments, transferring the right to use any goods or supply by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration etc. A transporter who is not involved in the business of such purchase and sale of goods cannot be assessed to tax as a dealer under the OVAT Act. The constitutional provisions are amply clear on this point. Entry 54 of List II of Seventh Schedule and Entry 92A of List I of First Schedule of the Constitution of India authorize levy of tax only on sale and purchase of goods other than newspaper. For ready reference, the said entries are quoted below:

Entry 54 Schedule-VII (II):- "Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I.

XX XX XX XX

Entry 92A of Schedule-VII (I):- "Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade and commerce.

Section 9 of the OVAT Act which deals with "Charge to tax and incidence" provides as under

Section 9. Charge to tax and incidence--There shall be levied in accordance with the provisions of this Act:

(a) a Value Added Tax hereinafter called VAT on the sale or purchase of goods by a dealer; and

(b) a turnover tax in lieu of VAT on the taxable turnover of sales of every retailer registered under this Act, whose annual gross turnover does not exceed rupees ten lakhs and dealers of any specific class or category as may be notified u/s 16.

(Underlined for emphasis)

A conjoint reading of the above statutory and constitutional provisions makes it amply clear that a "transporter" who is exclusively engaged in the business of transporting goods from one place to another including loading and unloading of goods is not a "dealer" so as to attract its liability to pay VAT in respect of goods it carries from one place to another as a transporter.

This Court in *Indo Arya Central Transport Ltd. Vs. Sales Tax Officer and Others*, held that a transporter who is not engaged in the business of purchase, sale of goods besides its transport business is not a dealer liable to pay sales tax in respect of goods he carries from one place to another as a transporter.

7. In the instant case, undisputedly the nature of the work carried on by the Petitioner is of transportation of rails, pre-stressed concrete, sleepers, glued joints etc. including loading, unloading, which is purely a contract for transport of goods from one place to another and it is not a works contract. Therefore, the Petitioner is not a dealer as defined u/s 2(12) of the OVAT Act and is not liable to pay tax under the said Act.

8. To deal with the second question, it is necessary to know what is contemplated in Section 54 of the OVAT Act and Rule 60 of the OVAT Rules. The relevant provisions of the said Section and the Rule are reproduced below:

Section 54 Deduction of tax at source from payment to works contractor--(1) Notwithstanding anything contained in Section 50 or any other law or contract to the contrary, any person responsible for making payment of any sum to any contractor (hereinafter referred to in this Section as deducting authority) for carrying out any works contract, which involves transfer of property in goods, in pursuance of a contract between the contractor and:

(a) the Central Government or any State Government, or

(b) any local authority, or

(c) any authority or corporation established by or under a statute, or

(d) any company incorporated under the Companies Act, 1956 (1 of 1956) including any state or Central Government undertaking, or

(e) any co-operative society, or any other association registered under the Societies Registration Act, 1860 (2 of 1860) shall, at time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, whichever is earlier, deduct, subject to the certificate, if any, produced by the contractor in pursuance of Sub-section (5), an amount towards tax equal to four per centum of such sum in

respect of the works contract, if the value of works contract exceeds rupees fifty thousand.

(2) xx xx xx

(3) xx xx xx

(4) xx xx xx

(5)(a) Where, on an application being made by the contractor in this behalf, the assessing authority is satisfied that any works contract of the nature referred to in Sub-section (1) involves both transfer of property in goods and labour or services, or involves only labour or services and., accordingly, justifies deduction of tax on a part of the sum in respect of the works contract or, as the case may be, justifies no deduction of tax, he shall, after giving the contractor a reasonable opportunity of being heard, grant him such certificate as, may be appropriate, in the manner prescribed:

Provided that nothing in the said certificate shall affect the assessment of the tax liability of the contractor under this Act:

Provided further that where the assessing authority, in consideration of the facts and circumstances of the case, is of the opinion that such certificate of no deduction or deduction of tax on a part of the sum as claimed is not justified he may, after allowing the dealer a reasonable opportunity of being heard, refused to issue such certificate.

(b) Where such a certificate is produced by a contractor before the deducting authority, until such certificate is cancelled by the assessing authority, the deducting authority shall either make no deduction of tax or make the deduction of the tax, as the case may be, in accordance with the said certificate.

(underlined for emphasis)

Rule 60--Grant of certificate of no deduction/deduction of tax at source, by the Commissioner to the works contractor:

(1) xx xx xx xx

(2) xx xx xx xx

(3) If the particulars and documents furnished by the contractor are correct and complete in all respects and after making such other enquiries, as deemed necessary, the assessing authority is satisfied that the works contractor concerned involves both transfer of property In goods and labour or service, or involves only labour and services and justifies deduction of tax or no deduction of tax, as the case may be, he may, after giving the applicant a reasonable opportunity of being heard, grant a certificate in Part II of Form VAT-606, within a period of thirty days from the date of receipt of the application and, shall forward a copy of such certificate to the deducting authority, under whom the work is executed.

(underlined for emphasis)

9. Section 54 provides for deduction of tax at source from payment made to works contractor. It provides that any person responsible for making payment of any sum to any contractor for carrying out "any works contract" which involves transfer of any property in goods shall at the time of credit of such sum to the account of the contractor or at the time of payment thereof deduct an amount towards tax equal to 4% or such sum in respect of "works contract" subject to certificate if any produced by the contractor in pursuance of Sub-section (5) of Section 54. Sub-section (5) further provides that on an application being made by the contractor in this behalf, if the assessing authority is satisfied that any works contract of the nature referred to in Sub-section (1) involves both transfer of property in goods and labour or services, or involves only labour or services and, accordingly, justifies deduction of tax on a part of the sum in respect of the "works contract" or, as the case may be, justifies no deduction of tax, he shall, after giving the contractor a reasonable opportunity of being heard, grant him such certificate as may be appropriate, in the manner prescribed, thus, the deduction of tax at source is only from the payments made to the "works contractor" for carrying out any works contract. The deduction is not referable to a transport contractor.

Similarly, Rule 60 provides for grant of certificate of no deduction/deduction of tax at source, by the Commissioner to the works contractor. Sub-rule (3) provides that if the assessing authority is satisfied that the works contract concerned involves both transfer of property in goods and labour or service, or involves only labour and services and justifies deduction of tax or no deduction of tax, as the case may be, he may, after giving the applicant a reasonable opportunity of being heard, grant a certificate. Here also grant of certificate of no deduction/deduction of tax at source is referable to a works contract.

Thus Section 54 of the OVAT Act and Rule 60 of the OVAT Rules do not provide for deduction of Tax at source from payment made to "transport contractor".

10. There is a distinction between a "works contractor" and "transporter" who carries on transport business. The Act itself makes such distinction by providing two separate definitions.

It is relevant to reproduce here Section 2(57) of the OVAT Act which defines "transporter", "carrier" or "transporting agent".

Section 2(57) "transporter", "carrier" or "transporting agent" means the owner or any person having possession or control of a goods vehicle, who transports on account of any other person for hire or on his own account, any goods from one place to another, and includes any person whose name is entered in the permit issued under the Motor Vehicles Act, 1988 (59 of 1988) as the holder thereof, the driver or any other person in charge of such vehicle.

It is also relevant to reproduce here Section 2(63) of the OVAT Act which defines

"works contract"

Section 2(63) "works contract" means a contract for the construction, building, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any property.

Perusal of Section 2(57) and Section 2(63) of the OVAT Act makes it amply clear that the activities carried on by a "transporter", "carrier" or "transporting agent" are different and distinct from the activities carried on by a "work contractor".

11. It may be relevant to refer Clause-2 of Schedule -"A" (TRANSPORTATION OF RAILWAY MATERIALS) Annexure-2 of the contract which runs as under:

If Rlys materials are lost, stolen or damaged while on transit, the cost of the same, at twice, of the prevailing market rate will be recovered from the contractor's dues and contractor will have no claim whatsoever on this account.

This clause itself shows that ownership of the materials required to be transported remains with the opp. parties and at no point of time, such ownership is transferred or conferred on the Petitioner. Consequently, the element of sale is absent in, the present case.

The Petitioner is only a bailee and his job is to transport the goods from one place to another for which, his services are being remunerated. He has nothing to do with the sale and purchase of the goods on behalf of the opp. parties because neither he has any licence to sell nor purchase goods in whatever capacity. Thus, the Petitioner is not effecting any sale on purchase of goods so as to come within the ambit of Section-9 which is the charging provision of the OVAT Act. Hence the action of opp. party-Railway authorities in deducting VAT " 4% towards payment made to Petitioner is not only illegal but also sans any authority of law.

12. In view of the above, we are unable to accept the contention taken by the learned Counsel appearing for the opp. party-railway authorities that Section 54 of the OVAT Act and Rule 60 of the OVAT Rules provide for deduction of tax at source from the transport contractor. Therefore, the opp. party-railway authorities are not justified in deducting tax at source from the payments made to the Petitioner who is a transport contractor and solely engaged in transporting the goods from one place to another.

13. In view of our above findings, it is open for the Petitioner to approach the Genera! Manager, East Coast Railway, Bhubaneswar (O.P. No. 1) for refund of the tax already deducted from the payment made by the Petitioner-transport contractor.

14. Both the writ petitions are allowed accordingly.