(2011) 10 AP CK 0026

In the Andhra Pradesh High Court

Case No : W.V.M.P. No. 570 of 2010 in W.P.M.P. No. 23034 of 2009 in W. P. No. 17563 of 2009 and W. V. M. P. No. 495 of 2010 in W. P. M. P. No. 23458 of 2009 in Writ Petition No. 17893 of 2009 and Writ Petition No''s. 17563 and 17893 of 2009

Qual Core Logic Ltd. APPELLANT

Vs

Appellate Deputy Commissioner (CT), Hyderabad and Another RESPONDENT

Date of Decision : 20-10-2011

Acts Referred:
Andhra Pradesh Value Added Tax Act, 2005 — Section 33, 9(2)
Constitution of India, 1950 — Article 226

Citation : (2012) 49 VST 47

Hon'ble Judges : N. Ravi Shankar, J;Goda Raghuram, J

Bench : Division Bench

Advocate : S.R.R. Viswanath, for the Appellant; P. Balaji Varma for Commercial Taxes, for the Respondent

Final Decision : Dismissed

Judgement

N. Ravi Shankar, J.—The parties to both these writ petitions are same and the points involved in them are similar and therefore they are being disposed of by this common order. The controversy in these two matters relates to the validity of two assessment orders one for the Assessment Year (AY) 2005-06 and the other for the AY 2006-07 passed against the petitioner-company under the provisions of the Central Sales Tax Act, 1956 (for short, "the Act"). The petitioner in both these writ petitions is a limited company located at Hyderabad and is registered as a dealer both under the Andhra Pradesh Value Added Tax Act, 2005 (for short, "the APVAT Act") and the Act and it is on the rolls of the Commercial Tax Officer, Nacharam Circle, Hyderabad, who is the second respondent in both the writ petitions.

2. Admitted facts are these. For the AY 2005-06, the petitioner-company had certain business transactions with four companies situated at Bangalore, viz., (1)

M/s. Texas Instruments (India) (P) Ltd., (for short, "TI") (2) M/s. Beecen Communications (P) Ltd., (3) M/s. Purple Vision Technologies (P) Ltd. and (4) Society for Integrated Circuit Technology and Applied Research and also two Hyderabad based companies. Then for AY 2006-07 the petitioner-company had again business transactions with TI, i.e., the first of the four Bangalore based companies referred to supra and also a Hyderabad based company.

3. The second respondent by his assessment order dated July 11, 2008 passed under the Act assessed the taxable turnover of the petitioner with the aforesaid four Bangalore based companies for AY 2005-06 at Rs. 2,65,75,770 treating them as sale of software by way of inter-State sales and levied a tax of 10 per cent on the said turnover. Similarly by another order also dated July 11, 2008 the second respondent assessed the taxable turnover of the petitioner for AY 2006-07 with the aforesaid Bangalore based company at Rs. 2,92,46,358 under the Act treating it as inter-State sale of software and similarly levied 10 per cent of that amount as tax. The second respondent levied 10 per cent tax on the ground that the petitioner failed to file the requisite C forms under the Act. In both the assessment orders it was observed that so far as the transactions of the petitioner with the Hyderabad based companies for both the years are concerned, they will be separately dealt with under the APVAT Act as they are sales within our State.

4. The petitioner filed statutory appeals against both the assessment orders before the first respondent but was unsuccessful. Questioning the assessments for AY 2005-06 and AY 2006-07 the petitioner filed W. P. Nos. 17893 and 17563 of 2009, respectively.

5. We are concerned herein only with the petitioner''s transactions with its client companies at Bangalore and not other sales. The first point raised in each of these two writ petitions is whether or not the petitioner''s business transactions with the aforesaid Bangalore companies constitute sale of software in the course of inter-State sales attracting tax under the Act. The second point is even if there is sale of software whether it was developed and sold in Bangalore, i.e., at the place of petitioner''s client companies there and not in the course of any inter-State sales and therefore levy of tax under the Act is not permissible. The third point is whether the matters should be remitted back to the assessing authority for making fresh assessments considering all the contentions raised on behalf of the petitioner.

6. Dr. S. R. R. Viswanath, the Learned Counsel for the petitioner, basing on the pleadings raised two contentions to show that the petitioner did not sell any software in the course of inter-State trade. The first is that the petitioner is in the business of providing only software services by deploying its personnel in the business places of its client companies at Bangalore and there was no sale of software on any media or through any other mode. He therefore argued that the second and first respondents totally erred in holding that there was sale of software in the course of inter-State trade. Further elaborating on this

contention, he argued that the service provided by the petitioner to its Bangalore client companies is merely a service and there is no transfer of software/goods as that expression is defined in entry 39(14) or any other entry under the Fourth Schedule to the APVAT Act. He also argued that as the transactions of the petitioner with the four Bangalore based companies constitute merely providing service they are not taxable either under the Act or under the APVAT Act as the transactions of the petitioner have already been subjected to service tax by the Central Government.

7. The other contention of Dr. Viswanath is that even assuming for a moment that any goods in the form of software or otherwise came into existence in the course of the business transactions of the petitioner with its client companies at Bangalore such software or goods must be deemed to have come into existence at the business places of its clients in Bangalore, i.e., in Karnataka and must be held to belong to them under the terms of agreements and therefore it cannot be said that there is movement of software/goods from our State to Karnataka and consequently the levy of tax is impermissible under law. In support of his above two contentions, Dr. Viswanath relied upon the copies of the agreements of the petitioner-company with its Bangalore based client companies and also certain decisions.

8. On the other hand, the learned Government Pleader for Commercial Taxes argued that the transactions of the petitioner with its four Bangalore based companies would, for the reasons recorded in the impugned order, show that there is sale of software in the course of inter-State sales and therefore the impugned assessment orders cannot be faulted. He also pointed out that no software even if developed and sold was developed in Bangalore and therefore that contention of the petitioner should be rejected. He also submitted that the impugned orders have been passed after considering all the aspects of the case and there is no need for remanding the matters for fresh assessment. In the light of the above rival contentions, the points are now taken up.

9. Before we deal with the point, we must mention here that against the order of the first respondent, i.e., the appellate authority, the petitioner has a right of appeal u/s 33 of the APVAT Act read with section 9(2) of the Act before the Sales Tax Appellate Tribunal. Both these writ petitions are of 2009 and it is seen that this Court after admitting the two writ petitions on August 28, 2009 has also granted interim stay of operation of the impugned orders. Having regard to the points raised by the petitioner that there was no sale of software at all in the course of inter-State sales or even if there was such sale it took place in Karnataka and not in the course of inter-State sale which if accepted would go to the root of the matter and jurisdiction and having regard to the fact that the writ petitions were admitted in 2009 and interim orders were granted, we propose to dispose of the writ petitions on merits notwithstanding the availability of alternative remedy.

10. In view of the contentions raised by the petitioner''s counsel, points 1 and 2

are taken up together for determination to find out whether the assessing authority and appellate authority considered the matters in their proper perspective. It may be noted that if we find that the assessing authority and the appellate authority have not considered the matters in their proper perspective, then the matters need to be sent back to the assessing authority for making fresh assessments which is the third point.

11. A perusal of both the impugned assessment orders would show that the assessing authority concluded that the petitioner developed and delivered certain software programmes to the TI in the course of inter-State sale. Its actual observations in the assessment order for 2005-06 read as follows :

... The scrutiny of all copies of work orders reveals that the company have developed and delivered the following software programmes to the customer-company as per the specifications laid down in each work order :--

(1) RLT Activity for MSTC.

(2) Test and support board/equipment, fixing boards/cables, debugging the boards for fault rectifications, ESD set up installation and audit work.

(3) Test and support board/equipment bring up activities.

(4) RLT design.

12. The same observations are made in the assessment order for the AY 2006-07.

13. After reaching the above conclusion, the assessing authority then proceeded to calculate the value of the above sales. In reaching that conclusion the assessing authority relied upon a copy of the Master''s Software Development Agreement dated November 16, 2004 (MSDA) between the petitioner and the TI, annual audit reports of the petitioner for both the AYs wherein certain software sales are said to have been shown, certain copies of invoices issued by the petitioner to the TI and the work orders given by the TI to the petitioner. It did not consider the documents of the petitioner with its other three client companies at Bangalore on the ground that they were not filed. The assessing authority in both the assessment orders has simply jumped to the conclusion that the petitioner has developed and sold the software to its client companies at Bangalore in the course of inter-State trade or sale without considering its pleas in detail having regard to the above MSDA and the work orders for the following reasons.

14. A copy of the MSDA has been made available to us. It no doubt reads that the petitioner has experience in developing software but it also reads that it has experience in providing services in design and layout. The plea of the petitioner is that the terms of MSDA would only show that it merely provided service but did not sell any software to the TI. The MSDA no doubt reads that TI desired to engage the contractors, i.e., the petitioner, in connection with development of certain software applications that are more specifically set forth and described in

the work order. The expressions "deliverable", "inputs", "materials" and "project" are defined in the MSDA.

15. It would be useful to note that the word "inputs" is meant to be the hardware, data, designs, diagrams, software programmes, technical specifications, documentations and other information provided to contractor by TI as TI deems appropriate for contractors use in carrying out the project. It may then be noted a copy of the work order is also made available to us by the petitioner and this is not disputed. In this work order, it will be found that there is a column for "inputs required" and against that column it is mentioned that inputs required mean hardware needed, software needed, any other equipment. Then what should be noted is that according to the definition of inputs in the MSDA and in the work order, it is mentioned that software and hardware are required to be supplied by the TI to the petitioner and it is not the other way.

16. The plea of the petitioner is that it was only providing service in development of certain technology or applications at the places of its client companies at Bangalore, i.e., TI and other three companies mentioned supra and it was not supplying or selling any software. The assessing authority, as already mentioned, concluded that the petitioner sold software programmes, viz., (1) RLT Activity for MSTC, (2) Test and support board/equipment, fixing boards/cables, debugging the boards for fault rectifications, ESD set up installation and Audit work, (3) Test and support board/equipment bring up activities and (4) RLT design. There is no discussion by the assessing officer as to how the above four items constitute software when the software is to be supplied according to the terms of MSDA by the TI to the petitioner. There is no clear cut discussion and reasoning as to how the above items which are support board, fixing boards/cables and audit work constitute software. It is also not made clear as to how RLT activity constitutes software.

17. The assessing officer should have clearly determined keeping in view the meaning of software as to what was the software that was developed and sold by the petitioner. This the assessing officer has not done. Added to this, the petitioner''s case is that according to MSDA and its dealings with the other three companies it has to deploy its personnel at the business premises of the TI and other companies for the purpose of the works. It may then be noted that para 14.2 of the MSDA deals with intellectual property rights (IPRs) developed during the period of the said agreement. In substance this para 14.2 reads that the TI shall exclusively own the right, title and interest in respect of the IPRs arising out of the services provided by the petitioner. It is even clarified that any IPRs solely developed by the contractor personnel, i.e., the petitioner''s employees shall also belong to the TI.

18. Now, even if any software is developed and sold, the above MSDA having regard to the fact that the petitioner has to deploy its personnel in the TI''s place at Bangalore would suggest that even if any software IPRs are developed, they may have been developed in Bangalore only and in such a case, it may not be

possible to hold that there is movement of any software from our State to Karnataka in the course of any inter-State sales. The petitioner''s second contention is based on this aspect. This has not been dealt with by the assessing authority or the appellate authority. The petitioner''s contentions on points 1 and 2 may be true or may not be true on facts, but they have to be examined by the assessing authority in detail considering all the materials placed before it or even by calling additional material from the petitioner or its Bangalore based client companies and the assessing authority should have dealt with this aspect in a clear cut manner. It should have demonstrated in the assessment orders giving reasons for its conclusion but it did not do so.

19. It can therefore be said that the assessing authority did not consider points 1 and 2 in their proper perspective and made the assessments in question in accordance with law. The appellate authority, i.e., the first respondent also did not consider the matters on the above lines. Even with regard to other three client companies of the petitioner at Bangalore the matter needs to be examined on the above lines having regard to the pleas of the petitioner. Hence the non-filing of the documents pertaining to the petitioner''s transactions with its other three client companies at Bangalore before the assessing authority does not make any difference.

20. It should also be mentioned here that it is the case of the petitioner that its services to its client companies at Bangalore have been subjected to service tax by the Central Government and this aspect and its bearing on the petitioner''s contentions which are referred to supra have also not been considered by the assessing authority and as well as the appellate authority. Hence this is also a point in favour of the petitioner. The learned Government Pleader could not put forward any convincing reasons to sustain the impugned orders of assessment.

21. It may be noted that this Court sitting under article 226 of the Constitution cannot go into the above aspects which involve disputed questions of fact and it is only for the assessing authority or the other prescribed authorities under the APVAT Act and the Act to go into the same by examining the material available on record and also calling for additional material if necessary. Hence we are of the opinion that the assessment orders in question should be set aside and the matters remitted back to the primary assessing authority for making fresh assessments in accordance with law keeping in view the short-comings in the assessment orders noticed by us.

22. Both the writ petitions are accordingly allowed and the impugned assessments orders are set aside and the matters remitted back to the second respondent for taking up fresh assessments. The petitioner''s counsel may cite his case law before the assessing authority. We make it clear that we are not expressing any opinion on the merits of the matter and the assessing authority shall proceed to make assessments in accordance with law without being influenced in any manner by observations made in this order. No costs. As the main writ petitions are disposed of, no separate orders are necessary in the

WVMPs in both the writ petitions and they are accordingly closed.