(2010) 07 AHC CK 0440

In the Allahabad High Court

Reliance Industries Limited — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 26-07-2010

Acts Referred:

Central Sales Tax Act, 1956 — Section 3
Constitution of India, 1950 — Article 226, 286
Uttar Pradesh Value Added Tax Rules, 2008 — Rule 2, 2(C)
Value Added Tax Act, 2008 — Section 7

Citation : (2010) 07 AHC CK 0440

Hon'ble Judges : Yogesh Chandra Gupta, J;Devi Prasad Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Yogesh Chandra Gupta, J.—Heard learned Counsel for the parties.

2. Assessment order under the VAT Act has been impugned from the month of April, 2009 to March, 2010 on the ground that business transaction is in the nature of inter-state sale and purchase and not intrastate and entire business transaction had taken place in the State of Andhra Pradesh. The petitioner, producer of natural gas, claims that the delivery took place at Gadimoga, Andhra Pradesh in terms of agreement, a copy of which has been filed as Annexure-1 to the Writ petition.

3. It has been submitted that u/s 3 of the Central Sales Tax Act there is bar to impose VAT Tax. The authority has relied upon the judgment of Sales Tax Tribunal of Gujarat while making assessment against the petitioner.

4. It has also been submitted that since, imposition of tax being on inter state trade is beyond the power of State Government, the writ petition may be entertained under extraordinary remedy of Article 226 of the Constitution of India.

5. Further submission of the learned Counsel for the petitioner is that the

impugned order has been passed by the Additional Commissioner, who is the appellate authority under the Act hence, hence, the writ petition may be entertained under extraordinary jurisdiction of this Court.

6. Shri J.N. Mathur learned Additional Advocate General of the State submits that controversy involves mix question of law and fact and agreement cannot be relied upon as it is a measure to evade tax in the State of U.P. Further, learned Advocate General submitted that the goods are not ascertainable at delivery point and having remedy to appeal the petition may be relegated to alternative forum.

7. Shri J.N. Mathur, learned Advocate General stated that in view of Apex Court''s Judgment reported in 2005 (10) SCC 192 GAIL India Limited v. Sales Tax Officer. Gujarat the controversy is not open for adjudication under Article 226 of the Constitution of India.

8. It shall be appropriate to give brief sketch of the dispute involved. Admittedly, the petitioner had entered into the agreement with the purchaser and delivery took place at Gadimoga in the State of Andhra Pradesh. The liability to transport the natural gas in terms of agreement is on Reliance Gas Transportation Infrastructure Limited (in short hereinafter referred as RGTIL). The gas is transported to State of U.P. through pipeline of Gas Authority of India Limited (in short hereinafter referred as GAIL). The agreement (Annexure-1) provides that the delivery point shall be at Gadimoga near Kakinda, Andhra Pradesh on which point the sellers has got facilities interconnected to the gas transportation facilities of RGTIL. The RGTIL transport the natural gas to M/s Indo Gulf and the other respondents i.e. respondent No. 4 to 10 situated in various places in the State of U.P. Agreement further provides that the sellers shall sell and deliver gas from gas fields at the delivery point on an as available basis at the sales price and subject to terms and condition set forth in the agreement. Sellers shall deliver the gas to buyers or buyers designee for onward transmission to buyer''s facilities. The buyers shall purchase from each seller that seller''s participating interest share of gas in the quantities and at the sales price and subject to terms and condition set forth in the agreement. The agreement further provides that sellers shall make all gas supplied in terms of agreement available for delivery at the delivery point (Andhra Pradesh), in accordance with and subject to terms and condition of the agreement. The buyer shall ensure receipts, off take and transportation of the gas from delivery point to buyer''s facilities. The risk of loss of gas delivered shall pass from sellers to buyer at the delivery point (Andhra Pradesh) upon the delivery of gas to buyer at such point.

9. Thus, it appears that after delivery of gas at the delivery point of Andhra Pradesh, the entire liability shall shift on the shoulder to purchaser of the gas i.e. respondent No. 4 to 10. Various conditions given in the agreement further reveals that the entire exercise with regard to transaction shall be in the Andhra Pradesh.

10. It has not been disputed that 4% (now 2%) Central Sales Tax Act is being paid by the petitioners against the Form "C" supplied by the State to the purchaser.

11. Attention has been further invited towards Section 3 of the Central Sales Tax Act. The Clause 1 of which provides that a sale or purchase of goods shall be deemed to take place in the course of inter-state trade or commerce if the sale or purchase is take place in a State.

12. Attention has also been invited toward Article 286 of the Constitution, which provides that State shall not be empowered to impose trade tax or VAT Tax with regard to inter state sale and purchase of goods. Learned Additional Advocate General has rightly said that provision contained in Section 3 of the CST Act is as per mandate of Article 286 of the Constitution.

13. Learned Counsel for the petitioner further submits that the impugned order has been passed by the Additional Commissioner Grade II, who is the appellate authority. In the present case, the officer concerned was a Joint Commissioner (Corporate Tax) at Lucknow, who was promoted and transferred on the post of Additional Commissioner to resume duty and in consequence he resumed duty in the forenoon of 8.6.2010.

14. While assailing the competence of Additional Commissioner attention has been invited towards Rule 2(c) of the U.P. Vat Rules, which provides that assessing authority means the Joint Commissioner, appointed and posted by state government in a corporate circle to perform the function. The word "appointed" and "posted" by State Government seems to has got significance while interpreting the statutory provision. However, the government order provides that the officer shall take over charge of Additional Commissioner but shall continue to discharge the duties of Joint Commissioner also for the purpose of assessment. The power delegated by the State Government has been assailed keeping in view the provisions contained in Rule 2(c) of the Rules in question, which requires consideration.

15. Shri Bharat Ji Agarwal learned Senior Advocate appearing on behalf of the petitioner while assailing the competence of Commissioner, who pass the impugned order, has relied upon the cases reported in Ram and Shyam Company Vs. State of Haryana and Others, Dev Dutt Vs. Union of India (UOI) and Others, Deepak Agro Foods Vs. State of Rajasthan and Others, Deepak Agro Foods v. State of Rajasthan for interference under extraordinary remedy of Article 226.

16. It has further been submitted that u/s 7 of the VAT Act 2008 State lacks jurisdiction to impose tax with regard to inter state transaction/sale and purchase of goods. Clause (a) of Section 7 provides that no tax under the Act shall be levied and paid in turn over of the sale and purchase, whether sale and purchase took place in the course of inter state or commence outside the state and so on.

17. Shri S.P. Gupta, learned Senior Counsel while appearing in another Writ Petition No. 6508 (MB) of 2010 as well as for the respondent No. 5 in the present writ petition, submitted that in consequence to impugned order passed against the petitioner Reliance supply of form (C) has been stopped and State is proceeding to impose penalty. The action taken against the respondent No. 5 is founded on the impugned assessment order against the petitioner of the writ petition.

18. Learned Senior counsel Shri S.P. Gupta while assailing the impugned order and defending the respondent No. 5 had relied upon the cases reported in Oil India Ltd. Vs. The Superintendent of Taxes and Others, Oil and Natural Gas Commission Vs. State of Bihar and Others, Indian Oil Corporation Ltd. and Another Vs. Union of India (UOI) and Others, The State of Tamil Nadu Vs. The Cement Distributors (P) Ltd. and Others, Balabhagas Hulaschand Vs. State of Orissa, Union of India (UOI) and Another Vs. K.G. Khosla and Co. Ltd. and Others, Onkarlal Nandlal Vs. State of Rajasthan and Another, Cannon India Pvt. Ltd. Vs. State of U.P. and Others, Cannon India Pvt. Ltd. v. State of U.P. and Ors., 2009 (4) SCC 231 PCM Limited v. CST and BOC India Ltd. Vs. State of Jharkhand and Others,

19. It has been vehemently argued by petitioner''s counsel that the reliance placed by the assessing authority on the tribunal''s Judgment of in 2005 (10) SCC 192 GAIL India Limited v. Sales Tax Officer, Gujarat is not applicable under the facts and circumstances of the present case.

20. It has been stated that the controversy involved before the Tribunal in Gujarat was with regard to GAIL itself where goods/natural gas were transferred from one place to other place. GAIL itself was seller and transporter and there was no agreement regulating the transaction like present one.

21. While distinguishing the tribunal''s judgment, it has also been stated that it was the case of stock transfer.

22. Needless to say that every judgment is to be seen in reference to context.

23. In the present case, learned Additional Advocate General submits that the agreement entered into between the petitioner is an incident to evade tax in the state of U.P.. The submission is that State has got right to impose tax in case, it is found that the agreement between the parties is colourable exercise of power to evade taxes. It shall be appropriate to refer three judgements of Hon''ble Supreme Court relied on by Sri S.P. Gupta learned Senior counsel representing opposite party No. 5, which seems to cover the present controversy.

24. In the case of Oil India Limited (supra) their Lordship was seized with the matter where contract between the parties was interpreted and with regard to supply of gas. Their Lordship observed that, to quote:

No matter in which State the property in the goods passes, a sale which occasions "movement of goods from one State to another is a sale in the course of inter-State trade". The inter-state movement must be the result of a covenant express or implied in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-state movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-state trade or commerce, that the covenant regarding inter-state movement must be specified in the contract itself. It would be enough if the movement was in pursuance of an incidental to the contract of sale.

25. In the case of Indian Oil Corporation Limited (supra), aforesaid principle has been reiterated by Hon''ble Supreme Court holding that in case, the entire transaction took place in a State only because movement of material from one state to other shall not attract to impose tax by the transfere state. The aforesaid proposition has also been borne out from the case of English Electric Co. of India Ltd. v. The Deputy Commercial Tax Officer and Ors. (supra). To reproduce relevant portion as under:

When the movement of goods from one State to another is an incident of the contract it is a sale in the course of interstate sale. It does not matter in which state the property in the goods passes. What is decisive is whether the sale is one which occasions the movement of goods from one state to another. The inter-state movement must be the result of a covenant, express or implied, in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-state movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-state trade or commerce, that the covenant regarding inter-state movement must be specified in the contract itself. It will be enough if the movement is in pursuance of and incidental to the contract of sale.

26. In view of above, agreement with regard to business transaction is admitted fact. Whether Additional Commissioner being appellate authority could have discharged duty of assessing authority, in view of Rule 2(C) and whether tax is not imposable under the VAT Act and whether trade in question is a inter state trade, prima facie may be adjudicated on the basis of affidavit filed by the parties. Case is made out to entertain the writ petition under extraordinary remedy, which requires hearing.

27. Accordingly, we admit the writ petition permitting the respondents to file counter affidavit, as prayed, within two weeks, rejoinder affidavit within one week.

Let notices be issued to the respondents No. 4 to 11 returnable at an early date. Apart from regular mode of service, liberty is given to the petitioner to serve notice on the respondents outside the court. Office shall provide necessary notices. Since, Shri S.P. Gupta, learned Senior Counsel appeared for opposite party No. 5, no fresh notice is required for opposite party No. 5.

List immediately after three weeks before appropriate Bench for peremptorily hearing.

Till further orders of this Court, operation of the impugned orders dated 11.6.2010 shall remain stayed and status-quo ante shall be maintained.