(2003) 01 GAU CK 0055

In the Gauhati High Court

Case No : Civil Rule No''s. 124 of 1988 and 17 and 18 of 1994

Roy Engineering Co. APPELLANT

Vs

State of Tripura and Others RESPONDENT

Date of Decision : 10-01-2003

Acts Referred:

Tripura Sales Tax (Fourth Amendment) Act, 1987 — Section 1(3)
Tripura Sales Tax Act, 1976 — Section 3A, 3A

Citation : (2003) 2 GLT 250 : (2003) 132 STC 436

Hon'ble Judges : B.B. Deb, J

Bench : Single Bench

Advocate : B. Das and T.K. Dey, for the Appellant; U.B. Saha, Sr. Government Advocate, S. Deb R. Dasgupta and A. Ghosh, for the Respondent

Judgement

B.B. Deb, J.—In these writ petitions under Article 226 of the Constitution of India, the petitioner challenged the vires of retrospectivity of Section 3A of the Tripura Sales Tax Act (hereinafter referred to as "the Act") and consequently challenged the impugned order dated November 9, 1993 passed in Appeal Case Nos. 90 and 91 of 1992 by the learned Tribunal constituted under the Act.

2. The petitioner''s case precisely could be narrated as follows :

(C.R. No. 17 of 1994)

The petitioner is a registered contractor under various statutory authorities including Oil and Natural Gas Corporation (ONGC). The Superintendent of Taxes passed an assessment order dated April 29, 1988, u/s 9(3) of the Act on best judgment assessment and determined the turnover at Rs. 8,10,146.88 and accordingly assessed the sales tax and imposed a penalty of Rs. 23,990.83 showing total tax payable at Rs. 71,972.50 for the assessment year 1393 B.S on the contract works done by the petitioner under respondent Nos. 5 and 6 (Executive Engineer and Superintending Engineer ONGC respectively). The taxing authority issued demand notice requiring the petitioner to pay the aforesaid dues. The petitioner moved a writ petition before this Court in Civil Rule No. 124 of 1988 challenging the validity of the assessment order. This Court vide order dated May 23, 1990 allowed the writ petition directing the Commissioner of Sales Tax to admit the statutory appeal and to decide the matter on merit. The Court did not examine the vires of provision of amended Section 3A of the Act. The petitioner preferred statutory appeal accordingly and after hearing, the Additional Commissioner of Sales Tax vide order dated October 20, 2002 quashed the order of imposition of penalty only while maintained the order of assessment and tax payable as determined by the Superintendent of Taxes. The Tripura Legislative Assembly amended the Act by the Tripura Sales Tax (Fourth Amendment) Act, 1987 substituting the provision of Section 3A thereto for the purpose of assessment and recovery of sales tax on works contract. By Section 1(3) of the Fourth Amendment Act, the amended Section 3A of the Act has been made retrospective effect from July 12, 1984. The petitioner executed works contract pursuant to the works order issued by the respondent Nos. 5 and 6 for the construction of buildings, etc., and the petitioner submitted the tender without claiming or adding sales tax over his quoted rate. The retrospective effect of Section 3A of the Act according to the writ petitioner is unreasonable, absurd, unjust and against the principle of practicability and as such he challenged the decision of the Tribunal as well as the validity of the aforesaid amended Section 3A of the Act.

3. The State respondents contested the case by filing counter-affidavit wherein it is contended, inter alia, that the petitioner-firm concealed the actual turnover in its return and on the basis of the entries made in the books of accounts of the petitioner-firm and after allowing the petitioner opportunity of being heard, the authority assessed the turnover determining the tax and imposed the penalty. Pursuant to the amended provision of Section 3A of the Act the authority assessed the tax on the price of the goods/commodities used in execution of the works contract while the petitioner wrongly shown four per cent of the tax on the tender value of the contract pursuant to the pre-amended provision. The Act has been amended pursuant to the 46th Amendment of the Constitution of India and as such in amending Section 3A, no illegality has been committed by the State Assembly and the sales tax authority being lawfully competent asked for deduction at source. The respondent Nos. 5 and 6 filed separate counter-affidavit contending, inter alia, that on the basis of demand notice they being under legal/ statutory obligation made attempt to deduct the tax as assessed by the sales tax authority.

4. (C.R. No. 18 of 2994)

The identical challenge has been made by the petitioner in the present case narrating, inter alia, that the Superintendent of Taxes vide order dated June 18, 1988 assessed the tax u/s 9(3) of the Act on the best judgment assessment and determined the turnover at Rs. 5,54,156 and assessed the tax and penalty for Rs. 99,304 for the assessment year 1392 B.S. The petitioner exhausted the statutory remedy and thereafter moved the case in C.R. No. 114 of 1988. The same decision has been rendered by this Court as was done in C.R. No. 124 of 1988 vide order dated May 23, 1990. The same ground of attack has been laid with identical reliefs. Only the amount of tax and dates of assessment order are different. The State respondents as well as the ONGC took the identical stand as has been taken in C.R. No. 17 of 1994.

5. On perusal of the pleadings of the respective parties and after hearing the learned counsel of either side, the following questions of law appear to be relevant for decision of both the cases :

(i) Whether the sales tax is to be levied on the basis of prevailing rate of tax with reference to the date of works order or whether the sales tax is to be levied with reference to the rate prescribed by subsequent amendment with retrospective effect covering the date of works order ?

(ii) Whether in absence of any agreement to the contrary between the contractor dealer and the ONGC, the subsequently amended rate with retrospective effect would be leviable from the contractor-dealer ?

(iii) Whether in such case the contractor-dealer is entitled to be reimbursed the leviable enhanced part of the tax pursuant to retrospectivity of the Act from the ONGC ?

6. From the assessment order pertaining to C.R. No. 17 of 1994 it appears that the petitioner was allotted with the works vide works order dated July 13, 1984, July 13, 1984, November 19 1984, November 19, 1984 and February 17, 1986. From the impugned assessment order available with C.R. No. 18 of 1994, it appears that the petitioner was allotted with the work vide work order dated February 17, 1986, July 17, 1986 and July 17, 1987.

7. The Tripura Sales Tax (Fourth Amendment) Act, 1987 was received the assent of the Governor of Tripura on May 12, 1987 and published in Official Gazette on June 12, 1987. The petitioner executed the works contract under the ONGC pursuant to different work orders as mentioned in the preceding paragraph. Thus, only one work order dated July 17, 1987 for which the petitioner has received Rs. 90,146 appears to have been issued by the ONGC authority after publication of the Tripura Sales Tax (Fourth Amendment) Act, 1987 in the Official Gazette on June 12, 1987 and thus, so far the work order dated July 17, 1987 is concerned, the question of retrospectivity does not arise. The amended provision of Section 3A of the Act is unquestionably applicable to the works contract covered by the aforesaid work order dated July 17, 1987.

8. Learned counsel for the petitioner submits that so far the bills received or receivable by the petitioner for works executed by him pursuant to the work order issued prior to the date of publication of the Tripura Sales Tax (Fourth Amendment) Act, 1987, the petitioner cannot be held liable to pay tax in accordance with the amended provision of Section 3A of the Act applying its

retrospectivity. At the relevant time, according to the learned counsel for the petitioner, Section 3A of the Act as was inserted by the Tripura Sales Tax (Third Amendment) Act, 1984 was in vogue and the amount received or receivable by the petitioner-contractor for the works executed by him pursuant to the work order issued prior to June 12, 1987 cannot be held liable for taxation under the provisions of Fourth Amendment Act, but it should have been according to the Third Amendment Act of 1984.

Mr. U.B. Saha, learned Senior Government Advocate, submits that since the provision of amended Section 3A of the Tripura Sales Tax Act has been made effective from July 12, 1984 pursuant to the Section 1(3) of the Fourth Amendment Act, the petitioner cannot escape his liability from retrospective application of the Act.

9. To appreciate the rival contention of the parties, it is expedient to excerpt the related provisions of the Tripura Sales Tax (Fourth Amendment) Act, 1987 :

"1. Short title, extent and commencement.--(1) This Act may be called the Tripura Sales Tax (Fourth Amendment) Act, 1987.

(2) It extends to the whole of Tripura.

(3) Clause (i) of Section 3 and Section 4 shall be deemed to have come into force on the twelfth day of July, 1984 and all other provisions shall come into force at once.

2. . .

3. . .

4. Amendment of Section 3A.--For Section 3A of the principal Act, the following Section shall be substituted :--

3A. Tax on the transfer of property in goods involved in the execution of works contract- Notwithstanding anything contained elsewhere in this Act, any transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to be a sale of those goods by the person making the transfer and shall be liable to be taxed at the rate specified in column 3 of the Schedule :

Provided that in respect of any such transfer only so much value of the goods involved in the works contract which has actually been paid to the dealer during the period, shall be taken into account for determining the turnover for the period.

Explanation:- For the purpose of this section ''property in goods'' shall mean the aggregate of the goods for which amounts have been received or receivable by a dealer during such period as valuable consideration, whether or not such amount has been separately shown in the works contract. The amount received or receivable shall include the value of such goods purchased, manufactured, processed, or procured otherwise by the dealer, and the cost of freight or delivery as may be incurred by such dealer for carrying such goods to the place where these are used in execution of such works contract, but shall not include such portion of the aforesaid amounts as may be prescribed."

10. From the aforequoted amended provision of Section 3A of the Act, it reveals that any transfer of property in goods whether as goods or in some other form involved in the execution of works contract shall be deemed to be sale of goods by the person making the transfer and shall be liable to be taxed at the rate specified in column 3 of the Schedule of the Act. In other words, in execution of works contract if any taxable goods are used the same shall be liable to be taxed according to the rates specified in the Schedule. The said provision has been made retrospective with effect from July 12, 1984, though the amendment has been notified in Official Gazette on June 12, 1987. So far the sales tax is concerned, the dealer is to collect the sales tax from the consumer/purchaser for the goods sold or used in execution of the works contract in accordance with the rate prescribed under the Schedule and to deposit the same periodically at the time of furnishing returns of the turnover. Though, admittedly the Legislature has the competency to make any amendment retrospectively, but so far the fiscal legislation is concerned, the retrospectivity of any amended provision must be just and practicable. The retrospective operation of the amended provision of fiscal law cannot put impracticable burden upon the assessee for payment of any sales tax at the rate which was not in vogue at the time of transaction of sale, be it sale of goods or contractual transfer of property involved in execution of works contract.

11. In the present case, the petitioner executed the works contract under the ONGC pursuant to the work orders issued prior to June 12, 1987 (except one item) and as such, in my considered opinion, the tax cannot be levied on the goods transferred or property in goods used in execution of works contract pursuant to work order issued prior to the date of notification by applying the amended provision. While entering into the agreement with the ONGC, the petitioner-contractor could not anticipate the future amendment of the fiscal legislation imposing tax at a rate different than that of which existed at the time of entering into agreement and as such the petitioner neither could lay claim to the ONGC for revising the accepted rate of its tender and in such situation the retrospective operation of the amended provision of Section 3A would be an absurdity so far levying tax regarding works contract he executed pursuant to the work orders issued prior to the notification of amended Act.

12. Under the Sales Tax Act, the dealer/assessee virtually collects taxes from the consumer or purchaser at par the rate prevailed at the time of transaction of sale, be it transfer of goods/commodities or transfer of property in goods involved in the execution of works contract and as such retrospectivity of the provision of amended Section 3A cannot be made unqualified applicable to such cases.

13. Under the aforesaid legal analysis, I am of the considered opinion that the retrospective operation of the amended provision of Section 3A would only be applicable to a transaction of works contract which though commenced prior to June 12, 1987, but is/as been subsisting on or after June 12, 1987 and in that event, the contractor is entitled to be reimbursed by the authority allotting the contract, the additional amount of tax leviable pursuant to the amended provision. But, in case the execution of works contract stood completed/ rescinded prior to June 12, 1987 the contractor cannot be asked to pay any additional taxes pursuant to amended provision of Section 3A of the Act, his liability to pay tax is confined to and governed by the provision of law stood prior to June 12, 1987.

14. Viewed above, I am of the considered opinion to hold that the sales tax is to be levied on the basis of prevailing rate of tax with reference to the dates of work orders in regard to works contract and in case, if during the subsisting of the contract and in course of progress of the execution of works contract, the rate of tax is enhanced by way of subsequent amendment with retrospective effect the tax is leviable at the said higher rate from the contractor and in turn the contractor is/will be entitled to be reimbursed by the authority allotted the works contract to him. On the other hand if the execution of works contract is completed or rescinded for reasons whatever prior to amendment and payment of money is awaited, the retrospective effect of such amended provision shall not have any manner of application.

15. In view of what have been discussed and decided about, both the writ petitions are partly allowed. The two impugned assessment orders under challenge stand quashed. The assessing authority is directed to reassess the turnover for the purpose of levying and collecting sales tax from the petitioner applying the implication of law enunciated in the preceding paragraphs of the judgment. No cost.

