(1998) 05 OHC CK 0027

In the Orissa High Court

Case No : O.J.C. No. 693 of 1998

Sri Durga Construction APPELLANT

Vs

Sales Tax Officer, Ganjam II Circle RESPONDENT

Date of Decision : 15-05-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa Sales Tax Act, 1947 — Section 13AA(1), 13AA(5)
Orissa Sales Tax Rules, 1947 — Rule 37D

Citation : (1998) 2 OLR 255

Hon'ble Judges : S.C. Datta, J;A. Pasayat, J

Bench : Division Bench

Advocate : Sanjay K. Acharya, N.C. Das, D.K. Swibedi, D.K. Sahoo, S.K. Nayak and B. Mohapatra, for the Appellant; Addl. Standing Counsel (C.T.), for the Respondent

Judgement

A. Pasayat, J.—This is third journey of the petitioner to this Court in the matter of its prayer to issue a certificate in terms of Section 14-AA (5)(a) of the Orissa Sales Tax Act, 1947 (in short, the ''Act'') read with Rule 37D of the Orissa Sales Tax Rules, 1947 (in short, the ''Rules'').

2. Factual position so far as undisputed and relevant for the purpose of adjudication of this case is as follows :

Petitioner carries on contract work under the Executive Engineer, DSARP Division No. II, Sorada in the district of Ganjam. It has been awarded with a contract work vide Agreement No. DL/1/ ACE/95-96 for treatment to creast of Dam including surface drainage arrangement of Sorada Dam. The original contract price was about Rs. 6.89 crores which has been subsequently revised to Rs. 8.85 crores. According to the petitioner, the work in volves earth excavation job, which is labour intensive in nature leaving aside a very negligible percentage towards materials and as such the work is not eligible to sales-tax. The Executive Engineer started deducting tax at source while making payment to the petitioner on submission of running bills. The petitioner immediately applied to the Sales-tax Officer, Ganjam II circle, Bhanjanagar (opposite party) for grant of no deduction certificate. As Rule 37D of the Rules prescribes that the application is to be disposed of within the time stipulated, petitioner moved this Court in OJC No. 13157 of 1996. Same was disposed of by order dated 10.11.1997 directing the Sales-tax Officer to deal with the application within the stipulated time. The date of appearance was fixed to 26.11.1997. Petitioner submitted the details, but the application was rejected. The conclusion of the opposite party that since the contract was not fully earth work and it involved transfer of property exigible to tax and therefore, no deduction certificate cannot be granted is contrary to law. That led the petitioner to file second writ application before this Court, which was registered as OJC No. 16969 of 1997. As the view of the Sales-tax Officer was not in accordance with the decision of this Court in M/s. Beskalis Dredging India (Pvt.) Ltd. v. Sales-tax Officer, Assessment Unit, Jagatsinghpur and Ors. (OJC No. 4166 of 1997 disposed of on 9.4.1997) the Sales Tax Officer was again directed to pass a fresh order by 10.1.1996. For the second time the Sales-tax Officer rejected the application.

3. The learned counsel for petitioner questioned correctness of the order primarily on the ground that the opposite party thoroughly misconceived the scope of work undertaken by the petitioner. As is evident from the order itself, he deputed an Inspector and his fellow officer to conduct enquiry as to the percentage of labour involved and had also written a letter to the Executive Engineer who informed about the percentage of earth work involved. Even if the figure indicated by the authorities, which according to the petitioner are low, are taken into consideration, out-right rejection of the application is uncalled for. According to him, the materials on record do not justify issue of no deduction certificate.

4. The stands about non-application of mind and non-consideration of the certificate issued by the technical authorities were pressed into, service by the learned counsel for petitioner. Additionally, the order of assessment, which is ex pane one, for the assessment year 1996-97 was also referred to. According to the learned counsel for petitioner, the said assessment was completed with great haste so that the tax deducted at source by the paying authority and collected by the Sales-tax Officer can be retained. Be that as it may the assessing officer has indicated in the order of assessment that the labour charges will be around 50%. The order of assessment is stated to have been passed on 28.1.1988. That being the position, the order of rejection cannot be maintained.

The learned counsel for Revenue took the usual plea regarding availability of alternative remedy by way of revision. According to him, the contract involved transfer of property and therefore, no deduction certificate cannot be issued.

5. In order to appreciate the rival submissions the provisions contained in Section 13-AA (5) (a) and Rule 37D along with Form XIC, Part I and II need td be noted.

They read as follows :

"Section 13-AA (5)(a). Where, on an application being made by the contractor in this behalf the Commissioner is satisfied that any work-contract of the nature referred to in Sub-section (1) involves both transfer of property in goods and labour or service, or involves only labour or service, 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 sales tax liability of the contractor under this Act."

"Rule 37-D. Grant of certificate of no deduction/ deduction of tax at source, by the Commissioner to the dealer/works contractor - (1) The application for grant of certificates of no deduction/deduction of tax at source under Sub-section (5) of Section 13-AA shall be made duplicate in Part I of Form XI-C.

(2) The application shall be accompanied by copies of the relevant contract, tender/quotation and other document on the basis of which the contractor relies his claim for no deduction/deduction of tax at source, as the case may be.

(3) If the particulars and document furnished by the contractor are correct and complete in all respects and after making such other enquiry as deemed necessary, the Commissioner is satisfied that the concerned works contract involves both transfer of property in goods and labour or service or involves only labour or service and justifies deduction of tax or no deduction of tax, as the case may be, he shall after giving the appellant a reasonable opportunity of being heard, may grant a certificate in Part II of Form XI-C within a period of one month 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."

"FORM - XI-C (See Rule 37-D) PART - I

Application for grant of certificate of no deduction of Tax at source from works contractor under Sub-section (5)(a) of Section 13-AA of the Orissa Sales-tax Act, 1947 (to be submitted in duplicate)

(To be filled by the applicant)

1. Name, address and A.C. No. of the applicant

2. Status and relationship of person making the application with respect to the business.

3. Location of business/works contract executed.

4. The nature of works contract executed and date of commencement (copy of contract to be filed with application)

5. Cost of the total value of the project/work

6. Period involved for completion, of project/work as per the agreement.

7. Nature of agreement, i.e. whether composite or divisible contract.

8. Material component and value thereof as per the agreement.

9. Extent of labour and service component

10. Whether interest infiduciary capacity in any company, firm or association of persons carrying on business in Orissa or in course of inter-State Trade.

11. Whether any sales-tax proceedings are pending or have been taken in the past, if so, details of the same.

12. Details of year-wise payment, if already received, if any, in respect of the work.

13. Name and address of the Contractor/deducting authority under whom the work is executed.

Place : Signature of the applicant Date : Date ....

PART - II CERTIFICATE (For official use)

This is to certify u/s 13-AA (5)(a) of the Orissa Sales-tax Act, 1947 read with Rule 37-D of the Orissa Sales Tax Rules, 1947.

1. That the above mentioned works contract involves both transfer of property in goods and labour or service or involves only labour or service, and accordingly justifies deduction of tax at source, at the rate prescribed u/s 13-AA(1) of the Orissa Sales Tax Act from .... % of the sums received by the contractor M/s........................in respect of the said works/justifies no deduction of tax at source from the sum received in respect of the said works (strike out words not applicable)

2. That this certificate shall remain valid till final payment is received in respect of the said work or till it is cancelled/ modified by the issuing authority, whichever is earlier.

3. That nothing in the said certificate shall affect the assessment of the sales-tax liability of the contractor under the Act.

Date : Signature of Issuing Authority"

6. A conspectus of the above provisions makes it abundantly clear that if an application is made in terms of Rule 37D for grant of certificate of no deduction of tax at source, the concerned officer is obliged to consider whether any works contract of the nature referred to in Sub-section (1) of Section 13-AA involves both transfer of property in goods and labour or service or involves only labour or service. If he is satisfied that either of the two situations exists to justify

deduction of tax of a part of the same in respect of the works contract, or as the case may be, does not justify any deduction of tax, he shall after giving the contractor of a reasonable opportunity of being heard, grant him such certificate in the manner prescribed. In the case at hand, the opposite party Sales Tax Officer does not appear to have considered the question as to whether both transfer of property in goods and labour or service are involved, even if he was of the view that the works-contract does not involve only labour or service. Once he comes to a conclusion that agreement involves transfer of property and labour or service, he has to determine the quantum on which deduction of tax would be necessary. In the application form which is Part I of Form XI-C at columns 8 and 9, the applicant is required to indicate the material component and value thereof as per agreement and extent of labour and service component. The Taxing Officer is to satisfy himself about the correctness of statement with reference to the agreement and thereafter issue certificate as per Part II of form XI-C. The certificate itself requires issuing authority to mention whether the works-contract involves both transfer of property in goods and labour or service or involves only labour or service. If it is the former, the percentage of the total sum involved on which deduction has to be made is to be indicated. The determination has to be done with a judicial approach. Even though no golden scale approach is to be adopted, yet it should not be arbitrary, irrational or bereft of basis.

7. Normally we would have asked the petitioner to avail alternative remedy. But in view of the disturbing factual position which has surfaced in this case, we have entertained the writ application. Exhaustion of alternative remedy is not the rule of law but a rule of caution. The Sales Tax Officer has sought for view of the Executive Engineer, DSARP Division No. II, Sorada by letter dated 18.11.1997 about the percentage of earth work. The Executive Engineer clearly indicated that the nature of work is mainly earth work involved with some quantity of stone and rip-rap with filter materials surface road and turfing. The percentage of earth work involved is 69.4% amounting to Rs. 5.93 crores out of the deviated amount. The Inspector by his report dated 25.11.1997 after obtaining the, views of the Executive Engineer has stated that the work undertaken is not fully earth work in nature and earth work involved is only 65% of the total work. The Sales-tax Officer, Ganjam II Circle. Ward C, who was deputed by the opposite party for the purpose has also submitted a similar report. Those documents have been annexed to the counter affidavits filed by the opposite party.

8. In view of the aforesaid position, it is surprising that the Sales-tax Officer by the impugned order has stated that no deduction certificate cannot be issued to the petitioner. There is some dispute about amount of tax deducted at source. According to petitioner, deduction position is as follows :

1st deduction - Rs. 12,65,260/- 2nd deduction - Rs. 21,25,086/- -------------- Rs. 33,90,346/- ---------------- According to the opposite party, the total amount deducted at source is Rs. 27,82,383/-, out of which he has adjusted Rs. 12,65,260/- while making assessment for the year 1996-97. In view of the percentage indicated by the Executive Engineer and observations made by the Sales Tax Officer in the ex parte assessment order, refusal by the Sales Tax Officer to issue no deduction certificate cannot be maintained. As adjustment has already been made for Rs. 12,65,260/-, same shall be subject to result of the appeal stated to have been filed by the petitioner. The balance amount collected in the peculiar circumstances be refunded to the petitioner subject to its filing an undertaking to deposit any amount that may be found payable after completion of assessment for the year 1997-98. This unusual course is being adopted by us in view of the conduct of the Sales Tax Officer who has not only acted contrary to the guidelines indicated by this Court in such matters in M/s. Daskalis Dredging India (Pvt.) Ltd. {supra), but also has acted without any material in rejecting the application for issue of no deduction certificate. We find substance in the plea of the learned counsel for petitioner that in the anxiety to collect tax dubious methods are being adopted, and the impugned order has been passed. It would be in the interest of State if such practice is discontinued as ultimately the burden will be on the State to make refund with interest in case the assessee succeeds. The refund shall be granted within one week from the date of filing of undertaking before the opposite party in the line indicated above.

The writ application is allowed to the extent indicated above. No costs.

S.C. Datta, J.

9. I agree.