

(2012) 04 MAD CK 0095

In the Madras High Court

Case No : Tax Case (Revision) No's. 1951, 1952, 1959 and 1960 of 2006

State of Tamil Nadu

APPELLANT

Vs

Mahindra and Mahindra Ltd.

RESPONDENT

Date of Decision : 16-04-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 4, 5

Central Sales Tax Act, 1956 — Section 3, 4, 5

Tamil Nadu General Sales Tax Act, 1959 — Section 2, 3B

Citation : (2013) 58 VST 483

Hon'ble Judges : K. Ravichandra Baabu, J; Chitra Venkataraman, J

Bench : Division Bench

Advocate : P.H. Arvinth Pandian, A.A.G. assisted by Manoharam Sundaram, J. Adithya Reddy and C.V. Shaichandhran and Cibi Vishnu, Additional Government Pleader Taxes, for the Appellant; K.J. Chandran, for the Respondent

Judgement

Chitra Venkataraman, J.—Following is the substantial question of law raised in these tax case revisions filed at the instance of the Revenue relating to the assessment years 1988-89 to 1991-92:

Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that the transaction in question is not indivisible works contract executed in Tamil Nadu, is correct and as a corollary, deletion of levy of penalty u/s 3B of the Tamil Nadu General Sales Tax Act, is correct?

The assessments for the assessment years 1988-89, 1989-90 and 1990-91 are revision of assessments and the assessment for the assessment year 1991-92 is the original assessment. It is seen from the facts stated herein that the assessee had a contract with Neyveli Lignite Corporation for design, manufacture, assembly, inspection, shop testing, providing comprehensive insurance, loading at work, supply, delivery at site, unloading at site, receipt, storage, handling and preservation at site, erection including complete civil works, commissioning and performance testing at site of the complete Hydrosilencing ash handling system

with all accessories, instruments and controls for second thermal power station-stage II expansion. The total cost of the contract was Rs. 12,49,76,000. A perusal of letter of intent placed before this court by the learned Additional Advocate-General shows that annexure I gives the break-up of the schedule of price on design, engineering, manufacture, shop testing supply ex-works. The contract also gives separate cost towards erection, testing and commissioning; complete civil work and other items were for fixed lump sum. It is further that the contract was entered into between Neyveli Lignite Corporation, Neyveli, Tamil Nadu, with the assessee's branch office at Calcutta. Evidently, the contract contemplated movement of machinery as well as manufacture and movement of goods from head office at Mumbai and branch office at Calcutta. Admittedly, full payment was made after successful completion of the performance. Apparently, based on this, as well as the fact that the insurance was borne by the suppliers, the assessing authority applied the theory of accretion that the sale had taken place in the State of Tamil Nadu and issued a notice for reopening the assessment for the first three years taking the view that the turnover was assessable under the provisions of the Tamil Nadu General Sales Tax Act.

2. Referring to the decision reported in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, , the assessing authority held that the sale value of the materials supplied was the value of the goods at the time of incorporation of goods in the works contract and hence to be assessed under the provisions of the Tamil Nadu General Sales Tax Act. The assessing authority further pointed out that the assessee had not furnished the list of purchase of materials from dealers in Tamil Nadu, consequently, no deduction could be granted on the local sales as second sales.

3. The assessee objected to the proposal to assess the transaction under the provisions of the Tamil Nadu General Sales Tax Act. Pointing out that even under the amended provision, as per the decision of the apex court reported in *Larsen and Toubro Limited Vs. State of Tamil Nadu* and another the question of inclusion of the inter-State sale even for the purpose of reckoning the turnover did not arise. The assessee pointed out to the decision reported in *Larsen and Toubro Limited Vs. State of Tamil Nadu* and another wherein while upholding the charge, this court had struck down rules 6A, 6B of the Tamil Nadu General Sales Tax Rules, 1959 and consequently further proceedings in assessment were suspended pending legislative measures.

4. Leaving that side, the assessee pointed out that the contract contemplated movement of goods, manufactured to the specification of the purchaser and the sales were all covered by sales tax declaration form C. Pointing out that the contract is divisible one, the assessee contended that the Neyveli Lignite Corporation was not bound to award the erection portion of the contract to the assessee. In any event, when the goods had moved from Mumbai and Calcutta, the same were taken delivery of by the Neyveli Lignite Corporation; the ownership of the goods thus passed on to Neyveli Lignite Corporation. Payment

of 90 per cent of the price till the stage of delivery and verification of the materials received and postponement of 10 per cent till successful completion of performance test at site had nothing to do with the transfer of property in goods. In any event, non-payment of full consideration did not have the effect of postponing the transfer of property. The assessee further pointed out that when the contract itself was with the head office at Mumbai, the terms of the contract contemplating movement of goods from outside the State and the assessee being the branch of the company had nothing to do with the contract and hence the State of Tamil Nadu had no authority to tax the inter-State transaction emanating from Mumbai and Calcutta. Referring to the decisions reported in *Chesebrough Pond's Inc. Vs. The State of Tamil Nadu*, and *Sahney Steel and Press Works Limited and Another Vs. Commercial Tax Officer and Others*, the assessee pointed out that the goods transferred direct to the Neyveli Lignite Corporation, could not be taxed as a local sale.

5. The assessee further pointed out that in the absence of any amendment made to the Central Sales Tax Act, after the 46th Amendment, the provisions of sections 3, 4 and 5 of the Central Sales Tax Act applied even to a deemed sale; thus inter-State works contract could not be brought under any of the provisions of the Tamil Nadu General Sales Tax Act or for that matter even under Central Sales Tax Act. Thus there was total lack of jurisdiction on the part of the Tamil Nadu State Authority to assess the transaction.

6. The assessing authority, however, rejected the said claim and confirmed the assessment, taking the view that since the payment was made by Neyveli Lignite Corporation part by part and full payment was made only after the successful completion of the performance, there was no outright purchase of materials by Neyveli Lignite Corporation, thus the assessee herein continued to be the owner, hence the turnover was assessable to the provisions of the Tamil Nadu General Sales Tax Act.

7. Aggrieved by this, the assessee went on appeal before the Appellate Assistant Commissioner, who confirmed the assessment taking the view that the responsibility to pay the insurance on the goods remained with the assessee and the goods ever remained the property of the assessee alone till they were assembled and installed before handing over to the contractee. In the circumstances, the Appellate Assistant Commissioner rejected the appeal. Aggrieved by this, the assessee went on further appeal before the Tamil Nadu Sales Tax Appellate Tribunal.

8. On a consideration of the terms of the contract, the Tribunal pointed out that the agreement entered into on August 2, 1989 showed that nowhere the assessee herein in Madras figured in as a party to the contract. The contract was a comprehensive one. It detailed the conditions for supply by way of inter-State sale and separate conditions for commissioning, test running, erection and handing over to the customer. In the background of the terms of the contract and copies of the invoices raised by the contractors' factory in Mumbai, the

Tribunal came to the conclusion that the movement was an inter-State movement and pursuant to the contract, the goods moved from Mumbai and Calcutta were taken delivery of by Neyveli Lignite Corporation. The mere fact that the insurance coverage was made by the assessee's head office, per se, does not make the supplier the owner of the goods till the commissioning was completed. Further, the insurance coverage, cannot in any manner, speak on the nature of the contract. In any event, the assessee, not being a party to the agreement, the question of making the assessee liable to be assessed of the transaction under the provisions of the Tamil Nadu General Sales Tax Act did not arise. On facts, the Tribunal came to the conclusion that the contract was a case of inter-State sale and not assessable under the provisions of the Tamil Nadu General Sales Tax Act. Hence, the assessment was set aside. Aggrieved by this, the Revenue has preferred the present tax case (revisions).

9. The learned Additional Advocate-General appearing for the petitioner/Revenue strenuously contended that having regard to the fact that the ultimate responsibility of erection was with the assessee, applying the principle of accretion, the transfer has to be treated as taking place only in Tamil Nadu attracting the provisions of the Tamil Nadu General Sales Tax Act. Pointing out to the insurance coverage and the handling by the assessee herein, learned Additional Advocate-General pointed out that even applying the decisions reported in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, as well as *Bharat Heavy Electrical Limited etc. Vs. Union of India and Others etc.*, it is clear that the sale could only be a local sale. He also placed reliance on the decision of the Kerala High Court reported in *State of Kerala Vs. Unitech Machines Ltd.* and submitted that the facts herein are similar to that of the reported case of Kerala, hence, the order of the Tribunal has to be set aside.

10. The learned counsel appearing for the assessee, however, supported the order of the Tribunal, particularly in terms of the agreement and contended that when the agreement for sale of machinery and erection was between the assessee's head office and Neyveli Lignite Corporation and the assessee had nothing to do with the contract, the assessing officer had no jurisdiction to assess the assessee. In the circumstances, learned counsel submitted that being pure factual findings, no interference is called for.

11. Heard learned Additional Advocate-General appearing for the petitioner and the learned counsel appearing for the assessee and pursued the materials placed before this court.

12. As already pointed out in the preceding paragraph, the assessee's head office at Mumbai entered into a contract with Neyveli Lignite Corporation in Tamil Nadu for design and manufacture of machineries, which were to be transferred on inter-State sale basis and further erection and commissioning by the principal office at Mumbai. A perusal of the letter of intent shows that nowhere the Madras office figures in, in any manner to be involved in either in the placing of the contract or in finalising the terms of the contract and above all, in the supply and

the erection of the machinery. It is not denied by the Revenue that the goods manufactured were customised to the specification of the Neyveli Lignite Corporation and the same could not be diverted to any other party. Thus with every stage involvement of Neyveli Lignite Corporation, pursuant to the agreement entered into between the parties, the machineries manufactured were delivered to Neyveli Lignite Corporation at Neyveli. Admittedly, the machineries thus moved from Calcutta/Mumbai was in the custody of Neyveli Lignite Corporation. Considering the abovesaid facts, it is crystal clear that the transactions in question satisfy the requirement u/s 3 of the Central Sales Tax Act, 1956 as to when inter-State sale deems to occur. It must be pointed out herein that except for propounding the accretion theory, the State has not placed any materials before this court to disturb the findings of fact by the Tribunal as to the character of movement as an inter-State sale.

13. The learned Additional Advocate-General appearing for the Revenue placed heavy reliance on the decision reported in *Bharat Heavy Electrical Limited etc. Vs. Union of India and Others etc.*, particularly, to Part III at page 390. We do not find the judgment in Part III would be of any assistance to the Revenue, since even on facts therein, the State itself had conceded the proposition that the movement of machineries from Andhra Pradesh to Tamil Nadu-BHEL was by way of branch transfer and in respect of movement from Andhra Pradesh to Orissa and West Bengal was an inter-State sale. The apex court pointed out that the movement of machineries from Andhra Pradesh to Tamil Nadu as a branch transfer was accepted by the State of Andhra Pradesh and no issues were raised thereon. The question that arose for consideration before the apex court was as to whether the movement of machineries from Andhra Pradesh to Orissa/West Bengal could be taxed in more than one State. While State of Andhra Pradesh was treating it as inter-State, State of Orissa treated it as a local sale.

14. As far as the movement of parts and components of goods moving from Andhra Pradesh to the State of Orissa/West Bengal was concerned, the apex court pointed out that the movement was occasioned by the supply contract entered into by BHEL, which was a contract of sale. The manner of movement and the documentation made therein clearly established that the same was not branch transfer, but one of sale pursuant to a supply contract. In the context of this, the apex court pointed out that the same was assessable only by the State of Andhra Pradesh under the provisions of the Central Sales Tax Act. Thus while holding that the question as to whether the movement could be an inter-State sale or an intra-State sale is a mixed question of law and fact, the apex court, on facts, held that only the Andhra Pradesh Government has the territorial jurisdiction to tax the sale as inter-State sale.

15. We do not find that this case would be of any assistance to the Revenue and in fact, comparing the facts as are available on hand in these tax case revisions with the reported decision based on the reasoning in the said decision, one would have no hesitation to reject the case of the Revenue outright.

16. As far as the decision of the Kerala High Court reported in *State of Kerala Vs. Unitech Machines Ltd.*, the same are distinguishable on facts. Evidently, the contract did not provide for any movement of the goods outside the State for the performance of contract in Kerala. Thus going by the facts therein, the Kerala High Court held that while there was a purchase of goods from outside the State, the subsequent sale there afterwards was only a local sale, hence, assessable under the provisions of the Kerala General Sales Tax Act.

17. As already pointed out, the contract contemplated divisibility and rightly specified the price, i.e., both in respect of goods, which were to be moved from outside the State and for the erection portion. Even in respect of movement of goods, it is not denied by the Revenue that the goods were manufactured as per the specifications of the customer on an order placed with the head office at Mumbai. Thus, given the fact that the movement of goods from Mumbai to Tamil Nadu was pursuant to the contract of sale, the fact that the insurance coverage was borne by the assessee/supplier, per se, could not stand in the way of the clear-cut facts existing in this case, pointing out that the sale could be nothing but an inter-State sale. In the circumstances, we have no hesitation in rejecting these tax case revisions.

18. It may be of relevance to point out that in the decision reported in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, the apex court pointed out that even works contract assessable under the local Act is subject to sections 3, 4 and 5 of the Central Sales Tax Act. Going by the definitions of inter-State sale and when a sale or purchase said to take place inside the State u/s 4 of the Central Sales Tax Act, which is subject to section 3 of the Central Sales Tax Act, we have no hesitation in holding that the transaction cannot be assessed under the provisions of the local Act, viz., Tamil Nadu General Sales Tax Act. Explanation 3(a) to section 2 of the Tamil Nadu General Sales Tax Act, which is no different from section 4 of the Central Sales Tax Act, thus clearly goes against the contention of the Revenue. Even in the case of an indivisible contract, what could be taxed under the Tamil Nadu General Sales Tax Act is the transfer of property in goods. Even though section 3B was inserted by Act 42 of 1986 dated June 17, 1986, effective from June 26, 1986, after the decision of this court reported in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, section 3B was amended and substituted from March 12, 1993 by Act 25 of 1993. In the decision reported in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, while considering the 46th Amendment, the Supreme Court pointed out that the State Legislature is not competent and cannot frame its law as to convert an outside sale or a sale in the course of import or export into a sale inside the State and whether the sale is an outside sale or inside sale or is a sale in the course of inter-State sale or in the course of import or export would have to be determined in accordance with the principles in sections 3, 4 and 5 of the Central Sales Tax Act. Thus, whether one treats the contract as divisible one or indivisible one, the character of the sale being one of inter-State sale, we have no hesitation in rejecting the contention of the

Revenue. In a contract of this nature, we do not find even the theory of accretion would be of any assistance, given the fact that even the charging provision u/s 3B was not available during the relevant assessment years, viz., 1988-89, 1989-90 and 1990-91. In the circumstances, we do not find any merits in these tax case (revisions). Accordingly, the above tax case (revisions) are dismissed. No costs.