
(2005) 08 AHC CK 0176
In the Allahabad High Court
Case No : Trade Tax Revision No. 1278 of 1996

The Commissioner, Trade Tax

APPELLANT

Vs

Jamuna Prakash Jaiswal

RESPONDENT

Date of Decision : 30-08-2005

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 11, 3A, 3AAA, 3D, 3F

Citation : (2008) 13 VST 403

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : Kunwar Saksena and S.C, for the Appellant;

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—Present revision u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") is directed against the order of Tribunal dated 30th May, 1996 relating to the assessment year 1987-88.

2. On the basis of the information that the assessee opposite party (hereinafter referred to as "the assessee") has received certain amount from M/S IFFCO, Phulpur, Allahabad and M/S BPCL, Naini, Allahabad towards hire charges, assessment proceedings have been initiated. During the course of the assessment proceeding, the assessee filed the copies of the agreement and explained that in pursuance of the agreement only buses were provided to M/S IFFCO, Phulpur, Allahabad and M/S BPCL, Naini, Allahabad for the transportation of their employees from their residence to the factory and from factory to the residence and for which charges were stipulated. It was submitted that the possession of the vehicle was always with him and the entire expenses, namely, diesel charges, salary of driver/conductor, road tax, passenger tax etc have been borne by it and at no stage the right has been transferred to the aforesaid two companies to use the buses and thus, the assessee was not liable to tax u/s 3-F of the Act. The assessing authority has not accepted the plea of the assessee and levied the tax on the amount received from the aforesaid two companies u/s 3-F

of the Act. Aggrieved by the assessment order, the assessee filed appeal before the Assistant Commissioner (Judicial). Trade Tax which was dismissed. The assessee filed appeal before the Tribunal that has been allowed by the impugned order.

3. Heard learned Standing Counsel and Sri Kunwar Saksena, learned counsel appearing on behalf of the assessee

4. Learned Standing Counsel submitted that the order of the Tribunal is erroneous. He submitted that as per the agreement, the assessee had to provide the vehicles to the aforesaid two companies and whatever charges have been received were the hiring charges liable to tax u/s 3-F of the Act. He submitted that since under the agreement, the assessee had to transport the employees of the companies at the material time, the said vehicles were for the use of the companies only and, therefore, the provisions of Section 3-F of the Act is applicable.

5. Learned counsel for the assessee filed copies of the agreement with the aforesaid two companies that are on record. He submitted that as per the agreement, the assessee has only provided the vehicles to the aforesaid two Companies for transportation of their employees from their residence to the factory and from factory to their residence at a stipulated amount. He submitted that at no stage, there was transfer of right to use the buses to the aforesaid two companies. He submitted that the entire expenses relating to the running of the buses, namely, diesel charges, salary of driver/conductors, road tax, passenger tax etc have been borne by the assessee and the possession and control of the buses were always with the assessee. He submitted that the entire transit risk was of the assessee and not of the companies; On these facts, he submitted that the effective control of the vehicle has never been with the aforesaid two companies and, therefore, the provisions of Section 3-F of the Act does not apply. Section 3-F of the Act reads as follows.

"Section 3-F. Rate of tax on the right to use any goods or goods involved in the execution of a works contract.

Notwithstanding anything contained in Section 3-A, or Section 3-AAA or Section 3-D, the turnover relating to the business of transfer of the right to use any goods for any purpose or of transfer of the property in goods involved in the execution of a works contract shall be determined in the manner prescribed and shall be liable to tax at such rate not exceeding fifteen percent, as the State Government may, by notification, declare, and different rates may be declared for different goods or different classes of dealers."

6. The bare perusal of Section 3-F of the Act shows that the provision of Section 3-F is applicable only in cases where there is transfer of right to use the goods.

7. Similar question came up for consideration in Kando Transport and Ors. v. S.T.O. Assessment Unit, Barbil and Ors. Orissa. In this case also the pe(1992) 43

STL 67itioner entered into a contract with M/s Minerals & Metals Trading Corporation of India Ltd. For transportation work including loading, unloading and stacking. The contention of the transporter was that there was no transaction of sale and that the contract was for purely labour and service, The department, however, contended that "hire charges" received by the transporter come within the definition of "sale price" Considering the enlarged definition of "sale" in view of the Constitutional amendment, the Orissa High Court held as follows

"In order to decide whether a transaction Is of sale", the determinative factor is whether transfer of right of user is involved. By way of illustration we may indicate that if "A" allows his vehicle to be used by "B" for a consideration, and the vehicle is placed at the control, custody and possession of "B" it may be a case of transfer of the right to use the vehicle for any purpose. Where, however, the control, custody, and possession over the vehicle remains with "A", notwithstanding the fact that certain amount were received as hire charges, no transfer of the right to use is involved."

8. In Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, the petitioner which owned the Visakhapatnam Steel Project, for the purpose of the steel project, allotted different parts of the project work to contractors. To facilitate the execution of work by the contractors with the use of sophisticated machinery, the petitioner had undertaken to supply the machinery to the contractors for the purpose of being used in the execution of the contracted Works of the petitioner and received charges for the same. The respondents made a provisional assessment in view of the enlarged definition of "sale". Then the Andhra Pradesh High Court held that under the agreement, the effective control of the machinery, even while the machinery was in the use of the contractor, was that of petitioner company. The contractor was not free to make use of the same for other works or move it out during the period the machinery was in his use. Therefore, the contractor was entitled to make use of the machinery for purpose of execution of the works of the petitioner and there was no transfer of the right to use it as such in favour of the contractor. This is how the court held that the hire charges collected by the petitioner from the contractors were not exigible to sales tax. To come to this conclusion, the Andhra Pradesh High Court relied on Corpus Juris Secundum, Vol. 87 page 892 which emphasised that the essence of transfer is passage of control over the economic benefits of property which results in terminating rights and over relations in one entity and creating them in another. While construing the word "transfer" due regard must be had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody.

9. Against the aforesaid decision of the Andhra Pradesh High, Court, the State of

Andhra Pradesh filed SLP before the Apex Court in the case of State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., Apex Court had affirmed the order of the Andhra Pradesh High Court and held as follows:

"The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractor did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and in particular, looking to clauses 1,5,7,13 and 14, it becomes clear that the transaction did not involve transfer of right to use the machinery in favour of contractors. The High Court was right in arriving at such a conclusion. In the impugned order, it is stated and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent-company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use; the condition that the contractor would be responsible for the custody of the machinery while it was on the site, did not militate against respondent's possession and control of the machinery."

10. A similar question came up for consideration before the Division Bench of this Court in the case of Ahuja Goods Agency and Anr. v. State of U.P. and Ors. , reported in 1997 NTN (Vol. 11), 484. Petitioner received transportation charges from a distillery in connection with the transportation of Indian made Foreign liquor from the distillery to various Government bonded warehouses. Question for consideration was whether the transportation charges was liable to tax u/s 3-F of the Act. The contention of the petitioner was that the transportation charges were paid for service Under the agreement and there was no transfer of right to use the vehicle. The Division Bench examined the agreement and held that the truck to be used for carrying the goods will continue to remain in the custody of the drivers employed by the owners of the trucks. The distillery could have used the vehicle only for the purpose specified goods and not for any other purposes. The transit risk was of the petitioner and not of the distillery It was the duty of the transporter to abide by all the laws relating to the motor vehicle and the excise, From these factors, it is manifest that there was no transfer of possession even of the vehicle, which were being used for carrying the goods. On these facts Division Bench held that in the absence of transfer of possession of vehicle there was no transfer of right to use the goods and the provisions of Section 3-F of the Act shall not be applicable.

11. In view of the ratio laid down by the aforesaid decisions of the High Court and the Apex Court, it is clear that for the transfer of right to use the goods and

to invoke the provision of Section 3-F of the Act, it is necessary that there should be transfer of effective control of the goods in favour of the party. It is relevant to refer some of the clauses of the agreement, which has also been referred in the order of the Tribunal to adjudicate the issue whether in the present case, there was any transfer of effective control of the buses by the assessee to the aforesaid two companies. The relevant extract of letter of M/S IFFCO, Phulpur, Allahabad is as follows:

"You will place at the disposal of IFFCO one 50/52 seater bus model 1987. This will be used for transportation of man and material of IFFCO and will be run as per directives of representatives of IFFCO. Generally the vehicle will run between Phulpur and Allahabad but some times it may be required to go outside Allahabad also. In such cases, you will arrange route permit for that destination. IFFCO will reimburse the charge for route permit when presents with monthly bill.

You will ensure availability of driver, in good condition spare tyres, tools and other necessary items and ensure that the vehicle is available for use every time.

The vehicle can be parked with prior approval for periodical check up, servicing and maintenance etc. for a maximum of one day in a month subject to the substitute vehicle of similar standard/capacity being made available by you during this period. In case you fail to provide substitute vehicle IFFCO will impose penalty @ Rs. 500/250 per day on you for the absent period. In case it is found that engaged vehicle is used outside, the penalty may extend upto Rs. 1000/- for Bus and Rs. 500/- for standard/Car/Jeep per day.

Payment shall be made on the following rates:-

- (a) Lump-sum rate for first 2500 Kms. In any month Rs. 15,000/-
- (b) Rate for distance beyond 2500 Kms. In a month Rs...
- (c) Rate per Km. Rs. 2.90 per Km.
- (d) Over time charges for driver after normal duty of 12 hours if officially detained inside or outside the factory premises Rs... per hour.
- (e) Night halt charges while on official duty Rs... Per night.

In the event of upward revision in the price of Diesel/Petrol Oil by Government compensation on the base consumption of one 4/10 Kms. Will be payable w. e. f. 1.7.1987.

The entire running and maintenance cost including the cost of diesel/petrol payment of salary and overtime allowance to driver, insurance, taxes, permits etc. will be borne by you.

Payment will be made only for distance from starting point of bus to Plant site and back to termination point. No payment will be made for the distance from or upto garage.

IFFCO reserves the right to terminate the contract without assigning any reason whatsoever. In the event of such termination. You will not be entitled for any compensation from IFFCO.

If any gross short comings/defects/negligence is found in the proper running of hired vehicle or its substitute.

IFFCO will deduct a fixed amount from your running bills as a penalty. The amount to be fixed will be at the sole discretion IFFCO and cannot be guaranteed."

12. The relevant extract of letter of BPCL, Naini, Allahabad is as follows:

"That the transporter will run three buses 50/52 seater as per details given below in good running condition for transporting the employees of Bharat Pumps & Compressors Ltd. From various routes as indicated below to Bharat Pumps & Compressors Ltd. and back. That in case of the above vehicle being out of order, the transporter shall provide an alternative/substitute vehicle after due approval of such vehicle by the Company for such period as the Company thinks reasonable, (i) UGV 153 A and B shifts (ii) UGV 181 one shift (iii) UGH 565 A and B shifts.

That the buses will be operated in different shifts as mentioned above as per the timings fixed from time to time from various routes to Bharat Pumps & Compressors Ltd. Naini, and back.

That the buses will pick-up/drop company's employees from different pick-up points and routes to be mutually agreed upon between the parties referred above and fixed from time to time.

That the buses must be duly insured under Motor Vehicle Act to cover the passengers travelling.

That in consideration of the above services to be rendered by the transporter, M/ S Bharat Pumps & Compressors Ltd., shall pay a sum of Rs. 34768.00 (Rupees Thirty four thousand seven hundred sixty eight) only per month, as under payable monthly after rendering actual services. (I) UGV 153 Rs. 12940/- per month (ii) UGH 565 Rs. 12940/- per month (iii) UGV 181 Rs. 8888/- per month. In case of any rise in the rates of fuel by any Govt. notification, below 20 n.p. will not be entertained and above 20 n.p. the extra cost will be paid to the contractor based on actual consumption of fuel per month.

That in case for any reason, whatsoever, the transporter fails to provide the said buses and/or is unable to transport the employees of Bharat Pumps & Compressors Ltd. on any day/trip, as the case may be, in addition to proportions to recovery of hire charges, he shall have to pay by way of liquidated damage a sum equal to double the hire charges for that day/trip.

That the responsibility of keeping the vehicles in good running condition as also to bear the cost of fuel etc., including the salary and wages of the staff employed

by the transporter and Bharat Pumps & Compressors Ltd., will in no way be responsible to pay any part of such expenditure as mentioned hereinbefore.

That the transporter shall obtain the route permit etc. for running these buses and M/S Bharat Pumps & Compressors Ltd., shall in no way be responsible for obtaining such permit etc. payment of taxes such as passenger tax, surcharge, Insurance charges, to concerned authorities will be the liability of the contractor and Bharat Pumps & Compressors Ltd. will in no way be responsible to pay any part of such taxes. The contractor will have to produce the above documents, as and when required by the authorised officer of Bharat Pumps & Compressors Ltd.

That the transporter will arrange at his own cost for the parking and garaging of the buses at Allahabad, or any other place the transporter may like to garage and keep the bus. But on the outward journey to the factory site of Bharat Pumps & Compressors Ltd., the bus will be allowed to be parked in the open ground for the period it is necessary to park and some for fulfilment of this contract.

That Bharat Pumps & Compressors Ltd. shall not be liable for wear and tear, maintenance or loss or damage to the bus while in use or while garaged or parked."

13. Perusal of the aforesaid terms of the contracts shows that the effective control of the buses have never been transferred to the aforesaid two companies and it always remain with the assessee. The assessee only provided the buses for transportation of employees of the companies from one place to another place and the price was stipulated only for the purposes of transportation and not for the leasing of the entire bus as such for a definite period. The entire expenses for running of the buses, namely, diesel charges, salary of driver/conductor, road tax, passenger tax etc are to be borne by the assessee. In this view of the matter, I am of the opinion that there was no transfer of right to use the vehicles by the assessee to the aforesaid two companies and the provision of Section 3-F of the Act is not applicable. The order of the Tribunal is upheld.

14. In the result, revision fails and is, accordingly, dismissed.