(2006) 03 AHC CK 0235

In the Allahabad High Court

Case No : Trade Tax Revision No''s. 581 and 582 of 1999

The Commissioner, Trade Tax — APPELLANT

Vs

Sunder Singh Aneja — RESPONDENT

Date of Decision : 22-03-2006

Acts Referred:
Constitution of India, 1950 — Article 366, 366(29A)
Uttar Pradesh Trade Tax Act, 1948 — Section 11, 3F

Citation : (2006) 03 AHC CK 0235

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : S.C, for the Appellant;

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—These two revisions u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") are directed against the order of Tribunal dated 27.01.1999 for the assessment year 1987-88. Since common questions are involved in both the revisions, same are being disposed of by common order.

2. Both the dealer/opposite party (hereinafter referred to as "Dealer") entered into contract with U.P.S.R.T.C. for plying the bus on the route prescribed by U.P.S.R.T.C. on the following terms and conditions:

^^2& cl ekfyd Jh lqUnj flag vustk }kjk vuqcU/k ij nh x;h cl es Lo;a dh vksj ls pkyd fu;qDr djsxk rFkk bl cl pkyd ds iwjs [kpsZ tSls osru vkfn cl ekfyd }kjk gh ns; gksxsa A blds vfrfjDr cl lapkyu esa gksus okys lEiw.kZ [kpZ tSls Mhty] rsy] ejEer] VwVQwV] chek rFkk ;kf=;ksa dh lqj{kk lEcU/kh nkf;Ro vkfn cl ekfyd }kjk gh ogu fd;s tk;sxsa A

3 cl dk O;kid dEizgsgsafUlo chek ftlesa r`rh; i{kh; chek Hkh ''kkfey gks] cl ekfyd }kjk gh djokuk gksxk A

4 jksM VSDl cl ekfyd }kjk gh ns; gksxk A

9 f}rh; i{k dh ;g ftEesnkjh gksxh fd og cl dks iw.kZr;k pkyw gkyr esa j[ks A cl dh lQkbZ rFkk ;k=h vf/kfu;e ds vUrxZr cuk;s x;s fu;eksa ds v/khu fu/kkZfjr Js.kh dh lhVksa dks lqUnj vkSj lkQ gkyr esa j[ksxk rFkk cl esa Vwy ckDl] QLVZ ,Ma ckDl] f=iky] LVsiuh o ehVj xkM+h vf/kfu;e rFkk mlds vUrxZr cuk;s x;s fu;eksa ds vUrxZr lHkh izdkj ds midj.kksa ds fy;s cl ekfyd gh mRrjnk;h gksxk ;k vU; ,sls lHkh dk;Z ij tks cl dks lgh gkyr esa j[kus ds fy;s vko";d gksa] lEiw.kZ [kpZ cl ekfyd dks ogu djus gksxsa A

10 & bl vuqcU/k ds vuqlkj f}rh; i{k ftl fnu ls cl dh fuxe }kjk fu/kkZfjr ekxZ ij lapkyu djus ds fy;s miyc/k djsxk ml fnu ls ekg esa flQZ 4 fnu ds fy;s lkef;d ejEer o vU; vko";d VwVQwV dks Bhd djus ds fy;s lEcfU/kr fMiks izHkkjh dh jk; ls ekxZ ls gVk ldsxk A ekxZ ls ,d ckj gVkus ij og cl dk 24 ?kUVs ls vf/kd u j[k ldsxk A nwljs "kCnksa esa ejEer vkfn ds fy;s cl gVk;s tkus ds ckn 24 ?kUVs ds vUnj okil ekxZ ij lapkyu gsrq miyC/k djkuk gksxk A

12 & ftu fnuksa esa cl lapkyu ls gVk;h tk;sxh mu fnuksa dk fdjk;k fuxe }kjk ns ugh gksxA

23 &;fn cl eghus esa dqy 4 fnu rFkk ,d ckj esa ,d fnu ls vf/kd le; ds fy;s gVk;h x;h rks fuxe dks ;g vf/kdkj gksxk fd og ml cl ds LFkku ij fdlh vU; cl dks lapkyu ds fy;s izkjEHk djsa A ,slh gkyr esa cl ekfyd dks izfrfnu :0&200-00 dk gtkZuk fuxe dks ns; gksxk A

16 ?v? cl ds nq/kZVuk xzLr gksus ij uqdlku@gtkZuk o ;k=h lqj{kk lEcU/;h nkf;Ro ds fy;s f}rh; i{k iwjh rjg ftEesnkj gksxk A 18& cl ekfyd okgu lEcU/kh dkxtkr dh deh o pkyd lEcU/kh leLr nks"kksa ds dkj.k lHkh izdkj ds eqdneksa ds fy;s Lo;a ftEesnkj gksxk ifjpkyd ds nks"kh vFkok ;kf=;ksa ds ys tkus ds vijk/k ds fy;s cl ekfyd ftEesnkj ugha gksxk A

21& f}rh; i{k dh cl fuxe }kjk vkoafVr ekxZ ij rFkk f"kMw;wy ij gh py ldsxh A blds vfrfjDr bldk iz;ksx cl ekfyd ejEer vkfn ds vfrfjDr dgha ugha dj ldsxk A ;fn f}rh; i{k }kjk vuqcfU/kr cl dk mi;ksx fuxe dk;Z ds vfrfjDr fd;k x;k rks fuxe dks vf/kdkj gksxk fd og fcuk lwpuk fn;s vuqcU/k dks fujLr dj ns rFkk f}rh; i{k dks CySd fyLV ?kksf"kr dj nsa A

25& ;fn vuqcfU/kr cl ekxZ esa czsd Mkmu gks tkrh gS rks f}rh; i{k dks ml fnu dk fdjk;s dk Hkqxrku ugha fd;k tk;sxk A

3. On the aforesaid terms and conditions, assessing authority held that the dealer had transferred the right to use the vehicles to U.P.S.R.T.C. and accordingly, on the hire charges, tax had been levied u/s 3-F of the Act. Order of the assessing authority has been upheld in first appeals. Dealer filed second appeals before the Tribunal. Tribunal by the impugned order held that on the terms and conditions of the agreements, there was no transfer of right to use the vehicles. Tribunal was of the view that the possession and effective control of the vehicles remained with the opposite parties and have never been transferred to U.P.S.R.T.C.

4. Heard learned Counsel for the parties.

5. I do not find any error in the order of Tribunal.

6. In Writ Petition (Civil) No. 183 of 2003, Bharat Sanchar Nigam Ltd. and Anr. v. Union of India and Ors., decided on 02.03.2006, the Larger Bench of Apex Court considered the scope of transfer of right to use the goods. Hon''ble Justice Ruina Pal, J. in her judgment has considered the decision of the Apex Court in the case of State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, , the observations of the Constitution Bench of the Apex Court in the case of 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, and other decisions of the Apex court and held as follows:

In the State of U.P. v. Union of India (supra) it was also held: "Handing over of possession is not sine qua non of completing the transfer of the right to use any goods, as was held by a Constitution Bench of this Court in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, . Once DoT connects the telephone line of the assigned number of the subscriber to the area exchange, access to other telephones is established. There cannot be denial of the fact that giving such an access would complete the transfer of the right to use the goods.

With respect, the decision in 20th Century Finance Corporation Limited v. State of Maharashtra, cannot be cited as authority for the proposition that delivery of possession of the goods is not a necessary concomitant for completing a transaction of sale for the purposes of Article 366(29A)(d) of the Constitution. In that decision the Court had to determine where the taxable event for the purposes of sales tax took place in the context of Sub-clause (d) of Article 366(29A). Some States had levied tax on the transfer of the right to use goods on the location of goods at the time of their use irrespective of the place where the agreement for such transfer of right to use such goods was made. Other States levied tax upon delivery of the goods in the State pursuant to agreements of transfer while some other States levied tax on deemed sales on the premise that the agreement for transfer of the right to use had been executed within that State (vide paragraph 2 of the judgment as reported). This Court upheld the third view namely merely that the transfer of the right to use took place where the agreements were executed. In these circumstances the Court said that:

No authority of this Court has been shown on behalf of respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for lew of tax on the transfer of right to use any goods. We are, therefore, of the view that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written contract, is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed.

(emphasis ours)

In determining the situs of the transfer of the right to use the goods, the Court did not say that delivery of the goods was inessential for the purposes of completing the transfer of the right to use. The emphasized portions in the quoted passage evidences that the goods must be available when the transfer of the right to use the goods take place. The Court also recognized that for oral contracts the situs of the transfer may be where the goods are delivered (see para 26 of the judgment).

In our opinion, the essence of the right under Article 366(29A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise.

In State of Andhra Pradesh and Anr. v. Rastriya Ispat Nigam Ltd. (2003) 3 SCC 214, it was claimed by the Sales Tax Authorities that the transaction by which the owner of certain machinery had made them available to the contractors was a sale. The Court rejected the submission saying that:

the transaction did not involve transfer of right to use the machinery in favour of contractors. 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. (para 4 page 315)

But in the case of Aggarwal Brothers Vs. State of Haryana and Another, when the assessee had hired shuttering to favour of contractors to use it in the course of construction of buildings it was found that possession of the shuttering materials was their use and therefore, there was a deemed sale within the meaning of Sub-clause (d) of Clause 29-A of Article 366. What is noteworthy is that in both the cases there were goods in existence which were delivered to the contractors for their use. In one case there was no intention to transfer the right to use while in the other there was.

But if there are no deliverable goods in existence as in this case, there is no transfer of user at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. Of course the toll payer will use the road or bridge in one sense. But the distinction with a sale of goods is that the user would be of the thing or goods delivered. The delivery may not be simultaneous with the transfer of the right to use. But the goods must be in existence and deliverable when the right is sought to be transferred.

Therefore whether goods are incorporeal or corporeal, tangible or intangible, they must be deliverable. To the extent that the decision in State of U.P. v. Union of India held otherwise, it was, in our humble opinion erroneous.

7. In the same case Hon''ble Dr. A.R. Lakshamanan, J. held as follows:

To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

a. There must be goods available for delivery;

b. There must be a consensus ad idem as to the identity of the goods;

c. The transferee should have a legal right to use the goods consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;

d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and

not merely a licence to use the goods;

e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

8. Apex Court in the case of Bharat Sanchar Nigam Limited (Supra) referred hereinabove has categorically laid down that the goods must be in deliverable stage and at some stage it is delivered and the period during which transferee has such legal right there has to be exclusion of such right to the transferor. In the present case on the terms and conditions of the agreement, Tribunal held that the possession and effective control of the vehicle remained with the dealer and have never been transferred to U.P.S.R.T.C. Finding of the Tribunal is finding of fact, based on the material on record. I do not find any error in the order of Tribunal.

9. In the result both the revisions fail and are accordingly, dismissed.