(2009) 07 AHC CK 0354

In the Allahabad High Court

Case No : Trade Tax Revision No. 623 of 2004

The Commissioner, Trade Tax, U.P. — APPELLANT

Vs

S/s. Ashok Kumar Gupta — RESPONDENT

Date of Decision : 23-07-2009

Acts Referred:

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

Citation : (2009) 07 AHC CK 0354

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : K.M. Sahai, for the Appellant; S.K. Pandey, for the Respondent

Judgement

Rajes Kumar, J.—These nineteen revisions u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") are directed against the orders of Tribunal on various dates involving common question of law. Brief facts of the case are that the opposite parties are the owners of the buses and entered into contract with the Uttar Pradesh State Road Transport Corporation (hereinafter referred to as ("UPSRTC") for providing the buses. The Assessing Authority had levied the tax on the amount received by the opposite parties from UPSRTC u/s 3-F of the Act treating the transactions under the transfer of right to use the buses. The contention of the opposite parties were that providing of buses under the contract did not amount to transfer of right to use. This contention had not been accepted by the Assessing Authority and on the basis of the agreement particularly, clause 1 of the agreement, had held that the possession of the vehicles had been given to UPSRTC and, therefore, the opposite party had transferred their rights to use the vehicles to UPSRTC and, therefore, the amount received in respect thereof is liable to tax u/s 3-F of the Act.

2. Being aggrieved by the order of the Assessing Authority, opposite parties filed appeals before the Deputy Commissioner (Appeals), which have been allowed. Deputy Commissioner (Appeals) held that as per the clause of the agreement, the ownership of the vehicles remained with the opposite parties and, therefore,

the amount received were not liable to tax u/s 3-F of the Act. The view of the Deputy Commissioner (Appeals) has been upheld by the Tribunal.

3. Heard Sri K.M. Sahai, learned Standing Counsel and Sri S.K. Pandey, learned Counsel appearing on behalf of the opposite parties.

4. Sri S.K. Pandey, learned Counsel appearing on behalf of the opposite parties has provided a copy of the agreement, which is placed in Trade Tax Revision No. 623 of 2004, which is the leading case. He submitted that the terms and conditions of the agreement in all the cases are common. It would be appropriate to refer the entire agreement, which read as follows:

5. Clause 1 of the agreement clearly says that during the contracted period the buses shall be in possession of the first party, namely, UPSRTC and the possession and effective control shall be with the first party. Clause 4.4 of the agreement says that the right to issue the tickets and to receive the rent will be with the first party. The conductors shall be appointed by UPSRTC and buses shall be operated on the directions of the conductors. The drivers and the conductors all shall be abide with the directions of the first party. The period of contract shall be for three years unless renewed further. Clause 14.2 says that in case if the second party wants to transfer the ownership to another person, he has to take prior permission from the first party. Clause 14.3 says that in case if without giving any prior notice, the ownership is transferred by the second party, the agreement shall stand cancelled and for the rest of the period, second party is liable for damages @ Rs. 500/- per day. In respect of the attached buses, the permit shall be issued in the name of UPSRTC and for which necessary fee etc shall be payable by UPSRTC. In the agreement it is also stipulated that the drivers would be of second party and all the expenses relating to the diesel, repairing etc shall be borne by the second party. In view of the above clauses referred hereinabove it is apparent that the parties have agreed that the possession shall be with the UPSRTC for the contracted period, which was stipulated for three years unless it is further renewed. Therefore, in my view, it is clear case of transfer of right to use the buses by the bus owners to UPSRTC through which the UPSRTC have effective control over the buses.

6. Let us examine the law laid down by the Constitution Bench of the Apex Court in the case of BSNL and Others us. Union of India, reported in JT 2003 (1) 574. In the aforesaid, the Apex Court has held as follows:

In our opinion, the essence of the right under Article 366 (29-A)(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.

7. In the case of State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., 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).

8. But if there are no deliverable goods in existence as in this case, there is no transfer of use at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a 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.

9. In the case of Aggarwal Brothers Vs. State of Haryana and Another, wherein 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 were transferred by the assessee to the customers for their use and, therefore, Apex Court held that there was a deemed sale within the meaning of sub-clause (d) of Clause 29-A of Article 366.

10. In the same case Hon''ble Dr. A.R. Lakshmanan, 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 there for 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 "transferor 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.

11. In view of the decision of Constitution Bench of the Apex Court in the case of

BSNL and Others vs. Union of India (supra) it is to be examined whether the Buses were in existence and in deliverable stage and at some stage they were delivered. In the present case, the buses were in existence. They were in deliverable stage and as per the agreement they have been delivered also for use as both the parties have acted upon the agreement, which says that the possession and effective control of the buses shall remain with the UPSRTC during the contract period, which was stipulated for three years. It appears that the Tribunal has not noticed the relevant clauses of the agreement, particularly Clause 1 referred hereinabove, which clearly says that the possession and effective control during the period of contract shall remain with the UPSRTC.

12. Learned Counsel for the opposite parties relied upon the decision of this Court in the case of The Commissioner, Trade Tax Vs. Sunder Singh Aneja , which also relates to providing of Bus by the Bus owner to UPSRTC under the contract, this Court held that at no point of time the possession of the Bus was transferred for use to UPSRTC and the effective control over the Bus was always with the Bus owner and Bus was only provided for the transportation of the passengers for which the payment was made on kilometer basis.

13. I have gone through the aforesaid decision of this Court. The said decision is based on the terms and conditions of the contract between the bus owners and UPSRTC referred in the order itself. In the said agreement there was no clause that the possession and the effective control over the Bus shall be with UPSRTC. Therefore, the said decision is not applicable to the present case. In this view of the matter, the order of the Tribunal is erroneous and is liable to be set aside.

In the result, all the revisions are allowed and the orders of the Tribunal and the First Appellate Authority are set aside and the order of the Assessing Authority is restored.

