(2011) 12 RAJ CK 0036

In the Rajasthan High Court

Case No : Civil Writ Petition No. 8491 of 2011

The Indure Pvt. Ltd. APPELLANT

Vs

State of Raj. and Others RESPONDENT

Date of Decision : 07-12-2011

Acts Referred:

Constitution of India, 1950 — Article 29A, 366
Rajasthan Value Added Tax Act, 2003 — Section 20, 33, 5G, 8

Citation : (2011) 12 RAJ CK 0036

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : Pallav Shishodia, along with Mr. Dinesh Mehta, for the petitioner - assessee, for the Appellant; G.S. Bafna, Advocate General and along with Mr. Vinit Kumar Mathur, for the respondent Revenue, for the Respondent

Final Decision : Dismissed

Judgement

Hon''ble Dr. Justice Vineet Kothari

1. The Indure Private Limited, New Delhi has filed the present two writ petitions being aggrieved by the impugned notice dated 12.5.2011 for rectification u/s 33 of the Rajasthan VAT Act, 2003 for the period 1.4.2008 to 31.3.2009 by which the respondent Assessing Authority, namely; Assistant Commissioner, Special Circle, Sriganganagar sought to rectify the exemption certificate to charge higher exemption fees of 2.25% of the total value of the contract awarded by the Rajasthan Rajya Vidhyut Utpadan Nigam Ltd. (`RRVUNL'' or `Vidhyut Nigam'' in short) while taking the two divisible and separate contracts for designing, engineering, procurement and supply of equipments including mandatory spares BOP Package and also for erection, testing, commissioning and civil works of Balance of Plant (BOP) package for setting up of Thermal Power Project at Suratgarh and Chhabra in the State of Rajasthan.

2. Civil Writ Petition No. 8491/2011 is directed against the aforesaid show cause notice for rectification u/s 33 of the VAT Act, 2003 while connected writ petition

no. 9185/2011 is mainly directed against the impugned assessment order passed by the respondent Assessing Authority on 29/9/2011 for the same Assessment Year 2008-2009 (1.4.2008 to 31.3.2009) which was passed by the Assessing Authority soon after filing of the present writ petition in this Court on 26/9/2011 in which only the show cause notice issued by the Assessing Authority vide Annex.16 dated 19/9/2011 was challenged.

3. The factual matrix in nutshell taken from Civil Writ Petition No. 8491/2011 is like this. Two contracts in question awarded by the RRVUNL to the petitioner company for the Suratgarh Power Project are the contract No. 3381 dated 3/10/2006 & 3382 dated 3/10/2006. Contract No. 3381 is for, "Design, Engineering, Procurement & Supply of equipments including mandatory spares of BOP Package on EPC basis for 1x250 MW Suratgarh Super Thermal Power Station, Suratgarh (Raj) as per the specification issued against TNS-1 including all amendments/clarifications.". The second contract, namely; contract no. 3382 of the same dated 3/10/2006 for the same Suratgarh Power Project is for, "Erection, Testing, Commissioning including civil works of Balance of Plant (BOP) Package on EPC basis for 1x250 MW Suratgarh Thermal Power Project, Suratgarh (Raj) as per the specification issued against TNS-1 including all amendments/ clarifications."

4. Similarly, the contract for Chhabra Power Project vide contract no.56 dated 7/1/2009 akin to contract no. 3381 for Suratgarh Thermal Power Project is for, "Design, Engineering, Procurement & Supply of equipments including mandatory spares of BOP Package on EPC basis for 2x250 MW Chhabra Super Thermal Power Project, Stage I, Phase-II as per the specification issued against TNCH-3 including all amendments/clarifications." and separate contract no. 57 dated 7/1/2009 for Chhabra Power Project is for, "Erection, Testing & Commissioning and Civil Works of BOP Package on EPC basis for 2x250 MW Chhabra Thermal Power Project, Stage-I, Phase-II as per the specification issued against NIT-TNCH-3 including all amendments/clarifications." The total contract value with schedule of material and prices, shorn of other details as given in the said contracts produced before this Court are as under:-

Contract No. 3381: Suratgarh

SCHEDULE OF MATERIAL & PRICES:-

S. No.

Details

Amount in Indian Rs.

1

Total F.O.R. Price of supply of entire scope of BOP including Mechanical, Electrical and Control& instrumentation packages includingmaintenance tools, Freight & Insurance, all taxesduties, as applicable on date.

183.5 crores

2

Total F.O.R. Price of supply of mandatory spares required for entire BOP including Mechanical, Electrical, and control of instrumentation packages including Freight & Insurance, all taxes and duties as applicable on date.

2.50 crores

3

Total F.O.R. Price for entire BOP package including supply of mandatory spares & maintenance tools, Freight & Insurance, all taxes, 3 duties as applicable on date (1.0+2.0)

186 crores

Total Amount in words: Rupees One hundred Eighty Six Crores only/-

Contract No. 3382 : Suratgarh

SCHEDULE OF MATERIAL & PRICES:-

S.No.

Details

Amount in Indian Rs.

1

Total F.O.R. Price of supply items of Civil & Structural work of entire BOP including all taxes & duties as applicable on date

80 crores

2

Total F.O.R. Price of Erection, Testing & Commissioning of entire scope of BOP including unloading, storage at site, handling from the storage area to erection site and performance testing for the equipment and test before taken over including all taxes and duties.

20 crores

3

Civil structural & architectural works for entire BOP package along with all necessary investigation including all taxes and duties as applicable on date.

85 crores

4

Total price for Civil & ETC work for entire BOP package including all taxes and duties as applicable on date (1.0+2.0)

185 crores

Total Amount in words: Rupees One hundred & Eighty Five Crores only/-

Contract No. 56: Chhabra

SCHEDULE OF MATERIAL & PRICES:-

S.No.

Details

Amount in Indian Rs.

1

Total F.O.R. Price of supply of entire scope of BOP including Mechanical, Electrical and Control & instrumentation package including maintenance tools, Freight & Insurance

412,40,31,100.00

2

Total F.O.R. Price of supply of mandatory spares required for entire BOP including Mechanical, Electrical, and control & instrumentation package eincluding Freight & Insurance

37,00,000.00 33,50,00,000.00 5,09,00,000,00

3

Taxes & duties. The various Taxes & duties as applicable on date shall be payable extra limited to amount given below:

a) Custom Duty

b) Excise duty

c) CST against ?C? form (EI Sales)/VAT

4

Total F.O.R. Price for entire BOP package including supply, mandatory spares, maintenance tools, freight & insurance, all taxes & duties as applicable on date of opening of technical bids (S.No.1.0 + 2.0+3.0)

451,36,31,100.00

Total in words: Rupees Four Hundred Fifty One Crore Thirty Six Lac Thirty One Thousand One Hundred only/-

Contract No. 57: Chhabra

SCHEDULE OF MATERIAL & PRICES:-

S.No.

Details

Amount in Indian Rs.

1

Total F.O.R. Price of supply items of Civil & Structural work of entire BOP

275,00,00,000.00

2

Total Price of Erection, Testing & Commissioning of entire scope of BOP including unloading, storage at site, handling from the storage area to erection site and performance testing for the equipment and test before taken over

30,46,12,000.00

3

Civil structural & architectural works for entire BOP package along with all necessary investigation

142,75,36,000.00

4

Taxes & duties. The various Taxes & duties as applicable on date shall be payable extra limited to amount given below:-

a) Excise duty

b) CST against ?C? form (EI sale)

c) Service Taxes

d) WCT/VAT

13,50,00,000.00 93,60,531.00 11,50,00,000.00 4,50,00,000.00

5

Total price for Civil & ETC work for entire BOP package including all taxes and duties as applicable on date (1.0+2.0+3.0+4.0)

478,65,08,531.00

Total in words: Rupees Four Hundred Seventy Eight Crore Sixty Five Lac Eight Thousand Five Hundred Thirty One only/-

5. Under the Notification No. F.12(63)FD/Tax/2005-80 dated 11/8/2006, the State Government under Rajasthan VAT Act, 2003 provided for exemption from

payment of tax by the registered dealers engaged in execution of works contract subject to condition of payment of exemption fees on the gross total value of such works contract and to the extent relevant for present controversy, the said Notification dated 11/8/2006 is reproduced hereunder for ready reference:-

No. F.12(63)FD/Tax/2005-80 Jaipur dated 11/8/2006

In exercise of powers conferred by sub-section (3) of section 8 of the Rajasthan Value Added Tax Act, 2003 (Act No. 4 of 2003), the State Government being of the opinion that it is expedient in the public interest so to do, hereby exempts from payment of tax the registered dealers engaged in execution of works contracts leviable on the transfer of property in good (whether as goods or in some other form) involved in the execution of works contract(s) subject to following conditions, namely:-

(1)...

(2)...

LIST

Item No.

Description of Work Contract

Rate of Exemption Fee % of the total value of the contract

1

2

3

1

Works contracts relating to dyeing, printing, processing and similar activities

0.25%

2

Works contracts relating to building, roads, bridges, dams, canals, sewerage system

1.50%

3

Works contracts relating to installation of plants and machinery including PSPO, water treatment

2.25%

4.

plant, laying of pipe line with material Any other kind of works contract not covered by item nos. 1, 2 and 3.

3.00%

This Notification shall be deemed to have come force w.e.f. April 1,

6. The petitioner company applied for exemption under the aforesaid Notification dated 11/8/2006 only for the second contract, namely; 3382 for Suratgarh Power Project and contract No. 57 for the Chhabra Power Project for Erection, Testing & Commissioning and Civil Works of BOP Package on EPC basis and on payment of exemption fees @ 1.50% of the total value of the contract, the exemption certificates in prescribed form WT-3 were issued to the petitioner company by the respondent Assessing Authority vide Annex.6 dated 13/11/2007 for Suratgarh Power Project and for Chhabra Project vide Annex.7 dated 20/2/2009.

7. By another Notification Annex.8 dated 5/7/2010 amending the earlier Notification dated 11/8/2006, a proviso was added to the effect that in case of a turnkey works contract awarded by the Government Department, if the Assessing Authority, on being satisfied that transaction of sale took place in the course of inter State trade and commerce, then he may pass an order directing the awarder of the contract not to deduct the amount in lieu of tax from the payment to be made to the contractor in this behalf and such order for not deducting the tax/exemption fee from the payment would be provisional in nature subject to final assessment under the provisions of VAT Act, 2003. The relevant proviso is also quoted below for ready reference:-

Provided also that in case of a turnkey works contract awarded by a Department of any Government, a corporation, a public undertaking, a cooperative society, a local body, a statutory body, an autonomous body, a trust, a private limited company or public limited company, having a separate contract for supply of goods, and in pursuance of such contract, the contractor claims that the sale of goods has occasioned in the course of inter State trade and commerce by the contractor to the awarder from outside the State, the Assessing Authority or an officer authorized by the Commissioner in this behalf on an application submitted by the said contractor, shall within ten days of receipt of such application, on being satisfied that the transaction of sale took place in the course of inter State trade and commerce, pass an order directing the awarder not to deduct the amount in lieu of tax from the payment to be made in this behalf. The order so issued shall be provisional in nature and applicable only for deduction of amount in lieu of tax under sub-section(2) of section 20 of the Value Added Tax Act, 2003, and shall be subject to assessment under the said Act.

8. The case of the petitioner is that in view of the said amendment vide Notification dated 5/7/2010, the Assessing Authority even directed the RRVUNL vide Annex.11 dated 27/7/2010 not to deduct the tax/exemption fee at source for contract no.3381. However, the petitioner was served with the impugned show cause notice for rectification of the aforesaid exemption fees certificate in

prescribed form VAT-14 for the aforesaid period vide Annex.16 dated 12/5/2011, purportedly after the Assessing Authority consulting the Head of the Department, namely; Commissioner, Commercial Taxes Department, Jaipur vide communication Annex.13 dated 21/2/2011. The petitioner has also alleged in the writ petition that these rectification proceedings were undertaken at the behest of higher authorities and even the Deputy Secretary of Finance Department vide communication Annex.18 dated 11/10/2010 addressed to the Commissioner, Commercial Taxes Department pointed out that on account of issuance of exemption certificate levying only 1.50% exemption fees of the total value of the contract instead of 2.25% of the gross value of both the contracts combined together, a revenue loss of Rs.22.29 crores was caused in the matter and since the two contracts in question were executed merely as a device adopted by the assessee to evade the exemption fee, which is paid in lieu of total tax liability & the bifurcation of the integrated one contract of turnkey project was deliberately made into two separate contracts by the petitioner company with RRVUNL and consequently, the exemption certificates were required to be rectified and hence impugned rectification proceedings were undertaken.

9. The petitioner assessee instead of replying to the said show cause notice, straightaway filed the aforesaid writ petition before this Court on 12/9/2011 challenging the said show cause notice for rectification. In the connected writ petition no. 9185/2011, which was filed on 26/9/2011 in this Court, the Assessing Authority on 19/9/2011 issued the show cause notice to the petitioner company to show cause as to why the assessment be not framed for the aforesaid period as the same was getting time barred, but since the petitioner again did not file any reply, the Assessing Authority passed the assessment order on 29/9/2011, challenge to which has also been laid in the writ petition by amending the same.

10. Mr. Pallav Shishodia, Senior Advocate assisted by Mr. Dinesh Mehta, appearing for the petitioner company, vehemently urged that the respondent Assessing Authority has proceeded on a wholly erroneous and confused premise to treat the two separate contracts as aforesaid as one works contract or one integrated contract and has been misled in believing that the turnkey project executed by the petitioner company for designing, engineering, procurement and supply of equipments for setting up thermal power plants at two places i.e. Suratgarh and Chhabra and also of erection, testing and commissioning including civil works of Balance of Plant (BOP) therefor as one integrated project, whereas, the contracts are not only separate and divisible contracts and, whereas, first contract, namely; contract no. 3381 for Suratgarh and contract no. 56 for Chhabra are contracts for supply/sale of equipments, whereas, both the second contracts, namely; contract no. 3382 for Suratgarh and contract no. 57 for Chhabra are the works contracts which comprise of erection, testing, commissioning of Balance of Plants including civil works therefor, besides another company BHEL (Bharat Heavy Electrical Limited) supplying the main plant in the form of turbines and, therefore, the learned Assessing Authority could not have

undertaken the rectification proceedings for amending the exemption certificates duly granted in favour of the petitioner company after realizing 1.50% of the total value of the contracts as exemption fees under the Notification dated 11/18/2006, which exemption certificates, in his submission, were issued with open eyes and full application of mind as per clause (2) of the list appended in the Notification dated 11/8/2006, quoted above.

11. Learned counsel for the petitioner, Mr. Pallav Shishodia further vehemently urged that for changing the classification of works contract from item no. 2 of the Notification to item no. 3 of the said Notification to apply higher rate of exemption fee at 2.25%, it involves debatable and mixed questions of facts and law and, therefore, the jurisdiction to rectify u/s 33 of the VAT Act, 2003, which empowers the Assessing Authority to rectify only the mistakes apparent on the face of the record, could not have been invoked in the present case and, therefore, the impugned notice deserves to be quashed by this Court in writ jurisdiction under Article 226 of the Constitution of India.

12. Learned counsel for the petitioner relied upon the following judgments in support of his submissions:-

1. Builders Association of India and Others Vs. Union of India (UOI) and Others,

2. Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others,

3. State of Andhra Pradesh Vs. Kone Elevators (India) Ltd.,

4. The Indure Ltd. and Another Vs. Commercial Tax Officer and Others,

5. Ishikawajma-Harima Heavy Industries Ltd. Vs. Director of Income Tax, Mumbai,

6. Assistant Commercial Taxes Officer Vs. Makkad Plastic Agencies,

13. On the other hand, Mr. G.S. Bafna, Advocate General and Senior Advocate assisted by Mr. V.K.Mathur, learned counsels appearing for the State - Revenue strongly opposed the maintainability of writ petitions itself. They submitted that the writ petition against mere show cause notice is not at all maintainable and the petitioner assessee was required to file reply to the said show cause notice and the power of the Assessing Authority to adjudicate the issues cannot be ruled out and whatever contentions are raised before this court can very well be raised before the Assessing Authority himself, who can decide all such questions and even if such adjudication by the Assessing Authority goes against the petitioner, the petitioner has a complete mechanism of alternative remedies provided under the Act itself way of appeals & revisions upto Tax Board and then on the question of law, a revision petition before this Court also.

14. Learned counsel for the Revenue without prejudice to their preliminary objections as to maintainability of the writ petition, also vehemently submitted that the contracts in question were deliberately divided into separate contracts of the one integrated contract of petitioner company with the RRVUNL and such

turnkey contract or integrated contract divided into two or more could not be permitted to be used as a device to evade the tax or to reduce the liability of payment of exemption fees in lieu of tax liability & such an integrated contract by no stretch of imagination could fall under clause (2) of the Notification dated 11/8/2006, which pertains to exemption fee of 1.50% of the total value of the works contract relating to building, roads, bridges, dams, canals and sewerage system. The integrated contract as per the learned counsel for the Revenue clearly and could fall only in entry no. 3, which pertains to works contract relating to installation of plant and machinery including PSPO water treatment plant, laying of pipe line with material, on which the exemption fee of 2.25% is leviable. They further submitted that it was clearly a mistake apparent on the face of the record and rectification proceedings were absolutely sustainable and correct in law and could not be validly assailed by the assessee petitioner.

15. Mr. G.S. Bafna, Advocate General further submitted that dividing the integrated contract into two or more separate contracts was not material at all and it was between the two contracting parties to divide such contract but as far as tax department is concerned, they can correctly construe the same contracts as one single integrated contract and consequently levy exemption fee of 2.25%, which in fact saves the assessee also from the hassles of levy of tax on each single transaction of sale under the VAT Act and entire assessment proceedings, therefore, the action of the Assessing Authority cannot be assailed in the present writ petitions.

16. Learned counsel for the Revenue also drew the attention of the Court towards the pleadings of the assessee himself in the writ petition, which would prima facie show that assessee himself treats both the contracts as one integrated works contract. Following extract from para 3 and 4 of the writ petition are significant and reproduced hereunder for ready reference:-

3. That Rajatshan Rajya Vidyut Utpadan Nigam Limited, Jaipur in the process of establishing coal based thermal power plant at Suratgarh and Chhabra for 1X250 MW & 2X250 MW respectively for which decided to avail services of the petitioner company for its designing, procurement, fabrication and establishment of the plants.

4. That both the projects consisted of designing, engineering, procurement and supply of equipments and spares on one part and erection, testing, commissioning including civil works on the other part. It is pertinent to submit that the Petitioner Company is an Engineering Company; having various experts in the fields of designing, procurement and supply of equipments as one arm and engineers, who are expert in the field of erection and commissioning and civil work as another arm. Similarly, Rajatshan Rajya Vidyut Utpadan Nigam Limited also has experts for different wings for purchase, procurement and civil engineers, who look after the work of construction and establishing of the plant. For the clear demarcation of the area of operation and for the purposes of administrative exigency and another for erection, testing, commissioning and

civil work relating to the Thermal Project were issued.

As such Rajatshan Rajya Vidyut Utpadan Nigam issued two separate orders each for Suratgarh and Chhabra to the Petitioner. Supply Order No. RVUN/ SE (TD-II)/ TDM-I/STPS-BOP(S)/TNS-1/D. 3381 dt 03.10.2006 (hereafter referred to as Supply Order No.3381 dated 03.10.2006) was for Design, Engineering, Procurement and Supply of Equipments including mandatory spares of BOP package of EPC basis for Suratgarh Thermal Power Station.

A copy of Supply Order No.3381 dated

03.10.2006 is submitted herewith and marked as

Annexure-1.

Work Order No. RVUN/SE (TD-II)/TDM- I/STPS-BOP(ETC)/TNS-1/D. 3382 dt 03.10.2006 (hereafter referred to as Work Order No.3381 dated 03.10.2006) for Erection, Testing & Commissioning including civil works of BOP package on EPC basis for Suratgarh Thermal Power Station.

A copy of the Work Order No.3382 dated 03.10.2006 is submitted herewith and marked as

Annexure-2.

Similarly, Supplies Order No. RVUN/Dy. CE (TD-M)/TDM-I/CTPP-II BOP/TNCH-3/ D.56 dt 07.01.2009 (hereafter referred to as Supply Order No.3381 dated 07.01.2009) was for design, engineering, procurement and supply of equipments including mandatory spares BOP package on EPC basis for 2X250 MW Chhabra Thermal Power Project, Stage-I, Phase-II as per specifications issued in the said order.

A copy of Supply Order No.56 dated 7.1.2009 is submitted herewith and marked as Annexure-3.

Another work order was issued for erection, testing, commissioning and civil work on BOP Package on EPC basis for 2X250 MW Chhabra Thermal Power Project being Work Order No. RVUN/ SE (TD-II)/TDM-I/CTPP-II BOP/TNCH-3/D. 57 dt 07.01.2009 (hereafter referred to as Work Order No.57 dated 07.01.2009).

A copy of Work Order No.57 dated 7.1.2009 is submitted herewith and marked as Annexure-4.

17. Learned counsel for the Revenue relied upon the following judgments in support of his contentions:-

(i) Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others,

(ii) Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others,

18. I have heard the learned counsels at length and given my thoughtful

consideration to the rival submissions, documents on record and the case laws cited at the bar.

19. In the considered opinion of this court, it would be rather premature for this Court to pronounce upon the validity of the show cause notice itself at this stage. While the jurisdiction of the Assessing Authority u/s 33 of the Act of 2003 to rectify the apparent mistake as such is not challenged and possibly cannot be challenged also, the mixed questions of facts and law including certain complex questions, if decided by this Court at this stage, would be like putting the cart before the horse. The Assessing Authority has the quasi judicial discretion and authority to decide all these questions, which are raised in the present writ petitions and this Court is at loss to understand how without even replying the show cause notice, the petitioner company chose to straightway invoke the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India for challenging the impugned rectification proceedings. Taking a view in favour of the Revenue is with in the discretion of the Assessing Authority and to contend otherwise is the pain of such proceedings for the assessee but it cannot mean that every such show cause notice or appealable order passed upon such show cause notice has to be adjudged as right or wrong in writ jurisdiction. Even the question about jurisdiction of the Assessing Authority like the case does not fall within the scope of Section 33 of the Act or not, is the question which has to be decided first by the Assessing Authority himself and subject to further appeal and revisional mechanism available to the assessee under the Act, it is only on the question of law arising out of the order of the Tax Board, that this Court in revisional jurisdiction can pronounce upon such question of law raised before it.

20. The questions involved in the present case are apparently complex and mixed questions of facts and law - more of facts & less of law. Whether the two contracts is a mere device or mechanism to divide one integrated works contract into two contracts, one for sale/ supply of equipments and other for erection, testing and commissioning of plant & machinery including civil works or not is a question which cannot be answered on the face of it. Whether the first contract of design, engineering, procurement and supply of equipments itself is merely a contract of supply or sale or is a works contract is an open question. Apparently, designing & engineering do not require any supply or sales. Likewise, the second contract of erection, testing and commissioning including civil works for Balance of Plant (BOP) by itself is also a works contract or not is another question to be decided on the basis of details of terms of contract, nature of supplies, nature of transactions undertaken by the assessee petitioner, so also delivery conditions, payment conditions etc. etc. Prima facie, it appears to this Court that the stand taken by the Revenue that both the contracts are one integrated contract is a plausible and possible view and it cannot be said that the Assessing Authority, labouring under the confusion or distorted view of the matter, seeks to treat the two contracts as one integrated contract. The date of both the contracts is same i.e. 3/10/2006 for Suratgarh project and 7/1/2009 for Chhabra project. Whether these two are merely two separate purchase orders under one integrated

contract or not is an open question. The supply of materials, plant and machinery are integral part and connected with the services like designing, engineering, testing, commissioning etc. of the civil works & installation of plant and machinery are included in it. Merely giving separate details in Schedules reproduced above including the liability of tax & duties cast upon the awarder of the contract does not make them separate and divisible separate contracts per se as contended by the learned counsel for the petitioner company.

21. The Hon''ble Supreme Court in State of Andhra Pradesh Vs. Kone Elevators (India) Ltd., in the unanimous opinion of 03 Judges Bench authored by Hon''ble Justice S.H. Kapadia (as Hon''ble Chief Justice of India then was) very succinctly brought out the distinction between the contract for sale and works contract in the following terms:

There is no standard formula by which one can distinguish a "contract for sale" for a "works contract". The question is largely one of fact depending upon the terms of the contract on proper construction of terms and conditions of the contract between the parties including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and labour. Another test often to be applied is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a "sale"; if it is the latter, it is a "works contract". Therefore, in judging whether the contract is for a "sale" or for "work and labour", the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provide a guide in deciding whether the transaction is a "sale" or a "works contract". Essentially, the question is of the interpretation of the contract. It is settled law that substance and not the form of the contract is material in determining the nature of the transaction.

If the thing to be delivered has any individual existence before the delivery as the sole property of the party who is to deliver it, then it is a sale. If the bulk of material used in construction belongs to the manufacturer who sells the end product for a price, then it is a strong pointer to the conclusion that the contract is in substance one for the sale of goods and not one for labour. However, the test is not decisive. It is not the bulk of the material alone but the relative importance of the material qua the work, skill and labour of the payee which also has to be seen. If the major component of the end product is the material consumed in producing the chattel to be delivered and skill and labour are employed for converting the main component into the end products, and the skill and labour are only incidentally used, the delivery of the end product by the seller to the buyer would constitute a sale. On the other hand, if the main object of the contract is to avail the skill and labour of the seller though some material or components may be incidentally used during the process of the end product being brought into existence by the investment of skill and labour of the supplier, the transaction would be a contract for work and labour.

M/s. Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh, clarified. In the present case the major component of the end product is the material consumed in producing the lift to be delivered, and the skill and labour employed for converting the main components into the end product was only incidentally used and, therefore, the delivery of the end product by the assessee to the customer constituted a "sale" and not a "works contract". Hence, the transactions in question constitute "sale" in terms of Entry 82 of the First Schedule to the said Act and, therefore, Section 5-G of the said Act was not applicable.

State of A.P. v. Kone (India) Ltd, (1999) 115 STC 96 (AP), reversed.

22. The contention of learned counsel for the petitioner, Mr. Pallav Shishodia that after the judgment of Hon''ble Supreme Court in the case of Builders'' Association of India & M/s Gannon Dunkerley & Co. & Ors. (supra), the Assessing Authority is not entitled to impose tax on works contracts even after the deeming fiction introduced by State Legislatures for bifurcation of indivisible contract into divisible contract for sale and supply and of service and labour, which was the position obtaining prior to 46th Amendment of the Constitution of India by which Article 366 (29-A) of the Constitution of India was amended and State Sales Tax Laws were further amended to fall in line with the said constitutional amendment, which was interpreted and held valid by the Hon''ble Supreme Court in the aforesaid two judgments explaining the entire concept of levy of sales tax, in the case of works contract, the submission of learned counsel for the petitioner that the Assessing Authority could not integrate the works contract with contract of supply of plant and machinery and impose works contract tax or exemption fees in lieu of such tax, misses the basic point involved in the case.

23. The basic issue involved in the present cases is as to whether the exemption Notification dated 11/8/2006 which provides for exemption of payment of tax on works contract subject to assessee obtaining the exemption certificate upon payment of exemption fees of fixed percentage of the total value of the contract at 1.50% in case works contract falls under entry no.2, or at 2.25% if the works contract falls under entry no.3 of the list appended in the Notification dated 11/8/2006 reproduced above. While the exemption fees in lieu of tax on works contract is admittedly based on the total value of the contract, which total value may comprise of the taxable portion (supply of goods) of works contract as well as non-taxable (labour & service) of such works contract, still the exemption fee

is levied on the gross total value of the contract, therefore, the question of imposition of tax on taxable portion of works contract does not arise in the present case of question of relating to exemption fees on gross value of the contract and, therefore, the judgments relied upon by the learned counsel for the petitioner seeking to contend that Assessing Authority is not entitled to levy higher amount of exemption fee on the basis of law propounded in these judgments is an argument, with respects, is an argument off the mark and, therefore, the same is liable to be rejected.

24. While, as aforesaid, this Court is not inclined to pronounce upon the identity of two contracts as one and the same is left open for the Assessing Authority to do so after the assessee files its reply along with relevant evidence and the Assessing Authority adjudicates upon the said issues, this Court cannot agree with the contention of learned counsel for the petitioner that the two contracts in question lie in a water tight separate compartment and cannot be treated as one integrated contract. The said integrated one contract from the stage of designing to commissioning of plant and equipments, if it is ultimately held to be one integrated contract, may fall under clause (3) of the Notification dated 11/8/2006 rather than clause (2). Be that as it may, since all these questions are open questions yet to be decided by the Assessing Authority, this Court, advisedly, does not want to go into the finer details of the questions of facts and apply the law propounded by the superior courts at this stage. The case laws cited before this Court can very well be cited before the Assessing Authority himself, who is expected to decide such questions u/s 33 of the VAT Act, 2003, therefore, this Court is not inclined to decide the present issues on merits as raised in the present writ petitions and present writ petitions directed only against the show cause notices and even the assessment order passed in the connected writ petition being an appealable order, which was passed not for rectifying the exemption certificate but for imposing VAT itself on the transactions of sales involved in the execution of such works contract, the validity of which can be adjudged by the higher appellate forums and, therefore, this Court would refuse to invoke its extra ordinary jurisdiction under Article 226 of the Constitution of India in the present matters at this stage.

25. Consequently, the present writ petitions are liable to be dismissed and are accordingly dismissed. No costs.

