

(2006) 06 JH CK 0050

In the Jharkhand High Court

Case No : Writ Petition (T) No's. 358, 482, 467, 493, 466, 542 and 533 of 2005

Voltas Limited

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 22-06-2006

Acts Referred:

Bihar Finance Act, 1981 — Section 12, 13, 17(5), 18, 19(1)

Bihar Finance Rules, 1981 — Rule 13A

Constitution of India, 1950 — Article 366(29A)

Citation : (2006) 3 JCR 518

Hon'ble Judges : S.J. Mukhopadhaya, Acting C.J.; Narendra Nath Tiwari, J

Bench : Division Bench

Advocate : Debi Pal, M.S. Mittal, A.R. Choudhary, Amar Nath Sen and Ashok Kr. Yadav, for the Appellant; I. Sen Choudhary, SC-III, Prabhat Kr. Sinha and K.K. Ambastha, JC to SC-III, for the Respondent

Final Decision : Allowed

Judgement

S.J. Mukhopadhaya, A.C.J.

1. These writ petitions having been preferred by same petitioner M/s Voltas Limited and common question of law being involved, they were heard together and are being disposed of by this common judgment.

2. Four of the writ petitions relate to the assessment years 1985-86 to 1988-89, wherein, the petitioner has exhausted all its statutory remedies, such as, appeal, review and revision but being unsuccessful and aggrieved, has preferred these writ petitions. The case numbers and their respective assessment year are as follows:

Case No. Assessment year W.P.(T)No. 482/05 1985-86 W.P.(T)No. 467/05 1986-87 W.P.(T)No. 493/05 1987-88 W.P.(T)No. 466/05 1988-89

Other three writ petitions relate to the assessment years 1990-91 to 1992-93. The petitioner has challenged the orders of remand, as made by the appellate

authority on the ground of limitation. Case numbers of these three writ petitions and their respective assessment year are as follows:

Case No. Assessment Year W.P.(T)No. 358/05 1990-91 W.P.(T)No. 542/05 1991-92 W.P.(T)No. 533/05 1992-93 3. The petitioner, a Company registered under the Indian Companies Act, 1913, is engaged in execution of works contract, relating to commissioning of air-conditioning plants in various organizations. It also sells its air-conditioning machines. According to the petitioner, all the works contract relating to commissioning of air-conditioning plants have almost similar terms and conditions and such plants are commonly known as air-conditioning system or facility. It undertakes air conditioning contracts where the contracts cover the design, supply, installation, testing and commissioning of the entire air-conditioning plants and such plants are extended a guarantee for the performance of satisfactory functioning. The air-conditioning plant is supposed to deliver certain desired comfort to its users, which depends on temperature, relative humidity and cleanliness. Such plant includes all machineries, accessories and parts, which are required to make the plant functional.

4. Further case of the petitioner is that it manufactures the main refrigeration equipments in its factory at Thane and Dadra (Maharashtra), such as, compressors, condensers, evaporators (chillers & coils), packaged air-conditioning units, split unit, reciprocating chillers, centrifugal chillers and vapour absorption machines. Other machineries, as required, are bought out items, such as, air-handling units, pumps, cooling towers, electrical panels, pipes, valves, G.P.sheets, insulation materials, cabling etc.

5. According to the petitioner, installation and commissioning of air-conditioning plant in different buildings, factories or offices by way of works contract are different from fixing self-contained units of air-conditioner of different capacities like one tonne, two tonnes, three tonnes etc., which are moveable properties and for which the petitioner pays the sales tax on the sale of such air-conditioner. The air-conditioners, which are moveable properties, can be transferred from one place to another and the sale of such air-conditioners is chargeable to sales tax under the Bihar Finance Act, 1981 under Entry No. 116 of the Schedule at the rate of 16%.

6. One of the disputes in these cases is confined to installation and commissioning of the air-conditioning plant and system, which required design, supply, installation, fabrication, testing and commissioning of the entire air-conditioning plant. Copy of the one agreement has been annexed by the petitioner as Annexure 1 to W.P.(T) No. 358 of 2005.

7. The fact that installation and commissioning of the air-conditioning plant and system constitute works contract is also admitted by the Assessing authority in his assessment order, who has himself recorded that in the gross turnover the amount represents the works contract and the materials supplied in execution of

works contract only are liable to be taxed.

8. Learned Counsel for the petitioner relied on a decision of the Madras High Court in the case of the petitioner itself, reported in 14 STC page-446, wherein, it has been held that the said Installation of the air-conditioning plant constitutes an indivisible works contract and, therefore, there was no divisible contract regarding the transfer of materials, involved in the execution of the works contract and no sales tax is exigible on the transfer of such materials.

9. According to the respondents, the petitioner has supplied air-conditioning plants to Bokaro Steel Ltd. Air-conditioner/Air-conditioning plant/Accessories etc. are notified goods as per Entry No. 116 of the Government's Notification No. 14545 dated 26th December, 1977. The assessment is to be done over such goods at the rate of 16% and, as such, the Assessing authority has rightly made the assessment and has rejected the plea of the petitioner to assess at the rate of 8%. Further, according to the respondents, the provision of Section 12 of the Bihar Finance Act is not applicable in these cases, as the said provision relates to the goods, which are not notified. Air-conditioning plant/Accessories, being notified goods vide Entry No. 116 of Notification No. 14545 dated 26 th December, 1977 and the rate of tax being 16%, the petitioner is liable to pay the same. It was submitted that the petitioner has preferred some of the writ petitions without availing the alternative remedy.

10. It was also submitted on behalf of the State that the status of movability and immovability of the goods is a pure question of fact, which cannot be decided by this Court under its writ jurisdiction. It has denied the fact that the components of air-conditioning plant supplied, after their fixture, become immovable.

11. It was further submitted on behalf of the State that the petitioner never raised the question before the Revenue authorities regarding the alleged change of status of air-conditioning plant from movable to immovable goods after its fixture with land. Such question having not been raised earlier, as per the respondents, it cannot be raised subsequently before this Court.

12. Counsel for the State further submitted that the petitioner has failed to produce any document in support of its claim and also could not produce Form-IX, which is a precondition for availing concessional or special rate of tax u/s 13 of the Bihar Finance Act, 1981. It only produced Xerox copies of those Forms before the Tribunal and failed to produce the originals before the Assessing authority and, therefore, it was not accepted. It was also suggested that as per the agreement and contract, the petitioner was to supply air-conditioning plant to Bokaro Steel Ltd. after designing and manufacturing the same. For the purposes of argument, the contract can be divided into three parts: (i) to design and manufacture, (ii) to supply and (iii) Installation and commissioning. Thus, according to the State, the petitioner, having supplied/sold air-conditioning plant, is liable to be taxed at the rate of 16%. It was also submitted that the petitioner's contract on the basis of the agreement is a divisible contract.

13. After 46th amendment of the Constitution under Article 366(29-A) it has been provided that the tax on sale or purchase of goods, inter alia, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract. The scope and effect of the said amendment was explained by the Supreme Court in the case of Builders Association of India v. Union of India reported in 73 STC page-370. It was held that after the 46th Amendment, the works contract, which was an indivisible one, is by a legal fiction altered into a contract, which is divisible into one for sale of goods and the other for supply of labour and services. After the 46th amendment it has become possible for the State to levy sales tax on the value of goods, involved in a works contract in the same way in which sales tax was leviable on the price of goods and materials, supplied in a building contract, which had been entered into in two distinct, separate and divisible parts.

14. Prior to the aforesaid judgment of the Supreme Court, in the case of Jamshedpur Contractors Association v. State of Bihar reported in 75 STC page-132, Ranchi Bench of Patna High Court declared Rule 13A, as it then stood, as ultra vires, since Rule 13A, as it then stood, provided for deduction of the labour charges at a fixed percentage of the works contract, irrespective of the fact whether the contractor had incurred high expenditure on account of labour charges. For the same analogy, Ranchi Bench of Patna High Court in the case of C.I.O. Tyres Ltd. v. State of Bihar reported in 1990(1) P.L.J.R. 397 had declared Section 21(1)(a)(i), as it then stood, as ultra vires.

15. In the case of Gannon Dunkerly & Co. Ltd. v. State of Rajasthan reported in, 88 STC page-204, the Supreme Court after detailed discussion summed up the manner and the method in which the value of the materials, involved in the execution of the works contract, is to be determined. The Court held that the value of goods, involved in execution of a works contract, will have to be determined, taking into account the value of the entire works contract and then deducting therefrom the charges towards labour and services, which would cover (i) labour charges for execution of the works; (ii) amounts paid to a sub-contractor for labour and services; (iii) charges for planning, designing and architect's fees; (iv) charges for obtaining on hire the machinery and tools used in the execution of the works contract; (v) cost of consumables, such as, water, electricity, fuel etc.; (vi) transportation charges for transport of goods to the place of works; (vii) overhead expenses of the head office and branch office, including rents, salary, electricity, telephone charges etc. and interest charges to the banks and financial institutions and (viii) profits expected on such contract.

16. According to the petitioner, the Legislature while imposing tax on transfer of property of goods (whether as goods or in some other form), involved in execution of a works contract, is not competent to impose a tax on such transfer, which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export. Therefore, in determining the taxable turnover, the value of all sales, which are in the course

of inter-State trade or commerce or outside the State or in the course of import of export, is to be excluded from the gross turnover. In this regard reliance was placed on the aforesaid decision in the case of "Gannon Dunkerly Co. Ltd. v. State of Rajasthan" (supra).

17. Learned Counsel for the petitioner referred to newly substituted Rule 13A, which provides for only deduction of labour charges. According to him, various other charges, which are to be deducted in computing the taxable turnover in the case of works contract, can be deducted only in the manner and to the extent, prescribed in the Rules.

18. It appears that Section 21 has been amended. Section 21(1)(a)(i) after amendment reads as follows:

Section 21.- Taxable Turnover- (1) For the purpose of this part the taxable turnover of a dealer shall be that part of his gross turnover which remains after deduction therefrom-

(a)(i) in case of the works contract the amount of labour and any other charges in the manner and to the extent prescribed.

19. Rule 13A was also amended subsequently vide Notification dated 1st February, 2000, which reads as follows:

Rule 13-A. Deduction in case of works contract on account of labour charges -[If the dealer fails to produce any account or the accounts produced are unreliable] deduction under Sub-clause (i) of Clause (a) of Sub-section (1) of Section 21 on account of labour changes in the case of works contract from gross turnover shall, be equal to the following percentages.

xx xx xx xx

20. The aforesaid provision has been bodily adopted by the State of Jharkhand vide Notification dated 15th December, 2000 and, thus, is applicable in the State of Jharkhand.

21. Amended Section 21(1) and newly substituted Rule 13A recently fell for consideration before a Division Bench of Patna High Court in the case of Larsen & Toubro Ltd. v. State of Bihar reported in 134 STC page-354. Having noticed the newly substituted Rule 13A, the Patna High Court held that the said Rule does not subscribe that in what manner and to what extent labour charges could be deducted from the gross turnover to reach a taxable turnover and made the following observations:

23. Rule 13A unfortunately does not talk of "any other charges". Rule 13A unfortunately does not take into consideration that under the Rules the deduction in relation to any other charges in the manner and to the extent were also to be prescribed. Rule 13A cannot be said to be an absolute follow-up legislation to Sub-clause (i) of Clause (a) of Section 21(1). When the law provides that something is to be prescribed in the Rules then that thing must be prescribed in

the Rules to make the provisions workable and constitutionally valid. In the matter of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, the Supreme Court observed that as Sub-section (3) of Section 5 and Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Act and the Rules were not providing for particular deductions the same were invalid. In the present matter the constitutional provision of law says that particular deductions would be provided but unfortunately nothing is provided in relation to the other charges either in Section 21 itself or in the rules framed in exercise of the powers conferred by Section 58 of the Bihar Finance Act

xx xx xx xx 31. In our considered opinion Sub-clause (i) of Clause (a) of Section 21(1) read with Rule 13A of the Rules did not make Sub-clause (1) fully workable because the manner and extent of deduction relating to any other charges has not been provided/prescribed by the State.

22. learned Counsel for the State submitted that the Patna High Court's decision, rendered in the case of "Larsen & Toubro Ltd. v. State of Bihar" (supra) is not binding on this Court. Though the submission is attractive, but we are of the view that the Judgment, rendered by the Patna High Court in the case of "Larsen & Toubro Ltd. v. State of Bihar" (supra), cannot be ignored, the provision, in question, i.e. Section 21(1)(a)(i) read with Rule 13A, in pursuance of which the impugned assessment has been made, has been held to be not workable, as the manner and extent of deduction relating to any other charges has not been provided/prescribed by the State.

23. The principle of interpretation for deciding the validity of a statutory provision or rules made thereunder and the constitutional validity of a statute has to be determined on the basis of the provisions and on the ambit of its operation, as may be reasonably construed. If it does not pass the test of constitutionality, it cannot be pronounced valid merely because it is administered in a manner, which might not be in conflict with the constitutional requirement. This principle was relied by the Patna High Court in the case of "Larsen & Toubro Ltd. v. State of Bihar" (supra), while declaring Section 21(1)(a)(i) read with Rule 13A as not workable, in absence of the manner and extent of deduction, relating to any other charges. Same provision having been made applicable in the case of the petitioner by the State of Jharkhand, the respondents cannot escape the findings of the Patna High Court with regard to the same provision on the ground that the judgment is not binding on this Court. The assessment orders in the case of "Larsen & Toubro Ltd." (supra) having been set aside by the Patna High Court, we have no other option but to grant similar relief to the petitioner, in view of the findings aforesaid.

24. The next issue will be as to what should be the rate of tax and at which "material portion" of the works contract it is to be taxed. In case of works contract, the value of the materials, involved in execution of the works, is to be taxed only at the rate applicable to different materials, supplied for execution of the works. A circular was issued by the Commissioner, Commercial Taxes, Govt.

of Bihar, on 18th May, 1984, which is also applicable in the State of Jharkhand, whereby, it was informed that if transfer takes place in some other form, then sales tax at unspecified rate will be applicable i.e. at the rate of 8%.

25. Entry No. 116 of Annexure-III to the Bihar Finance Act, 1981, published vide Notification No. 1026/77-14545 dated 26th December, 1977 deals with Refrigerators, Air-conditioners, Air-coolers & Air-conditioning plant spare parts, accessories and components thereof. "Air-conditioner" is different than "Air-conditioning plant". While "Air-conditioner" is movable item like Refrigerator, Air-cooler etc., as mentioned under Entry No. 116, "Air-conditioning plant" is immovable item. Totality of the plant cannot be shifted from one place to another, once it is installed at a particular place. It can be shifted only after dismantling the plant, which cannot be called "Air-conditioning plant" after it is dismantled.

26. Though learned Counsel for the State tried to suggest that Entry No. 116 includes "Air-conditioning plant", we are not inclined to accept such suggestion, as it does not stipulates "Air-conditioning plant" but "Air-conditioning plant spare parts, accessories and components thereof", as distinguished from "Air-conditioning plant".

27. Learned Counsel for the petitioner has referred to a list of goods and materials, which are used in execution of works contract of "Air-conditioning plant" and the rate of tax applicable to them, as per its Entry number, as set out hereunder:

Sl.No.

List of Items

Rate of tax

Entry No.

Specified

Unspecified

1.

Electric Motors

9%

73

v

2.

Electrical goods, instruments, electric fans

12%

81

v

3.

Iron & Steel (Gp sheets, Angle Iron/ Channels, pipes, pipe fittings, valves, strainer)

4%

20

v

4.

Insulation materials such as thermocole and glass wool

8%

v

5.

Cooling tower

8%

v

6.

Pumps

8%

v

7.

Refrigerant gases

12%

236

v

8.

Exhaust fans, air circulators, electrical heaters

16%

119

v

9.

Lubricants

9%

68

v

10.

Aluminum Sheets

8%

v

11.

Thermometer

8%

220

v

12.

Electrical switchboard

8%

230

v

13.

Cables

8%

143

v

28. However, we are not inclined to give any finding as to what should be the rate of tax, applicable to individual goods or materials, used in execution of the works contract, as it is for the authorities to decide the same.

Issue of Limitation:

In three of the writ petitions i.e. W.P.(T) No. 358 of 2005, W.P.(T)No. 542 of 2005 and W.P.(T) No. 533 of 2005, which relate to three assessment years viz. 1990-91 to 1992-93, the petitioner has raised the question of limitation and has,

thus, raised the jurisdiction of the appellate authority in passing the impugned orders. Section 24 of the Bihar Finance Act prescribes limitation in the matter of completion of assessment proceeding and reassessment in pursuance of an order, passed in appeal, revision, reference or review. Section 24 reads as follows:

Section 24. Period of limitation for completion of assessment proceeding- Except a proceeding under Sub-section (5) of Section 17, Section 18 and Sub-section (1) of Section 19 no proceeding for assessment of the tax payable by a dealer under this, part in respect of any period shall be initiated and completed except before the expiry of four years from the expiry of such period:

Provided that a proceeding for re-assessment in pursuance of or as a result of an order on appeal, revision or reference or review shall be initiated and completed before the expiry of two years from the date of communication of such order to the Assessing authority.

From the pleadings, as made by the petitioner in the aforesaid three cases and not disputed by the respondents, it appears that against three assessment orders for the period 1990-91; 1991-92 and 1992-93, the petitioner preferred three appeals i.e. JUSTA 56/97098, 57/97-98 and 58/97-98 before the Joint Commissioner, Commercial Taxes (Appeal), Jamshedpur Division, Jamshedpur. The appellate authority passed a common order on 31st August, 1998 and communicated the decision vide Memo No. 2177 dated 5th November, 1998 to the assessing authority and other officers. The Assessing authority was directed to make reassessment. As per the proviso to Section 24, the Assessing authority was supposed to complete and pass re-assessment order pursuant to the remand by 5th November, 2000 (two years from the date of communication of such order to the assessing authority). However, the assessment was not concluded and fresh assessment on remand was made on 27th November, 2004 i.e. after more than six years of communication of the said order.

The respondents have not disputed the aforesaid fact in their counter affidavit but according to the counsel for the State, the order of appellate court was communicated to the assessing authority for the first time along with the records vide Memo No. 204 dated 6th August, 2003, which was received on 7th August 2003. The Court directed the respondents to produce the original file to find out the date of communication. From the records, it appears that the appellate order passed on 31st August, 1998 was communicated to the Assessing authority vide Memo No. 2177 dated 5th November, 1998. The petitioner obtained the certified copy of the same in January, 1999. Memo No. 204 dated 6th August, 2003, as referred to by the counsel for the State, is the 2nd time communication, which can be held to be a reminder. Thus, the appellate order having been communicated to the assessing authority vide Memo No. 2177 dated 5th November, 1998, for the purposes of limitation, the period will start from 5th November, 1998 and will complete on 5th November, 2000 i.e. two years from the date of communication of such order to the assessing authority. We,

accordingly, hold that the assessment order, made after remand on 27th November, 2004 and the consequential demand of notice, raised in pursuance of such order of re-assessment, all dated 29th November, 2004 are barred u/s 24 of the Act and are bad and illegal.

29. Having regard to the facts and circumstances and in view of the findings aforesaid, the assessment orders are, accordingly, set aside and consequently, the respondents are prohibited from initiating any proceeding for recovery or to take any coercive step against the petitioner in pursuance of the assessment orders, in question. It is further made clear that the liability of dealer shall survive and continue and would be liable to be taxed, if the provisions are made workable within a reasonable period. The re-assessment orders all dated 27th November, 2004 and the consequential notice dated 29th November, 2004 having been declared illegal, those orders and notices, challenged in W.P.(T) No. 358 of 2005, W.P.(T) No. 542 of 2005 and W.P.(T) No. 533 of 2005 are also set aside. All the writ petitions are allowed with the aforesaid observations and directions. However, having regard to the facts and circumstances, there shall be no order as to costs.