

2008-VIL-30-SC

*IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION*

*CIVIL APPEAL No. 5239 OF 2008
(Arising out of S.L.P. (C) No. 12482 of 2007)*

Date: 26th August 2008

State of Andhra Pradesh & Ors

Vs

Larsen & Tourbo Ltd & Ors

CORAM:

S.H. Kapadia & B. Sudershan Reddy

JUDGMENT

S.H. KAPADIA, J.

1. Leave granted.

2. Respondent - Larsen & Tourbo Ltd. (L&T) is engaged in executing civil, mechanical and other building works throughout India including Andhra Pradesh. During the relevant period it entered into contracts with its clients (contractees) whose names are given in the annexure to the original writ petition filed in the High Court of Andhra Pradesh. Under the Contract, L&T, with the consent of the contractee, was permitted to assign parts of construction work to the sub-contractors whose names are also given in the list annexed to the original writ petition filed in the High Court. Accordingly, L&T placed orders on such sub-contractors for agreed price, inclusive of applicable taxes. The overall work was done under the supervision of the consultants nominated by the contractee. The sub-contractors were registered dealers. The sub-contractors purchased goods and chattel like bricks, cement and steel and, where necessary, supply and erect equipments such as lifts, hoist, etc. The materials were brought to site. They remained the property of the sub-contractors. The site was occupied by sub-contractors. The materials were erected by the sub-contractors.

3. L&T was served with a notice dated 10.3.06 in which it was alleged that the Company had failed to disclose the sub-contractors' turnover of Rs.111,53,05,835/- in the returns filed upto 31.1.06 for the period 1.4.05 to 31.1.06. In reply, L&T submitted that under Section 4(7)(a) of the Andhra Pradesh Value Added Tax Act, 2005 ("2005 Act", for short) there was no provision for inclusion of sub-contractors' turnover in the turnover filed by the Company; that, the scheme of the said Act at the relevant time did not contemplate for the declaration of sub-contractors' turnover and, that, under the scheme of the said 2005 Act the sub-contractor was a "dealer".

4. In this case the sub-contractors were registered dealers. This point is not in dispute. It was submitted by the Company before the Assessing Authority that the transfer of property in goods, as effected by the sub-contract, resulted in direct sale to the contractee and consequently it did not involve multiple sales either in favour of the main contractor or in favour of the contractee. By the said reply, the Company specifically stated that it did not claim 'input tax credit' (ITC) on the tax invoice of sub-contractors. Accordingly, the Company objected to the proposal made in the show cause notice by the A.O. to recompute the tax liability adopting a uniform rate of 12.5% on the sub-contractors' turnover.

5. The objections raised by the Company in its reply to the show cause notice were rejected by the A.O. and the Company was consequently served with an assessment order dated. 31.5.06 raising an additional tax payment of Rs. 9,75,89,261/-.

6. Aggrieved by the assessment order dated 31.5.06, for the aforesaid period, the Company moved the Andhra Pradesh High Court vide Writ Petition No.12124 of 2006 and challenged the following conclusion of the A.O. made in the assessment order dated 31.5.06 which reads as under:

"Main contractor is having an order from the contractee to purchase and sell goods in the course of execution of works contract and for that matter, the main contractor should acquire that goods from the sub-contractor, by way of deemed sale as well as the main contractor, by way of deemed sale as well as the main contractor should transfer the value of the property by way of deemed sales to the contractee. The principles whatsoever apply to a sale in general squarely apply to a deemed sale also. Therefore, herein cannot question the legislative wisdom in framing the scheme of the Act giving a similar treatment to a deemed sale that is given to a sale in general. It being so, there are two deemed sales one from main contractor to contractee and the other from sub-contractor to the main contractor in the event of contractee not having any privity of contract with sub-contractor." (emphasis supplied by us)

7. The question which needs consideration in this civil appeal is: whether the A.O. was right in his conclusion, namely, that in this case there were two deemed sales, one from main contractor to the contractee and the other from the sub-contractors to the main contractor as there was no privity of contract between the contractee and the sub-contractors.

8. To answer the above issue we need to quote relevant provisions of the 2005 Act which reads as under:

"CHAPTER -I

PRELIMINARY

SECTION 2 - Definitions-

In this Act, unless the context otherwise requires: --

(10) 'Dealer' means any person who carries on the business of buying, selling, supplying or distributing goods or delivering goods on hire purchase or on any system of payment by instalments, or carries on or executes any works contract involving supply or use of material directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration, and includes:

(a) a company, a Hindu undivided family or any society including a co-operative society, club, firm or association which carries on such business;

(b) a society including a co-operative society, club, firm or association which buys goods from, or sells, supplies or distributes goods to its members;

(c) a casual trader, as herein before defined;

(d) any person, who may, in the course of business of running a restaurant or an eating house or a hotel by whatever name called, sells or supplies by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink whether or not intoxicating;

(e) any person, who may transfer the right to the use of any goods for any purpose whatsoever whether or not for a specified period in the course of business to any other person;

(f) a commission agent, a broker, a delcredere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal;

(16) 'Goods' means all kinds of movable property other than newspapers, actionable claims, stocks, shares and securities, and includes all materials, articles and commodities including the goods as goods or in some other form, involved in the execution of a works contract or those goods used or to be used in the construction, fitting out, improvement or repair of movable or immovable property and also includes all growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

(19) 'Input tax' means the tax paid or payable under the Act by a VAT dealer to another VAT dealer on the purchase of goods in the course of business;

(28) 'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods (whether as such goods or in any other form in pursuance of a contract or otherwise) by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration or in the supply or distribution of goods by a society (including a co-operative society), club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on goods.

Explanation VI: - Whenever any goods are supplied or used in the execution of a works contract, there shall be deemed to be a transfer of property in such goods, whether or not the value of the goods so supplied or used in the course of execution of such works contract is shown separately and whether or not the value of such goods or material can be separated from the contract for the service and the work done.

(29) 'Sale Price' means:

(a) the total amount set out in the tax invoice or bill of sale; or

(b) the total amount of consideration for the sale or purchase of goods as may be determined by the assessing authority, if the tax invoice or bill of sale does not set out correctly the amount for which the goods are sold; or

(c) if there is no tax invoice or bill of sale, the total amount charged as the consideration for the sale or purchase of goods by a VAT dealer or TOT dealer either directly or through another, on his own account or on account of others, whether such consideration be cash, deferred payment or any other thing of value and shall include:

(i) the value of any goods as determined by the assessing authority:

(a) to have been used or supplied by the dealer in the course of execution of the works contract; or

(b) to have been delivered by the dealer on hire purchase or any other system of payment by instalments; or

(c) to have been supplied or distributed by a society including a Co-operative Society, Club, firm or association to its members, where the cost of such goods is not separately shown or indicated by the dealer and where the cost of such goods is separately shown or indicated by the dealer, the cost of such goods as shown or indicated;

(ii) any other sum charged by the dealer for anything done in respect of goods sold at the time of, or before, the delivery of the goods;

(iii) any other sum charged by the dealer, whatever be the description, name or object thereof;

(35) 'Tax invoice' means a sale invoice containing such details as may be prescribed and issued by a VAT dealer to another VAT dealer;

(38) 'Taxable turnover' means the aggregate of sale prices of all taxable goods;

(39) 'Total turnover' means the aggregate of sale prices of all goods, taxable and exempted, sold at all places of business of the dealer in the State, including transactions falling under Section 8 of the Act and under Section 6A of the Central Sales Tax Act, 1956 and shall also include the gross consideration received or receivable towards execution of works contract;

(45) 'Works Contract' includes any agreement for carrying out for cash or for deferred payment or for any other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, laying, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;

CHAPTER - III

INCIDENCE, LEVY AND CALCULATION OF TAX

Section 4 - Charge to tax-

(7) Notwithstanding anything contained in the Act; -

(a) Every dealer executing works contracts shall pay tax on the value of goods at the time of incorporation of such goods in the works executed at the rates applicable to the goods under the Act:

Provided that where accounts are not maintained to determine the correct value of goods at the time of incorporation, such dealer shall pay tax at the rate of 12.5% on the total consideration received or receivable subject to such deductions as may be prescribed;

(b) Any dealer executing any works contracts for the Government or local authority may opt to pay tax by way of composition at the rate of 4% on the total value of the contract executed for the Government or local authority ¹[* * *];

(c) Any dealer executing works contracts other than for Government and local authority may opt to pay tax by way of composition at the rate of 4% ²[***] of the total consideration received or receivable for any specific contract subject to such conditions as may be prescribed;

(d) Any dealer engaged in construction and selling of residential apartments, houses, buildings or commercial complexes may opt to pay tax by way of composition at the rate of 4% of twenty five percent (25%) of the consideration received or receivable or the market value fixed for the purpose of stamp duty whichever is higher subject to such conditions as may be prescribed

³(e) Any dealer having opted for composition under ⁴[Clauses (b) or (c) or (d)], purchases or receives any goods from outside the State or India or from any dealer other than a Value Added Tax dealer in the State and uses such goods in the execution of the works contracts, such dealer shall pay tax on such goods at the rates applicable to them under the Act and the value of such goods shall be excluded for the purpose of computation of turnover on which tax by way of composition at the rate of four percent (4%) is payable.]

¹ Omitted for the words "and in such cases, the tax at 4% shall be collected at source by such contractee and remitted to Government in such manner as may be prescribed" by Act 5 of 2007, dt. 22.01.2007, w.e.f. 01.09.2006

² Omitted for the words "of fifty percent (50%) by Act NO.23 of 2005, w.e.f. 29.08.2005

³ Inserted by Act No.23 of 2005, w.e.f. 29.08.2005

⁴ Substituted for the words "clauses (b), (c) and (d)" by Act 5 of 2007, dt. 22.01.2007, w.e.f. 01.09.2006

⁵[f] Any dealer who is liable to be registered for TOT and executing any works contracts shall pay tax at the rate of 1% on total value of the goods at the time of incorporation of the goods used:

Provided that where accounts are not maintained to determine the correct value of the goods at the time of incorporation, such dealers shall pay tax at the rate of 1% on the total consideration received or receivable subject to such deductions as may be prescribed.

⁶ [***]

⁷ [(g) notwithstanding any thing contained in clauses (a) to (f) above, no tax shall be leviable on the turnover of transfer of property in goods whether as goods or in some other form involved in the execution of works contract, if such transfer from the contractor to the contractee constituted a sale in the course of interstate trade or commerce under section 3 or a sale outside the State under section 4, or a sale in the course of import or export under section 5 of the Central Sales Tax Act, 1956;

(h) no tax shall be payable under ⁸[clauses (a) or (b) or (c) of] this sub-section on the turnover relating to amounts paid to a sub-contractor as consideration for the execution of works contract whether wholly or partly subject to the production of proof that such sub-contractor is registered as a VAT dealer under the Act and the turnover of such amount is included in the return prescribed filed by such sub-contractor.]

⁸ [(i) no tax shall be payable under clause (d) of this sub-section on the turnover relating to the consideration received as a sub-contractor if the main contractor opted to pay tax by way of composition subject to the condition that the sub-contractor shall pay tax in respect of any goods purchased or received from outside the State of Andhra Pradesh or from any person other than a Value Added Tax dealer in the State on the Value of such goods at the rates applicable to them under the Act.]

⁵ *Renumbered by Act No.23 of 2005, w.e.f. 29.08.2005*

⁶ *The proviso was omitted by Act 5 of 2007, dt.22.01.2007, w.e.f. 01.09.2006.*

The earlier proviso: "Provided further that no tax shall be payable under this sub-section on the turnover relating to the consideration received as a sub-contractor if the main contractor opted to pay tax by way of composition subject to the condition that the sub-contractor shall pay tax in respect of any goods purchased or received from outside the State of India or from any person other than a Value Added Tax dealer in the State on the value of such goods at the rates applicable to them under the Act".

⁷ *Added by Act 5 of 2007, dt.22.01.2007, w.e.f. 01.09.2006*

⁸ *Added by Act No.39 of 2007, dt. 18.12.2007, w.e.f. 01.09.2006*

9. We also quote relevant provisions of the Andhra Pradesh Value Added Tax Rules, 2005 (as it stood at the relevant time) which read as under:

"RULE 17: Treatment of works contracts -

(1) Treatment of VAT dealer executing works contract:

(a) In the case of contracts not covered by sub-rules (2), (3) and (4) of this rule, the VAT dealer shall pay tax on the value of the goods at the time the goods are incorporated in the work at the rates applicable to the goods;

(c) If such VAT dealer awards any part of the contract to a sub-contractor, such sub-contractor shall issue a tax invoice to the contractor for the value of the goods at the time of incorporation in such sub-contract. The tax charged in the tax invoice issued by the sub-contractor shall be accounted by him in his returns.

(e) Subject to clause (d) the following amounts are allowed as deductions from the total consideration received or receivable for arriving the value of the goods at the time of incorporation, -

(i) Labour charges for execution of the works;

(ii) Charges for planning, designing and architect's fees;

(iii) Charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;

(iv) Cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract, the property in which is not transferred in the course of execution of a works contract;

(v) Cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

(vi) Other similar expenses relatable to supply of labour and services;

(vii) Profit earned by the contractor to the extent it is relatable to supply of labour and services;"

10. We also quote Article 366(29A)(b) of the Constitution of India which reads as under:

"366. Definitions: In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say -

(29A) "tax on the sale or purchase of goods" includes –

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract; and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

11. The only question which we are required to decide is:

Whether the turnover of Rs. 111,53,05,835/- of the sub-contractors is liable to be added to the turnover of L&T? On the turnover of L&T, it is liable to pay the tax and that is not in dispute. What is in dispute is the addition of sub-contractors' turnover to the turnover of L&T.

12. A contract of work, i.e., "works contract" involves transfer of property and also element of service or work rendered. That is why it is called composite contract. Works contracts can be of two types only:

(a) Works contracts for constructions; and

(b) Works contract in relation to any movable property like repairs to vehicles, printing contracts etc.

13. In the first case of *The State of Madras v. M/s. Gannon Dunkerley & Co., (Madras) Ltd.* - [(1958) 9 STC 353] this Court held that if the words "sale of goods" have to be incorporated in their legal sense, that sense can only be what it has in the law relating to sale of goods. Accordingly, this Court opined that the expression "sale of goods" involves existence of an agreement between the parties for the sale of goods in which eventually property passes.

14. The judgment of the first case of *Gannon Dunkerley (supra)* necessitated an amendment to Article 366 of the Constitution. Thus, the (Forty-Sixth Amendment) Act, 1982 to the Constitution inserted clause 29A to Article 366 of the Constitution, inter alia, inserting the definition of "tax on the sale or purchase of goods". Insertion of clause 29A thus empowers the States to levy the tax on deemed sale. This amendment enables States to levy tax on transfer of property in goods involved in the execution of works contract. The validity of this Amendment was upheld by this Court in the case of *Builders' Association of India and others v. Union of India and others* - [(1989) 73 STC 370].

15. According to the judgment of the Constitution Bench of this Court in the case of *M/s Gannon Dunkerley and Co. and others v. State of Rajasthan and others* - [(1993) 88 STC 204], the measure for the levy of tax contemplated by Article 366(29A)(b) of the Constitution is the value of the goods involved in the execution of a works contract.

16. In this case we are concerned with Andhra Pradesh Value Added Tax Act, 2005. Section 4 is the charging section. It comes in Chapter III which deals with 'incidence, levy and calculation of tax'. In this case, we are concerned with the taxability of works contract. That subject is dealt with by Section 4(7) of the said 2005 Act. In our view, Section 4(7) is a Code

by itself. It begins with a non-obstante clause. It, inter alia, states that every dealer executing works contract shall pay tax on the value of goods at the time of incorporation of such goods in the works executed at the rates applicable to the goods under the Act. The point to be noted is that Section 4(7)(a) of the 2005 Act indicates that the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which constitutes the measure for the levy of the tax is the value of the goods at the time of the incorporation of the goods in the works. What is stated hereinabove also finds place in Rule 17(1)(a) of the APVAT Rules 2005, quoted hereinabove. It is important to note that each of the sub-contractors of L&T is registered dealer. None of them are unregistered. Under Section 4(7)(a) read with Rule 17(1)(c), quoted above, where VAT dealer awards any part of the contract to a sub-contractor, such sub-contractor shall issue a tax invoice to the contractor for the value of the goods at the time of incorporation in such sub-contract. The tax charged in the tax invoice issued by the sub-contractor shall be accounted by him in his returns. Therefore, the scheme indicates that there is a "deemed sale" by the dealer executing the work, i.e., the sub-contractor. It is only the sub-contractor who effects transfer of property in goods as no goods vests in the respondent company (contractor) so as to be the subject-matter of a retransfer. By virtue of Article 366 (29A)(b) of the Constitution once the work is assigned by the contractor (L&T), the only transfer of property in goods is by the sub-contractor(s) who is a registered dealer in this case and who claims to have paid taxes under the Act on the goods involved in the execution of the works. Once the work is assigned by L&T to its sub-contractor(s), L&T ceases to execute the works contract in the sense contemplated by Article 366(29A)(b) because property passes by accretion and there is no property in goods with the contractor which is capable of a retransfer, whether as goods or in some other form.

17. The question which is raised before use is: whether the turnover of the sub-contractors (whose names are also given in the original writ petition) is to be added to the turnover of L&T. In other words, the question which we are required to answer is: whether the goods employed by the sub-contractors occur in the form of a single deemed sale or multiple deemed sales. In our view, the principle of law in this regard is clarified by this Court in the case of Builders' Association of India (supra) as under:

"Ordinarily unless there is a contract to the contrary in the case of works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building."
(emphasis supplied by us)

18. As stated above, according to the Department, there are two deemed sales, one from the main contractor to contractee and the other from sub-contractor(s) to the main contractor, in the event of the contractee not having any privity of contract with the sub-contractor(s).

19. If one keeps in mind the above quoted observation of this Court in the case of Builders' Association of India (supra) the position becomes clear, namely, that even if there is no privity of contract between the contractee and the sub-contractor, that would not do away the principle of transfer of property by the sub-contractor by employing the same on the property belonging to the contractee. This reasoning is based on the principle of accretion of property in goods. It is subject to the contract to the contrary. Thus, in our view, in such a case the work, executed by a sub-contractor, results in a single transaction and not as multiple transactions. This reasoning is also borne out by Section 4(7) which refers to value of goods at the time of incorporation in the works executed. In our view, if the argument of the Department is to be accepted it would result in plurality of deemed sales which would be contrary to Article 366(29A)(b) of the Constitution as held by the impugned judgment of the High Court.

Moreover, it may result in double taxation which may make the said 2005 Act vulnerable to challenge as violative of Articles 14, 19(1)(g) and 265 of the Constitution of India as held by the High Court in its impugned judgment.

20. Before concluding, we may refer to one more aspect. It appears that after the impugned judgment, the Department has amended Rule 17 of the APVAT Rules, 2005 vide Government Order dated 20.8.2007. The position has been clarified vide Rule 17(1)(c) (as amended). It is now clarified that where a VAT dealer awards any part of the contract to a registered sub-contractor, no tax shall be payable on the consideration paid for the sub-contract. Therefore, in our view, the principle to be adopted in all such cases is that the property in the goods would pass to the owner/contractee on its incorporation in the works executed. This principle finds place in sub-section 7(a) of Section 4 of the said 2005 Act.

21. On the facts of the case, it has been urged on behalf of the Department that the respondent company has not complied with the provisions of Rule 17(1)(c) as it stood at the relevant time, which require the sub-contractor(s) to issue tax invoice to the L&T which invoices would have indicated the value of the goods at the time of incorporation in such sub-contract and which would have indicated the tax charged. This point is seriously disputed. According to the respondent company it did produce all tax invoices received from the sub-contractors but the A.O. proceeded on the basis that there were two deemed sales, one from main contractor to contractee and the other from the sub-contractors to the main contractor and consequently the A.O. did not look into the tax invoices of the sub-contractor(s). In this connection, we may state that the A.O. decided the matter on principle. The respondent company has annexed a list to the original writ petition in which it has given all the details regarding works contract turnover including the value of the work done by the sub-contractor(s).

22. For the aforesaid reasons, we see no reason even on facts to interfere in the matter, however, in future we expect the A.O. to call for individual contract(s), tax invoice(s) and call such particulars require to be submitted by the assessee before adding the turnover of the sub-contractor to the turnover of the contractor.

23. We find no infirmity in the impugned judgment dated 12.10.06 delivered by the High Court in the Writ Petition No.12124 of 2006. Accordingly, this civil appeal stands dismissed with no order as to costs.

J. (S.H. Kapadia)

J. (B. Sudershan Reddy)