(2002) 08 GAU CK 0026

Gauhati High Court

Case No: Civil Rule No. 2252 of 1997

Daelim Industrial Co. Ltd.	APPELLANT
Vs	
State of Assam and Others	RESPONDENT

Date of Decision: Aug. 16, 2002

Acts Referred:

- Assam General Sales Tax Act, 1993 - Section 2(38)

Citation: (2003) 1 GLR 239 : (2003) 2 GLT 273

Hon'ble Judges: Ranjan Gogoi, J

Bench: Single Bench

Advocate: G.K. Joshi, R.K. Joshi and U. Chakraborty, for the Appellant; B.J. Talukdar, for the Respondent

Final Decision: Allowed

Judgement

Ranjan Gogoi, J.

The petitioner, a Company incorporated in Korea, entered into a contract with M/s Numaligarh Refinery Limited for execution of a Co-Generation Plant at Numaligarh in the State of Assam. Two separate contract agreements, one for indigenous supplied and services and the other for overseas supplied and services, were entered into by and between the parties, which were later amalgamated into a single contract. After obtaining necessary statutory permission from the Reserve Bank of India, for undertaking the business in question, the petitioner company registered itself under the provisions of Assam General State Tax Act, 1993 (hereinafter referred to as "the Act") and filed its return for the financial year 1995-96 disclosing a gross turnover of Rs. 75,21,500.00. The return filed by the petitioner company was finalised by assessment order dated 21.3.1997 passed by the Authority empowered to complete the assessment under the Act. In the aforesaid assessment order dated 21.3.1997 an amount of Rs. 63,36,094.00 claimed by way of deduction by the petitioner company on account of value of works executed by Sub-contractors was disallowed and added to the gross turnover.

Another amount of Rs. 35,49,000.00 being the value of design and engineering in respect of which deduction was claimed by the petitioner company was also disallowed and the aforesaid amount was similarly added to the gross turnover of the petitioner company. Apart from the aforesaid two deductions, the entire turnover relating to overseas supplies and services amounting to Rs. 3,74,97,667 was added to the gross turnover and on the basis of the aforesaid computation, the Assessing Officer determined the tax payable and after deduction of tax already paid, worked out the balance tax payable along with penalty. Aggrieved, the writ petitioner has instituted the present proceedings under Article 226 of the Constitution calling into question the aforesaid assessment order dated 21.3.1997.

2. I have heard Mr. GK Joshi, learned senior counsel appearing on behalf of the writ petitioner and Mr. BJ Talukdar, learned counsel appearing on behalf of the Revenue.

3. An assessment order passed under the provisions of the Act is an appealable order and ordinarily an aggrieved assessee must be left to ventilate his grievances in respect of the assessment made by the Competent authority before the appellate forum provided by the Act. Mr. Joshi, Senior counsel appearing for the petitioner has tried to over come the first obstacle coming in the way of adjudication of the merits of the controversy in the present case, by contending that as the instant writ application has remained pending in this Court since the year 1997, the writ petitioner ought not be relegated to the appellate forum at this belated stage and that this Court may proceed to adjudicate the grievances of the petitioner. Mr. Joshi, learned counsel, has in this regard relied on a decision of the Division Bench of this Court in the case Borsapori Tea Estate v. Additional. Deputy Commissioner, Golaghat, reported in 1995 (1) GLR 203. According to Mr. Joshi the law laid down by the Division Bench in the above noted case is that once a writ petition is admitted to final hearing, the same ought to be heard on merits and should not be dismissed on the ground of availability of alternative remedy.

4. A careful reading of the Division Bench judgment relied upon by the learned counsel for the petitioner would go to show that the view taken is qualified by the observation that the writ petition to be entitled to a hearing on merits must not involve a decision on questions of fact. The said judgment is, therefore, not an authority for the proposition that once writ petition is admitted for final hearing, such a writ petition can in no circumstances, be refused an adjudication on merits. Much would depend on what is the controversy in the writ petition. In the instant case, as evident from the pleadings and the arguments advanced by the parties, the issues involved raise pure questions of law and, therefore, this Court, having regard to the questions involved, is inclined to go into the merits of the controversy leaving the consequential order that would be called for in terms of the decision of this Court on the legal issues, to be settled by the Authority under the Act.

5. The first ground of attack of the petitioner against the assessment order dated 21.3.1997 is the addition of the entire turnover of the overseas part of the contract

to the gross turnover of the petitioner assessee. The contract agreements executed by and between the parties are available on record and so are the documents relating to the import of goods and services pursuant to the contract agreement. The aforesaid imports were made by the Numaligarh Refinery Limited in its own name and under its own importer code number. The import of the goods into the territory of India were on account of a sale and purchase made pursuant to the contract agreement by and between the parties. Article 286 of the Constitution imposes a fetter on the power of the State to impose a tax on the sale and purchase of goods, where such sale or purchase of goods took place in the course of import of the goods into, or export of the goods out of the territory of India. In the case of Ben Gorm Nilgiri Plantations Company, reported in 1964 15 STC 753, the Apex Court had laid down the test of integral connection or inextricable link between the sale and the actual import or export to satisfy the requirement of sale a being in the course of the import or export particular commodity. The following passage from the judgment of the Apex Court in the above case may be usefully extracted hereunder;

"A sale in the course of export predicated a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be an obligation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export. A transaction of sale which is preliminary to export of the commodity sold may be regarded as a sale for export, but is not necessarily to be regarded as one in the course of export, unless the sale occasions export. And to occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it. Without such a bond, a transaction of sale cannot be called a sale in the course of export of goods out of the territory of India.

Conversely, in order that the sale should be one in the course of import, it must occasion the import and to occasion the import there must be integral connection or inextricable link between the first sale following the import and the actual import provided by an obligation to import arising from statute, contract or mutual understanding or nature of the transaction which links the sale to import which cannot, without committing a breach of statute or contract or mutual understanding, be snapped."

6. The judgment of the Apex Court in the case of Deputy Commissioner of Agricultural Income Tax and Sales Tax v. Indian Explosives Ltd. reported in Vol.

(1985) 60 STC 310, relied upon by the learned counsel for the petitioner reiterates the aforesaid law. The Apex Court has held that if the movement of the goods from a Foreign Country of India is in pursuance of the requirement flowing from a contract of sale between the assessee and the local purchaser, such sales must be held to be in the course of import. Applying the ratio of the aforesaid judgment of the Apex Court, what clearly transpires in the present case is that the movement of the goods pertaining to the overseas part of the contract, into India followed the sale pursuant to the agreement between the parties. There is no dispute that the overseas part of the contract of the turnover relating to the aforesaid contract for the assessment period amounted to Rs. 3,74,97,667.00. No disputed has been raised on behalf of the Revenue that tried turnover relating to the Import of goods pursuant to the contract is not to the extent claimed by the Assessee as mentioned hereinabove, i.e., Rs. 3,74,97,667.00 or that the aforesaid turnover needs to be quantified to some other figure. In view of the law enunciated by the Apex Court as noticed hereinabove, and in the light of the provisions of Article 226 of the Constitution, the aforesaid addition of Rs. 3,74,97,667.00 to the gross turnover of the petitioner appears to be wholly illegal and unauthorised and the assessment order insofar the aforesaid addition is concerned is liable to be interfered with.

7. The next ground of challenge against the assessment order dated 21.3.1997 is the disallowance of the claim of deduction of Rs. 36,49,000.00 from the gross turnover of the assessee, which deduction was claimed by the assessee on the basis that the said amount represents the value of design and engineering. The conclusion of the Assessing Officer on the aforesaid point appears to be based on a consideration of the definition of "work contract", as contained in Section 2(38) of the Act. Section 2(38) of the Act defined works contract. But the entire turnover relating to a works contract is not taxable. It is the value of the goods used in the works contract as distinguished from the labour and service component that has become taxable by virtue of the legal fiction of "deemed sale" introduced by the 46th amendment to the Constitution incorporating Clause 29(A) in Article of the Constitution. It is the transfer of the property in the goods involved in the execution of a works contract that constitute the taxable event as held by the Apex Court in the case of Gannon Dunkerly & Co. and Ors., v. State of Rajasthan and Ors. reported in Vol (1993) 88 STC 204, cited by the learned counsel for the petitioner. In the aforesaid judgment, the Apex Court had laid down that the value of the goods involved in the execution of the work contract will have to be determined by taking into account the value of the entire works contract and deducting there from the charges for labour and service which would cover, amongst others, charges for planning, design and architect fees. The value of design and engineering, therefore, will have to be excluded from the value of the works contract on the ratio of law laid down by the Apex Court in the case of Gannon Dunkerley & Co. and Ors. (supra), It will not be necessary for this Court while deciding the question involved to go into the further question as to whether the design and engineering part of a works contract involve any transfer of

property in goods giving rise to the taxable event to sustain the levy in question. The said question, thus may be left to be determined in an appropriate case. However, for the purpose of the present case, it will be sufficient to record that the deduction disallowed on account of the value of design and engineering by the Assessing Authority does not appear to be correct.

8. Coming to the last ground of challenge made in the present proceeding against the assessment order in question, it is noticed that the Assessing Authority had added an amount of Rs. 68,63,36,094.00 to the gross turnover of the petitioner assessee by disallowing the deduction claimed on the ground that the aforesaid value represents the turnover of work executed through subcontractors. The Assessing Officer appears to have reached the conclusion that the assessee would not be entitled to the aforesaid deduction and the amount in question is liable to be added to the turnover of the assessee by relying on the explanation to Section 2(38) of the Act to the effect that all contracts including sub-contracts in relation to the same works is to be deemed as a single works contract. The assessee had claimed the aforesaid deduction on the ground that in respect of the works executed through subcontractors of the value of Rs. 63,36,094.00, tax at the applicable rate was deducted at source from the bills of the sub-contractors and deposited in the Government Treasury. The details of such tax deducted and stated to have been deposited in the Treasury were filed before the Assessing Officer and are also a part of the record of the present proceedings. The Assessing Officer instead of addressing himself to the aforesaid point at issue, after considering the explanation to Section 2(38) of the Act, relied on the communication issued by the sub-contractor to the effect that no sales tax is payable by them on account of the Sub-contract and tax, if any, is payable by the Principal Contractor, to come to the impugned conclusion. Under Rule 14(1)(c) of the Assam General Sales Tax Rules, 1993, the turnover relating to the sub-contractors is to be deducted subject to production of proof of payment of tax by the sub-contractors. The logic is plain and simple. If the turnover relatable to the sub-contractor has already suffered taxation at the hands of the sub-contractor, such turnover is liable to be excluded from the turnover of the Principal Contractor subject to proof of payment of tax in respect of such turnover. The dispute on this count, therefore, turns out to be on questions of fact needing appreciation of relevant materials. The matter does not appear to have been examined by the Assessing Authority from the aforesaid stand point. At the same time, this Court in exercise of power under Article 226 of the Constitution would not ordinarily appreciate the effect of documents introduced by the assessee in supports of its claim for a deduction as the same is essentially a matter for the Assessing Authority to appreciate and determine. Consequently, while setting aside the aforesaid part of the assessment order the same shall now be re-determined by the Assessing Authority, in accordance with the law laid down in the present judgment and order.

9. For the reasons aforesaid, this writ petition is allowed to the extent indicated above. The Assessing Officer will now carry out necessary corrections in the assessment order in the light of the directions contained herein and shall also determined the entitlement of the petitioner assessee to deduction of the value of the turnover relatable to execution of the work by sub-contractors as directed.