(2016) 08 MEG CK 0003

MEGHALAYA HIGH COURT

Case No: Writ Petition (C) No. 126 of 2013

NG. Meghachandra Singh	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision: Aug. 2, 2016

Acts Referred:

- Meghalaya Value Added Tax Act, 2003 - Section 106, Section 5

Citation: (2016) 4 NEJ 386

Hon'ble Judges: Mr. Dinesh Maheshwari, CJ. Mr. Ved Prakash Vaish, J.

Bench: Division Bench

Advocate: Mr. H.L. Shangreiso and Ms. P. Agarwal, Advocates, for the Petitioner; Dr. B.P. Todi, Advocate General, with K.P. Bhattarcharjee, G.A. Mr. R. Deb Nath, CGC and Mr. Ankit Todi, Advocates, for the Respondents

Final Decision: Disposed Off

Judgement

Mr. Dinesh Maheshwari, C.J.(Oral) - These two writ petitions involving similar nature issues have been considered together and are taken up for disposal by this common order.

2. We have heard Mr. HL Shangreiso, learned counsel for the petitioner in W.P. (C) No.126 of 2013, Ms. P Agarwal, learned counsel for the petitioner in W.P. (C) No.16 of 2013, learned Advocate General Dr. BP Todi, assisted by Mr. KP Bhattacharjee, GA for the contesting respondents related with the State of Meghalaya in both the petitions and Mr. R Deb Nath, learned counsel for the respondents No. 1 and 2 in W.P. (C) No.126 of 2013. In W.P. (C) No.16 of 2013, nobody has appeared on behalf of respondents No. 4 to 7, to whom notices were sent in the year 2013. Although there is no clear report of their service, but learned counsel for the petitioner has candidly submitted that against them, no relief on the principal aspects is being sought and they had only been the proforma parties herein.

3. Put in a nutshell, the basic assertion of the petitioners in these writ petitions is that while making payments of bills against their works contracts, deduction at source, of Value Added Tax (''VAT'') payable to the State of Meghalaya per Section 106 of the Meghalaya Value Added Tax Act, 2003 (hereinafter referred to as ''the Act''/''the Act of 2003''), could only be on the ''taxable turnover? after providing for deduction as per Section 5 thereof and not on the ''total value of the work contracts?.

4. Though learned counsel appearing for the parties are more or less ad idem that the issues raised in these petition could be concluded by the ratio of Division Bench decision of the then Shillong Bench of Gauhati High Court in **MES Builders Association of India and others v. Union of India and others: 2010 (2) GLT 310** and we are inclined to accept the submissions but then, it appears appropriate that the ratio in MES Builders Association''s case be clarified a little, for the reasons indicated infra.

5. In the given circumstances, not much of dilatation on the factual aspects appears necessary; and only a brief reference to the relevant background aspects would suffice. The petitioners herein were awarded separate works contracts. The petitioner of W.P. (C) No.126 of 2013 was awarded the works contract by the Garrison Engineer (1) (AF), Shillong Zone, Shillong on 10.08.2004 for construction of "Married Accommodation For Service Personnel at L/Peak, Shillong i.e., 13 Blocks comprising 95 quarters" with the lump sum contractual amount of Rs.5,28,46.641.17. On the other hand, the petitioner of W.P. (C) No.16 of 2013 was awarded the works contract by Chief Engineer/Con-II N.F. Railway, Maligaon on 10.12.2012 for "Balance earthwork in filling between Ch.17.50 Km to Ch.19.47 Km with blanketing, construction of 3 Nos. of minor bridges, goods circulating area and platform, passenger platform etc. in connection with construction of New B.G. Railway Line from Dudhnoi (Assam) to Mendipathar (Meghalaya)" at the contractual amount of Rs.26,17,94,929.35.

6. The common features in both these petitions are that the petitioners-contractors have received running payments for the works in question but then, the question, of deduction of VAT payable to the State of Meghalaya in terms of Section 106 of the Act of 2003, arose at the time of final payments in the manner that, according to the petitioners, authorities concerned were poised to deduct the tax at source on the total value of the work contracts without providing for deductions as per Section 5 thereof.

7. Aggrieved by such alleged propositions of the respective respondents, of deducting VAT on the total value of the contract amount, the petitioners preferred these petitions in this Court. It is noticed that in W.P. (C) No.16 of 2013, the Court also provided for interim relief on 11.02.2013 that the respondents will not deduct any tax under Section 106 of the Act at source from the bills of the petitioner for the works contract in question.

8. It has been contended by the learned counsel for the petitioners that the question of value at which deduction at source could be made is no more res integra with the decision in MES Builders Association (supra) wherein, after noticing the scheme of the Act of 2003 and inconsistency likely to result from the existing Section 106 therein, the High Court read down the provisions so as to make them workable; and settlement of the respective bills ought to be in accordance with the said decision in MES Builders Association''s case.

9. The learned Advocate General appearing for the State of Meghalaya does not dispute the position that the requirements of Section 106 of the Act of 2003 are to be met with reference to the decision in MES Builders Association (supra). However, learned Advocate General would submit that any deduction at source shall nevertheless remain subject to the final assessment by the concerned Assessing Officer under the Act of 2003. Mr. R Deb Nath, learned counsel appearing for the other respondents in W.P. (C) No.126 of 2013 would, however, submit that they were rightly seeking to make payment to the contractor after providing for such deductions as are permissible under Schedule-IV A of the Act of 2003.

10. The position of law, more or less indisputable, is that in the scheme of the Act of 2003, while the incidence of tax is specified in Section 3 thereof, the charging provision is Section 5 that read as under:-

"5. Levy of Value Added Tax on goods specified in the Schedules appended to this Act – (1) Subject to the provision of this Act, and Rules, there shall be levied a tax on the turnover of sales of goods specified in Schedule II, III and IV appended to this Act at every point of sale of such goods within the State at the rate specified therein.

(2) Taxable turnover of sales in relation to a dealer liable to pay tax on sale of goods under sub-section (1) of section 3 shall be part of the gross turnover of sales during any period which remains after deducting therefrom;

(a) sales of goods declared as exempted under Section 8(i)(a);

(b) sales of goods which are shown to the satisfaction of the Commissioner to have taken place –

(i) in the course of inter-State trade or commerce; or

(ii) outside Meghalaya; or

(iii) in the course of the import of the goods into or export of the goods out of the territory of India;

Explanation - Section 3, 4 and 5 of the Central Sales Tax Act, 1956 shall apply for determining whether or not a particular sale or purchase has taken place in the manner indicated in sub-clause (i), sub-clause (ii) or sub-clause (iii);

(c) in case of turnover of sales in relation to works contract, the charges towards labour, services and other like charges and subject to such conditions as may be prescribed:

Provided that in the cases where the amount of charges towards labour, services and other like charges in such contract are not ascertainable from the terms and conditions of the contract, the amount of such charges shall be calculated on the basis of such percentages of the value of works contract as specified in Schedule IV A appended to this Act;

(d) such other sales on such conditions and restrictions as may be prescribed."

On the other hand, special provisions for deduction of tax at source and the mechanism therefor are contained in Section 106 of the Act of 2003 that reads as under:-

"106. Special Provisions relating to deduction of tax at source-Notwithstanding anything contained in any other provisions of this Act – (1) Every person (excluding an individual, Hindu undivided family, a firm or a company not under the control of the Government) responsible for making any payment of discharging any liability on account of any amount payable for the transfer of property in goods (whether as goods or in some other form) involved in a work contract for the transfer of the right to use any goods for any purpose; or

(2) Every person responsible for paying sale price or consideration or any amount purporting to be the full or part payment of sale price or consideration in respect of any sale or supply of goods liable to tax under this Act to the Government or to a company, corporation, board, authority, undertaking or any other body by whatever name called, owned, financed or controlled wholly or substantially by the Government shall at the time of credit to the account of or payment to the payee of such amount in cash, by cheque, by adjustment or in any other manner whatsoever, deduct tax therefrom in the prescribed manner at the rate specified in the Schedule to the Act in respect of sale or supply of goods or transfer of the right to use any goods and in respect of work contract at the rate of 12.5% after allowing percentage of deduction from the work value as prescribed in Schedule IV-A appended to the Act:

Provided that no deduction shall be made under this sub-section where the amount paid or credited by such person in any financial year does not exceed the prescribed amount or where the dealer produces a certificate as prescribed from the Commissioner that he has no liability to pay tax or that he has paid tax payable by or due from him.

(3) Any tax deducted under sub-section (2) shall be paid to the account of the State Government in such manner and within such time as may be prescribed.

(4) The person making any deduction of tax under sub-section (2) and paying it to the account of the State Government shall issue a certificate of tax deduction to the payee in such manner in such form and within such time as may be prescribed.

(5) Any tax deducted under sub-section (2) and paid to the account of the State Government shall, on production of the certificate of tax deduction under sub-section (4) by the payee be deemed to be tax paid by the payee for the relevant period and shall be given credit in his assessment accordingly.

(6) No interest or penalty shall be imposed or no recovery proceedings against the dealer/payee shall be initiated in respect of tax deducted under sub-section (2)."

11. In the case of MES Builders Association (supra), the Shillong Bench of the Gauhati High Court proceeded to examine and analyse the aforesaid provisions contained in Section 5 and Section 106 of the Act of 2003; and found the shortcomings in Section 106 that even while the charging provision i.e., Section 5 provided for liability for tax on "taxable turnover", the mechanism for deduction at source, as contained in Section 106 of the Act did not provide for confining the quantum of advance tax to the taxable turnover alone. The Court, inter-alia, observed as follows:-

"12. It is against the backdrop of the aforesaid propositions of law laid down by the Apex Court that we propose to examine the validity of Section 106 of the Act. As already noticed, this provision is not the charging section, but is the mechanism section, and is ancillary to Section 5 of the Act. What this provision plainly says is that every person or body responsible for paying the bills in respect of works contract shall deduct in advance tax from the bill of the contractor at the rate of 12.5% after allowing percentage of deduction from the work value as prescribed in Schedule IV-A to the Act. The percentage of deduction so allowed is confined to those prescribed in Schedule IV-A to the Act and no other. No deduction/exemption of sales tax is also permissible for transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract which will constitute a sale in the course of inter-State trade or commerce or sale outside the State of Meghalaya or a sale in the course of import into or export out of the territory of India. Section 8 of the Act exempts the sale of goods listed in Schedule I appended to the Act subject to conditions and exceptions set out therein, etc. from payment of sales tax. On the other hand, the charging section, namely, Section 5 (2) clearly provides that the taxable turnover must be arrived at after deducting from the gross turnover (a) sales of goods declared as exempted under Section 8(i)(a), (b) sales of goods in the course of inter-State trade or commerce, (c) and sales outside Meghalaya, (d) sales in the course of import and export and (e) charges towards labour services and other like charges if they are ascertainable from the terms and conditions of the contract. As indicated earlier, Section 106 is the mechanism section and is ancillary to the charging section, namely, Section 5. When the liability on tax under Section 5 is on taxable turnover, the deduction of tax at source should also be

in terms of the taxable turnover. In other words, Section 106 does not provide any mechanism for confining the quantum of advance tax to the tax attributable to the taxable turnover: it should conform to the charging section. ..."

12. The Court further observed that Section 106 of the Act of 2003 not only failed to conform to the requirements of the principal provision contained in Section 5 of the Act of 2003 but had gone beyond the legislative competence of State Legislature when it did not make the provision for exclusion/deduction envisaged by Section 5 inasmuch as, per Entry 92-A of the Union List read with Article 286 of the Constitution, the State could not have levied tax on inter-State sale or on the sale made in the course of import. The Court said,-

"13. ..The tax liability with reference to a works contract can arise only on the taxable turnover which will be arrived at after excluding turnover pertaining to inter-State sales, import sales, outside the State sales, exempted goods, tax suffered goods, labour charges and payment to sub-contractors. ..

14. To summarise the foregoing discussion, a combined reading of Section 106 (2) and the charging section, namely, Section 5 (2) of the Act leaves no room for doubt that the person responsible for paying any sum to a contractor for carrying out any works contract which involves the transfer of property in goods ("the contractee" for convenience) is obliged to deduct, at the time of credit of that sum to the account of the contractor or payment thereof to him, an amount "at the rate of 12.5% after allowing percentage of deduction from the work value as prescribed in Schedule IV-A appended to the Act", provided the value of the work exceeds rupees one lakh. The permissible deduction prescribed in Schedule IV-A to the Act, as already explained earlier, is referable only to the proviso to Section 5(2)(c) of the Act, namely, where the amount of charges towards labour, services and other like charges in such contract are not ascertainable from the terms and conditions of the contract. Except for this, the deduction, therefore, is towards the sales tax that is payable to the State upon the total value of the works contract and it is of 12.5% of the total value of the works contract. .. On closer scrutiny of Section 106 of the Act, it becomes crystal clear that for the purpose of deduction of the State sales tax at source on the value of the works contract, neither the Commissioner nor the contractee, who issues the Tax Deduction Certificate is required or entitled to take into account the fact that the works contract involves transfer of property in goods consequent upon an inter-State sale, an outside sale or a sale in the course of import. In other words, there is no express provision in the impugned section obligating the contractee or the Commissioner to take into account the deductions mandated by the charging section, namely, Section 5(2)(a), (b) and (c) of the Act. All that the impugned section says is that the contractee is to deposit towards the contractor''s liability to State sales tax at 12.5% of such amount as he credits or pays to the contractors, regardless of the fact that the value of the works contract may include the value of inter-State sales, outside sales or sales in the course of import.

In the view that we have taken, we have no hesitation to hold that the provisions of Section 106 are beyond the legislative competence of the State Legislature since the State Legislature is prohibited by Entry 92-A of the Union List read with Article 286 of the Constitution from making any law for levying sales on inter-State sales, outside sales or sales in the course of import."

13. In regard to the contention on behalf of the Government that ultimately, the adjustment was to be made at the time of final assessment by the Assessing Officer and claim for refund/adjustment can also be made, the Court observed that even when the adjustment was to be made at the time of assessment, it was impermissible for the State Legislature to impose advance tax on the turnover which was not exigible to tax. Having said so, the Court observed that prima facie, Section 106 of the Act of 2003 could be declared ultra vires the said Entry 92-A read with Article 286 of the Constitution but then, referred to the principles of reading down so as to save the provision from being unconstitutional; and observed that the apparent contradiction of Sections 106 (2) and Section 5 (2) of the Act of 2003 could be harmonised (rather resolved) by reading the words "of the taxable turnover referred to in Section 5 (2) of the work value" after the numerals/figures "12.5%" in Section 106 (2) of the Act of 2003. The Court proceeded to hold as under:-

"17. The underlying principle which can be culled out from the foregoing discussion is that where the language of the statute leads to manifest contradiction of the apparent purpose of the enactment, the Court can, of course, adopt a construction which will carry out the obvious intention of the legislature. But we must hasten to add that in the course of construction of the relevant provisions, there must be manifest contradiction or ambiguity or defect or omission. Judging the provisions of the mechanism section i.e. Section 106 and the charging section, namely, Section 5 of the Act on the touchstone of the aforesaid legal principles, we are of the considered opinion that there is apparent contradiction between these two provisions. The width and amplitude of the machinery or ancillary provision has become larger than the charging section, which is clearly unwarranted. The easy way out is, no doubt, to simply quash the impugned provision as it is found to have transgressed the constitutional limitations imposed by Entry 92-A of the Union List read with Article 286 of the Constitution, which is impermissible. But our endeavour must always at first be to save the impugned provision from the vice of unconstitutionality and not "to be trigger-happy shooting at sight every suspect law" as that would amount to "judicial legicide". If, on giving one interpretation, the statute becomes unconstitutional and, on another interpretation, it will be constitutional, then this Court should prefer the latter on the ground that the legislature is presumed not to have intended to have exceeded its legislative powers. Sometimes to uphold the constitutional validity, the statutory provision has to be read down. Thus, the apparent contradiction between Section 106(2) and Section 5(2) of the Act can be harmonised by reading the words "of the taxable turnover referred to in Section 5(2) of the work value" after the numerals/figures

"12.5%" in Section 106(2) of the Act. This restrictive interpretation has become imperative so as to save the impugned provision from becoming violative of Entry 92-A of the Union List read with Article 286 of the Constitution, which prohibits imposition of sales tax by the State Legislature upon declared goods of special importance, sales in the course of inter-State trade or commerce, sales outside State and sales in the course of import into, or export out of, the territory of India. While imposing sales tax on deemed sales, the State-respondents shall always keep in mind the principles laid down by the top Court in paragraph 51 of Gannon Dunkerly case (supra) in order to save the sales tax from unconstitionality."

(underlining supplied)

14. It is not in dispute that there is no decision to the contrary and the learned Advocate General candidly admits that the said decision was not challenged by the State of Meghalaya. Thus, the indisputable position remains that the said decision in MES Builders Association has attained finality and State of Meghalaya has accepted the same. The consequential position is that with the words read by the Court, for restricting the width and amplitude of the machinery provision, Section 106 (2) of the Act of 2003 would appear in the modified phraseology as under:-

(2) Every person responsible for paying sale price or consideration or any amount purporting to be the full or part payment of sale price or consideration in respect of any sale or supply of goods liable to tax under this Act to the Government or to a company, corporation, board, authority, undertaking or any other body by whatever name called, owned, financed or controlled wholly or substantially by the Government shall at the time of credit to the account of or payment to the payee of such amount in cash, by cheque, by adjustment or in any other manner whatsoever, deduct tax therefrom in the prescribed manner at the rate specified in the Schedule to the Act in respect of sale or supply of goods or transfer of the right to use any goods and in respect of work contract at the rate of 12.5% of the taxable turnover referred to in Section 5 (2) of the work value after allowing percentage of deduction from the work value as prescribed in Schedule IV-A appended to the Act.

(the phrase read by the Court in the provision shown in bold-underlining)

15. The spirit of the order of the Court in MES Builders Association''s case has been clear that there should not be a deduction of tax at source on the value of the contract but, such a deduction at source should only be on such turnover that would be taxable, i.e., taxable turnover after providing for the deductions envisaged by Section 5(2) of the Act. However, If we literally read the provisions of Section 106 (2) of the Act of 2003 with insertion of the phrase as indicated in paragraph 17 of the decision in MES Builders Association, the resultant position may lead to inconsistency in relation to clause (c) of Section 5(2) of the Act, because therein, two alternative methods for turnover of sales in relation to works contract are provided: one in the principal provision whereby, the charges towards labour, services and

other like charges (subject to such conditions as may be prescribed) are to be deducted; and second, in the proviso whereby, such percentages of the value of works contract as specified in Schedule IV-A is to be deducted in the cases where the amount of charges towards labour, services and other like charges are not ascertainable from the terms and conditions of the contract. If it is provided that in the first instance, the percentage as prescribed in Schedule IV-A shall be deducted and thereafter, taxable turnover shall be worked out with deductions as per Section 5(2) of the Act, an inconsistency is likely to occur in the cases where the amount of charges towards labour, services and other like charges are indeed ascertainable from the terms and conditions of the contract. If the deduction had already been made per Schedule IV-A, further deduction per Section 5(2)(c) would neither be permissible nor that has been the intention of the Hon''ble Court while deciding the matter in MES Builders Association (supra).

16. In fact, learned counsel for the parties have also candidly submitted that it had never been the case of anybody nor it could be that the deductions for the purpose of Section 106 (2) could be claimed twice over. Thus, it appears necessary to harmonise the ratio in MES Builders Association (supra) with the statutory provisions. In our view, taking the ratio as it is from the decision in MES Builders Association and keeping in view the scheme of the Act of 2003, appropriate it would be to say that in relation to Section 106(2) of the Act, if the deduction had already been made per Schedule IV-A, further deduction per Section 5(2)(c) would not be made. In this manner, the provisions would stand clear that for the purpose of Section 106 (2) of the Act of 2003, the deduction in relation to Section 5 (2) (c) of the Act of 2003 would be either on the actual value of labour, services and other like charges; or it would be at the percentage provided in Schedule-IV-A, in such cases where the charges towards labour, services etc. are not ascertainable from the terms and conditions of the contract. This clarification appears sufficient to dispose of these matters and no further adjudication is called for.

17. So far the submissions of the learned Advocate General that ultimately the matters remain subject to the final assessment by the Assessing Officers are concerned, in our view, no comments are requisite thereupon. It goes without saying that any deduction made by the principal while making payments towards the works contract would always remain subject to the final assessment under the Act of 2003 by the Assessing Officer; and deduction at source by the principal, by itself, is not decisive of the actual amount of VAT payable.

18. So far the question of final payment to the petitioners by their respective principals is concerned, we are clearly of the view that their final bills should now be settled with reference to the provisions of the Act of 2003 read with the decision in MES Builders Association (supra) as also the observations foregoing. Needless to reiterate that any deduction by the principal shall ultimately remain subject to the final assessment by the concerned Assessing Officer.

19. Of course, it would be expected of all the authorities concerned to finalise the bills and other proceedings with reasonable expedition.

20. The petitions stand disposed of accordingly. No costs.