

**(2014) 12 CAL CK 0064**

**Calcutta High Court**

**Case No:** W.P. 24939 (W) of 2012 and CAN 10009 of 2014

Reliance Infrastructure Ltd.

APPELLANT

Vs

Deputy Commissioner, Sales Tax

RESPONDENT

**Date of Decision:** Dec. 23, 2014

**Acts Referred:**

- Central Sales Tax Act, 1956 - Section 14, 15, 3, 4, 5
- Constitution of India, 1950 - Article 269, 286, 286(1)(b), 286(3), 286(3)(a)
- West Bengal Value Added Tax Act, 2003 - Section 46

**Hon'ble Judges:** Harish Tandon, J

**Bench:** Single Bench

**Advocate:** Biswajit Bhattacharjee, Sushil Verma, C. Bhattacharya and Partha Basu, Advocate for the Appellant; Abhratosh Majumdar and Soumitra Mukherjee, Advocate for the Respondent

### **Judgement**

Harish Tandon, J.

The International Competitive Bidding Tender commonly known as Global Tender was invited by the Damodar Valley Corporation (in short DVC) for supply and installation of main plant package for Raghunathpur Thermal Power Project, Stage-I.

2. The bid was not restricted to a foreign bidder as the domestic bidder was also permitted to participate therein.
3. Three contract agreements were entered into on 6th December, 2008 wherein the first contract relates to the supply including design, engineering, manufacturing, inspection, testing and packing of a plant and equipments including mandatory spares of the main plant as Turn Key Package from abroad, the second one also relates to supply contract inclusive of the above of Indian origin and the third contract is restricted to a service. All the aforesaid contracts were agreed under a Turn Key Package for commissioning and setting up of the Thermal Power Project and the ownership of the plant and equipments including the spare parts procured

in the country or by import shall be transferred to the DVC.

4. A search and seizure was conducted by the Bureau of Investigation and the petitioner was directed to appear before the Investigating Officer. A final report was drawn containing the finding on the seized documents and evidence recorded during the investigation. On the basis of the return, an assessment was undertaken in terms of Section 46 of the West Bengal Value Added Tax Act, 2003 (in short VAT Act) and a demand was raised against the petitioner. The said order of assessment is challenged in this writ petition primarily on the grounds that the said assessment order is violative of principles of natural justice and the imposition of VAT on inter-State Sale or import of the goods treating the three separate contracts to be composite one.

5. At the initial stage of hearing, the writ petition was dismissed because of the existence of alternative efficacious remedy. It would appear from the judgment delivered on 9th September, 2013 that the only point raised before this Court was that the order of assessment is passed without affording an opportunity of hearing and the said point having raised this Court held that the impugned order is capable of being challenged before the Taxation Tribunal constituted under the West Bengal Taxation Tribunal Act, 1987 and by virtue of Section 5 and 6 of the Tribunal Act, the jurisdiction of the High Court is excluded.

6. The said judgment was assailed by the petitioner before the Division Bench who set aside the said order and remanded the matter to the Trial Court for reconsideration in the light of the observations made therein. The order dated 19th March, 2014 passed by the Division Bench would reveal that a question was formulated as to whether the assessing officer has not usurp the jurisdiction under West Bengal Value Added Tax when he has taxed the transactions not liable to tax under the provision of the said Act. The Division Bench observed:

"The learned trial Court shall consider the question as to whether the transactions are covered by the Central Sales Tax Act or by the West Bengal VAT Act. In the event, the learned trial Court is of the opinion that the West Bengal VAT Act is applicable, he shall be entitled to direct the writ petitioners to approach the learned trial Court. Consequence otherwise will follow as per the decision which he may arrive at."

7. This is how the matter has come again before this Court and as observed by the Division Bench, the point in issue is whether the transactions pertaining to the supplies in terms of the aforesaid contracts is excisable to the VAT or not.

8. The learned advocate for the petitioner submits that the Deputy Commissioner appointed under the West Bengal VAT Act cannot usurp the power to bring the sale of the goods effected in course of inter -State sale or by import within the purview of the West Bengal VAT Act. He further submits that three independent contracts were entered into between the DVC and his client of which two of them relates to the supply by import and by way of inter-State sale and, therefore, the authority have

wrongly interpreted those agreements to be a single one and treat the sale of goods to have been effected within the state to attract the VAT. By referring the three separate contracts, he would contend that the contract have supplied of the goods by purchase from abroad. The separate rate is provided in foreign currency, which logically infers that the sale is effected by import and, therefore, the VAT Act is not applicable. By referring another contract, he further submits that though the rates are mentioned in Indian currency but it would be evident therefrom that the supplies are to be made by procuring the goods from the other state which constitutes inter-State Sale. So far as the third contract is concerned, it admittedly relates to the services, which cannot be brought within the purview of the West Bengal VAT Act. Lastly, he submits that the Deputy Commissioner though recorded that there are three separate contracts but have misinterpreted those contracts while arriving at the conclusion that those are composite works contract by creating a legal fiction that the transfer of property in goods involved in the execution of the works contracts is deemed to be a sale for the purpose of VAT.

9. The learned advocate for the department submits that by Forty-sixth Amendment having brought in the Constitution of India, the works contracts are capable of being divided into a supply and service and the state is competent to legislate so far as the imposition of sales tax on the component of supply. He further submits that if the contract is composite and not capable of separated, the state is not incompetent to charge the sales tax. By referring the contracts, it is submitted that those are turn key contracts and the supply cannot be delinked as the intention of the parties are to be set up a complete operative plant. He thus submits that whether the work contracts are separable and divisible is a question which can be agitated before the Taxation Tribunal and this Court, therefore, should not usurp the power of the Taxation Tribunal in view of the embargo created under Section 5 and 6 of the West Bengal Tax Tribunal Act, 1987.

10. Before proceeding to deal with the points formulated by the Division Bench, it would be beneficial to look at the historical background which prompted the amendments to be introduced by the Constitution (Forty-sixth Amendment) Act, 1982.

11. Before India got independence, the Government of India Act, 1935, confers the legislative power on the provincial legislatures to impose taxes on sale of goods and on advertisements under Entry 48 in List II of the Seventh Schedule. The framers of our Constitution retained the aforesaid power on the Parliament with minor amendments under Entry 92 in List I of the Seventh Schedule. By virtue of Entry 54 in List II, the State was also empowered to legislate on taxes on the sale or purchase of goods other than newspapers.

12. There has been a series of debates on the issue whether the word "sale" can be given the same meaning to the goods involved in execution of the works contracts for the purpose of imposition of sales tax both under Entry 48 in List II in the

Seventh Schedule of the Government of India Act, 1935 which is retained with some modifications under Entry 92 of List I of the Seventh Schedule to the Constitution and Entry 54 in List II of the Seventh Schedule to the Constitution. There appears to be divergent views on the above issue until the matter came up before the Supreme Court in the The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., wherein it is held that the expressions "sale of goods" shall have the same meaning as provided in sale of goods Act, 1930. In relation to the building contract, it is held that the same is composite and indivisible. There cannot be a sale of goods as the contractor is to construct building according to the specification enshrined in the contract and the provincial legislature or the Parliament is not competent to impose a tax on supply of the materials used in execution of the building treating the same as sale. However, it was clarified therein that where the parties have entered into distinct and separate contracts that is one fourth of transfer of materials on consideration and other for rendering services and the work done on payment of money, it would not lead to distinct and separate contracts and the power of the state to impose tax is beyond any question. The judgment rendered in Gannon Dunkerley & Co. (Madras) Ltd. (Supra), the Law Commission in its 61st report suggested certain recommendations, which prompted the Forty-sixth amendment to be brought in the Constitution. By the said amendment, clause 29-A was brought under Article 366 and simultaneously clause 3 of Article 286, which originally stood was substituted by a new clause. It would be profitable to quote the aforesaid provisions brought by way of Forty-sixth Amendment which runs thus:--

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

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (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;
- (c) a tax on the delivery of goods on hire-purchase or any system or payment by instalments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
- (f) a tax on the supply, 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), where such supply or service, is for cash, deferred payment or other valuable consideration,

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."

9. Clause (3) of Article 286 provides as under :

"(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,-

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of clause (29-A) of Article 366."

13. The Forty-sixth Amendment was challenged under Article 32 of the Constitution before the Supreme Court by the Builders Association of India on two grounds, firstly, that the said amendment have not been ratified by the legislatures not less than one half of the states before the bill was presented to the President for assent and, secondly, the state cannot ignore Article 286 of the Constitution and the provisions of the Central Sales Tax Act by making assessment under the Sales Tax Laws of the states. The Constitution Bench upholds the constitutionality of the said amendment and negated the first objection. However, on the second point of objection, it is held that the Sales Tax Laws passed by the legislature of the state levy tax on the transfer of property in goods involved in the execution of the works contracts are subject to such restrictions and conditions mentioned in the different clauses of Article 286 of the Constitution. It is further held that prior to the said amendment, the Sales Tax cannot be levied when the contract is indivisible and composite works contracts which by the said amendment is divisible by a legal fiction into one for sale of goods and other for supply of labour and services. It is thus held that the state power to levy Sales Tax on the value of the goods involved in the works contracts is preserved and has not been taken away.

14. The matter did not raise there as it led to another point which infact was raised before the Constitution Bench of the Supreme Court by Gannon Dunkerley & Co. (Madras) Ltd. (Supra), that the state cannot levy tax on transfer of property in goods involved in execution of the works contract under Entry 54 of the State list in respect of a transactions which are in the nature of sales in course of inter-State sale trade or in course of import.

15. In the celebrated judgment delivered in case of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, the Constitution Bench held :

"31. The legislative power of the States under Entry 54 of the State List is subject to two limitations - one flowing from the entry itself which makes the said power "subject to the provisions of Entry 92-A of List I", and the other flowing from the prohibition contained in Article 286. Under Entry 92-A of List I, Parliament has the power to make a law in respect of taxes on sale or purchase of goods other than

newspapers where such sale or purchase takes place in the course of inter-State trade or commerce. The levy and collection of such tax is governed by Article 269. This shows that the legislative power under Entry 54 of the State List is not available in respect of transactions of sale or purchase which take place in the course of inter-State trade or commerce. Similarly clause (1) of Article 286 prohibits the State from making a law imposing or authorising the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State or (b) in the course of the import of goods into or export of the goods out of the territory of India. As a result of the said provision, the legislative power conferred under Entry 54 of the State List does not extend to imposing tax on a sale or purchase of goods which takes place outside the State or which takes place in the course of import or export of goods. In view of the aforesaid limitations imposed by the Constitution on the legislative power of the States under Entry 54 of the State List, it is beyond the competence of the State Legislature to make a law imposing or authorising the imposition of a tax on transfer of property in goods involved in the execution of a works contract, with the aid of sub-clause (b) of clause (29-A) of Article 366, in respect of transactions which take place in the course of inter-State trade or commerce or transactions which constitute sales outside the State or sales in the course of import or export. Consequently, it is not permissible for a State to frame the legislative enactment in exercise of the legislative power conferred by Entry 54 in State List in a manner as to assume the power to impose tax on such transactions and thereby transgress these constitutional limitations. Apart from the limitations referred to above which curtail the ambit of the legislative competence of the State Legislatures, there is clause (3) of Article 286 which enables Parliament to make a law placing restrictions and conditions on the exercise of the legislative power of the State under Entry 54 in State List in regard to the system of levy, rates and other incidents of tax. Such a law may be in relation to (a) goods declared by Parliament by law to be of special importance in inter-State trade or commerce, or (b) to taxes of the nature referred to in sub-clauses (b), (c) and (d) of clause (29-A) of Article 366. When such a law is enacted by Parliament the legislative power of the States under Entry 54 in State List has to be exercised subject to the restrictions and conditions specified in that law. In exercise of the power conferred by Article 286(3)(a) Parliament has enacted Sections 14 and 15 of the Central Sales Tax Act, 1956. No law has, however, been made by Parliament in exercise of its power under Article 286(3)(b)."

16. The ancillary point arose from the core issue in the said Constitution Bench decision was that without amending the Central Sales Tax Act in relation to the transfer of property in goods involved in execution of works contract, Sections 3, 4 and 5 of the Central Sales Tax Act can still be pressed in action. The Constitution Bench answered in following :

"34. The question is whether in the absence of an amendment in the Central Sales Tax Act specifically applying its provisions to a transfer of property in goods involved

in the execution of a works contract, the provisions of Sections 3, 4 and 5 contained in Chapter II can be held applicable to such a transfer. In this context, it may be mentioned that prior to the Forty-Sixth Amendment, a distinction was being made between a "works contract" which was entire and indivisible and a works contract composed of two distinct and separate contracts-one, for transfer of materials and other, for payment of remuneration for services and for work done. The non-availability of the legislative power of the States under Entry 54 of the State List, as construed by this Court in the Gannon Dunkerley case was confined, in its application, to works contracts falling in the first category, i.e., contracts which were entire and indivisible and it was permissible for the States to impose tax on sale or purchase of goods where the parties had entered into distinct and separate contracts one for the transfer of materials and other for payment of service and for work done. The provisions of Sections 3, 4 and 5 of the Central Sales Tax Act were applicable where there were two separate contracts. In Builders" Association case it has been observed : (SCC p. 672, para 36: SCR p. 351 F-G)

".....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 States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above."

"35. This would mean that as a result of the Forty-sixth Amendment, the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and other for supply of labour and services and as a result such a contract which was single and indivisible has been brought on a par with a contract containing two separate agreements. Since the provisions of Sections 3, 4 and 5 were applicable to such contracts containing two separate agreements, thee is no reason why the said provisions should not apply to a contract which, though single and indivisible, by legal fiction introduced by the Forty-sixth Amendment, has been altered into a contract which is divisible into one for sale of goods and other for labour and services. Reference may be made in this context to the oft-quoted observations of Lord Asquith in East End Dwellings C. Ltd. v. Finsbury Borough Council :

"If one are bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.....The statute says that one must imagine a certain state of affairs. It does not say that, having done so, one must cause or permit one's imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

"36. If the legal fiction introduced by Article 366(29-A)(b) is carried to its logical end it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services."

"37. For the reasons aforesaid, we are of the view that even in the absence of any amendment having been made in the Central Sales Tax Act (after the Forty-sixth Amendment) expressly including transfers of property in goods involved in execution of a works contract, the provisions contained in Sections 3, 4 and 5 would be applicable to such transfers and the legislative power of the State to impose tax on such transfers under Entry 54 of the State List will have to be exercised keeping in view the provisions contained in Sections 3, 4 and 5 of the Central Sales Tax Act. For the same reasons Sections 14 and 15 of the Central Sales Tax Act would also be applicable to the deemed sales resulting from transfer of property in goods involved in the execution of a works contract and the legislative power under Entry 54 in State List will have to be exercised subject to the restrictions and conditions prescribed in the said provisions in respect of goods that have been declared to be of special importance in inter-State trade or commerce."

17. It is ultimately held :

"51. (1) In exercise of its legislative power to impose tax on sale or purchase of goods under Entry 54 of the State List read with Article 366(29-A)(b), the State Legislature, while imposing 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 is not competent to impose a tax on such a transfer (deemed sale) 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.

(2) The provisions of Sections 3, 4 and 5 and Sections 14 and 15 of the Central Sales Tax Act, 1956 are applicable to a transfer of property in goods involved in the execution of a works contract covered by Article 366(29-A)(b).

(3) While defining the expression "sale" in the sales tax legislation it is open to the State Legislature to fix the situs of a deemed sale resulting from a transfer falling within the ambit of Article 366(29-A)(b) but it is not permissible for the State Legislature to define the expression "sale" in a way as to bring within the ambit of the taxing power 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 and export.

(4) The tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract falling within the ambit of Article 366(29-A) is leviable on the goods involved in the execution of a works contract and the value of the goods which are involved in execution of the works contract would

constitute the measure for imposition of the tax.

(5) In order to determine the value of the goods which are involved in the execution of a works contract for the purpose of levying the tax referred to in Article 366(29-A)(b), it is permissible to take the value of the works contract as the basis and the value of the goods involved in the execution of the works contract can be arrived at by deducting expenses incurred by the contractor for providing labour and other services from the value of the works contract.

(6) The charges for labour and services which are required to be deducted from the value of the works contract would cover (I) labour charges for execution of the works, (ii) amount paid to a sub-contractor for labour and services; (iii) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract; (iv) charges for planning, designing and architect's fees; and (v) cost of consumables used in execution of the works contract; (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services; (vii) other similar expenses relatable to supply of labour and services; and (viii) profit earned by the contractor to the extent it is relatable to supply of labour and services.

(7) To deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the assessing authority the legislature may prescribe a formula for deduction of cost of labour and services on the basis of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. It would be permissible for the legislature to prescribe varying scales for deduction on account of cost of labour and services for various types of works contract.

(8) While fixing the rate of tax it is permissible to fix a uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rates of tax fixed in respect of sales or purchase of those goods as a separate article."

18. In case of 20th Century Finance Corp. Ltd. and Another Vs. State of Maharashtra, somewhat identical question arose whether the state can levy tax on transfer of property in goods by way of Inter State Sale in relation to the works contract, it is held:

"35. As a result of the aforesaid discussion our conclusions are these:

(a) The States in exercise of power under Entry 54 of List II read with Article 366(29-A)(d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the State or in a sale in the course of inter-State trade or commerce or is a sale in the course of import or

export.

(b) The appropriate legislature by creating legal fiction can fix situs of sale. In the absence of any such legal fiction the situs of sale in case of the transaction of transfer of right to use any goods would be the place where the property in goods passes, i.e., where the written agreement transferring the right to use is executed.

(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods.

(e) The transaction of transfer of right to use goods cannot be termed as contract of bailment as it is deemed sale within the meaning of the legal fiction engrafted in clause (29-A)(d) of Article 366 of the Constitution wherein the location or delivery of goods to put to use is immaterial."

19. Before proceeding further, this Court feels that it would not be proper if the judgment rendered by the Supreme Court in case of The Indure Ltd. and Another Vs. Commercial Tax Officer and Others, is not noticed. In the said report a tender was invited by National Thermal Power Corporation Limited (NTPC) for submitting the bid for Ash Handling Plant Package in relation to Farraka Super Thermal Power Project, Stage-II through a global tender. The involvement of the work therein was on a turnkey basis. In course of commissioning the works contract, an import of MS Pipe was made which was found eligible to State Sales Tax. A point was taken whether the goods imported in course of the works contract can be covered under Section 5(2) of the Central Sales Tax Act and is exempted from the said purview. It is held that since the aforesaid goods were imported into India for completion of the project on turnkey basis; by virtue of Article 286(1)(b) of the Constitution it would not be taxable.

20. The Court noticed the decision rendered in case of M/S. BINANI BROS. (P) LTD. Vs. UNION OF INDIA and Others M/S. PRAGDAS MATHURADAS v. UNION OF INDIA and Others, and found the distinguishing feature that since the said MS Pipes imported by the company were used for erection and commissioning of the plant in the same conditions as they were imported and were not used in any manufacturing process, the Sales Tax cannot be attracted.

21. It is, therefore, settled that the state cannot by legislature imposed Sales Tax of the inter-State sale or the sale by import in relation to a works contract provided the same is used in commissioning of the project on turnkey basis in the same form without changing its character through a manufacturing process. The power of the

state to legislate on imposition of Sales Tax in relation to the works contract is not unfettered but a restrictive one. After the Forty-sixth amendment in the Constitution, the works contract is capable of being divorced into a supply and the labour and service. It is not a universal rule that if the works contract is on the turn key basis, it imbibed inseparation and indivisible but depends upon the construction of the contracts and the intention of the parties to be gathered therefrom. The Deputy Commissioner has simply proceeded on the basis that though the separate contracts are entered into between the parties but they are on a turn key basis, it partakes the character of indivisible and inseparable works contract exigible to the State Sales Tax. There is no finding recorded in the impugned order on the nature of the transaction reflected in the books maintained by the petitioner and the return filed in this regard.

22. Since the same required a voluminous documents to be looked into which this Court has no occasion to look into it, it is not possible to ascertain whether the sale of transfer of property in goods in connection with the Inter State Sale or by import can be segregated and the said authorities is incompetent to levy tax under the State Legislation.

23. This Court, therefore, feels that it would be proper that the Deputy Commissioner should relook the judgment in the light of the law enunciated above and to record his findings and the reasons in relation thereto.

24. The order impugned is thus set aside.

25. The matter is relegated back to the Deputy Commissioner for reconsideration in the light of the observations made hereinabove. It is expected that the said authority would take utmost efforts to dispose of the assessment proceeding within six weeks from the date of the communication of this order in accordance with law.

26. In view of the disposal of the writ petition, the connected application has become infructuous and is accordingly disposed of.

27. There shall be no order as to costs.