

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ S.T.APPEAL No. 10/2009

Reserved on : August 19, 2009
Pronounced on : September 8, 2009

COMMISSIONER, VAT, TRADE AND TAXES
DEPARTMENT ...Appellant

Through: Mr. Parag Tripathi, ASG with
Mr. H.C. Bhatia, Mr. H.L. Taneja, Advocates

VERSUS

INTERNATIONAL TRAVEL HOUSE LTD. Respondent
Through: Mr. S. Ganesh, Sr. Advocate with
Mr. Shammi Kapoor, Ms. Kavita Jha, Ms. Payal
Mahajan, Mr. Sri Ram, Ms. Megha Suri,
Advocates

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment? yes
2. To be referred to the Reporter or not? yes
3. Whether the judgment should be reported in the Digest? yes

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VALMIKI J.MEHTA, J

1. This Sales Tax Appeal has been filed by the Commissioner, Value Added Tax, New Delhi against the order dated 16.10.2008 passed by the Appellate Tribunal, Value Added Tax whereby the Tribunal has held that the respondent is providing services only and there is no transfer of the right to use the goods for levy of tax under the Delhi Value Added Tax Act, 2004 (hereinafter referred to as “DVAT Act”). The issue in the case pertains to the claim of the appellant to the applicability of the DVAT Act to the transaction in question which was of hiring of Maruti Omni Cabs by the respondent to a company M/s. New Delhi Power Limited (hereafter “the NDPL”).

2. Two issues arise for determination by this Court:-

- a) Whether the transaction in question is sale within the meaning of the expression in Article 366(29-A)(d)?
- b) Whether the contracts in question are contracts for services and hence not assessable to tax under the DVAT Act? Putting it differently, is the appellant entitled to

impose tax on the transaction in question because it contains an aspect/element of sale of goods and it makes no difference if services also are included in the transaction?

3. Both the parties have extensively relied upon the decision of the Supreme Court in the case of **Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 3 SCC 1**. They have also relied upon certain other judgments as discussed hereinafter.

4. Before we proceed to answer the issues arising, it will be necessary to give a gist of the contract between the respondent and M/s. NDPL for hiring of Maruti Omni Cabs by the former to the latter. The appellant has referred to the said contract and its terms in para 11 of the appeal and which para reads as under:-

“11. That the Respondent had enclosed a copy of the agreement with NDPL for hiring of Omni Vans. As per the copy of the said agreement the respondent was to provide to NDPL 9(Nine) non-ac Maruti Omni Vans on 24 hours/2500 Km per month per vehicle on a monthly cumulative basis @ Rs.23,000/- per vehicle per month and 16(sixteen) non-ac Omni Vans on 12 hour/3000 Km basis @ Rs.16,000/- car/per month. Extra Km above the cumulative 48000 Km per month was to be paid @ Rs.4/Km and extra hours of duty in excess of 12 hours/day of duty @ Rs.15/hr. NDPL also required the respondent to, inter alia, ensure the following:

- 1. All chauffeurs will be uniformed and are Hindi and English speaking.*
- 2. All chauffeurs have mobiles.*
- 3. ESI and PF are paid for the chauffeurs.*
- 4. The car exterior and interior are kept clean.*

5. *Rates above are inclusive of fuel, maintenance and driving charges.*
6. *Parking, Toll and other road taxes shall be paid extra at actuals. Individual Bills/receipts shall be submitted.*
7. *Kilometre reading for the purpose of billing shall be from point to point to Base Station.*
8. *Vehicles hired under monthly services shall be available for 24 hours a day and all 7 days of the week. Change drivers will be arranged by you to continue provision of the service.*
9. *Drivers shall have valid professional driving license and adequate experience of driving in and around Delhi. They should be thoroughly familiar with the various roads/locations in Delhi especially in North and North-West Delhi.*
10. *Vehicle with requisite permit shall be provided without any extra charge as and when required.*
11. *Please submit for records, copies of vehicle documents viz. Registration Certificate, Insurance certificate and tax permit. Also submit copies of Driving License and Badge No. of the drivers engaged on monthly services.*
12. *Log book specifying trips done, date, time, Kms at the beginning of the trip and at the end of the trip are to be maintained. These are to be signed off by the user of the vehicle. His name is to be appended under the signature.*
13. *Replacement vehicles are to be provided in case the vehicle has to go for maintenance for over 4 hours.*
14. *The provision of the vehicle is an important activity in the process of our Company and the vehicle's uptime should always be 100%.*
15. *The vehicles should be fitted with a carrier to carry an aluminium/fibre glass ladder.*
16. *Driver should look after the security of the ladder on the carrier and also ensure safe removal and loading.*
17. *Two vehicles will not be fitted with rear seat and the rear should be fitted at our cost of clamps for safe keeping of test equipment.*

18. *The colour of the Ominis should be white and should either be painted or stickers fixed as per corporate logo scheme enclosed.*

PERIOD OF CONTRACT : From May 01,2003 to March 31, 2004 extendable upto March 31, 2005 by mutual consent.

1. *Estimated Total Contract Value: Rs. 56 lacs (Fifty six lacs)*
2. *TAXES, DUTIES AND DELIVERY: Service tax extra as applicable.*

All Taxes, Deductible at Source (TDS) as per concerned authorities, and at the rates specified, shall be deducted by NDPL from your invoices and TDS certificate/s shall be issued.

3. *PRICE VARIATION CLAUSE: The unit price contracted shall normally be firm during the period of the contract. However, variation for price may be permitted for fuel price variation as per the following formula:*

Difference to be paid/deducted based on {[difference (increase/decrease) price at the beginning of 3 monthly period commencing 01 May and that on 31 July 2003]/14} x Kms run during the period.

4. *TERMS OF PAYMENT: Payment will be made within 15 days of submission of monthly bills and summary of log sheets duly certified by DGM(Admn)'s office.*
5. *BILLING: Bills in duplicate, shall be submitted monthly basis to DGM (Admin) at corporate office. These bills shall be duly certified/verified by the concerned user/department for satisfactory services.*

NDPL

General Conditions of the Contract

1. *You shall undertake to indemnify NDPL against any liabilities or damages by way of compensation arising from any accident to the person or property of those in your employment or to any other person whomsoever, during the contract.*
2. *In the event of accident a police complaint must be lodged and the injured victims shall be taken to nearest bona fide hospital for medical attention. Copy of the FIR shall be furnished.*

3. *You shall bear the entire responsibility, liability and risk relating to coverage of your workforce under different statutory regulations including Workman's Compensation Act, ESI Act, Factories Act, the contract Labour (Regulation and Abolition) Act, 1970, and any other relevant regulations as the case may be. You shall also be solely responsible for the payment of all benefits such as Provident Fund, Bonus, Retrenchment Compensation, Leave etc. applicable as per the various statutory regulations and shall keep the NDPL Indemnified in this regard against any claim. The NDPL shall be entitled to, if necessary, make such payment and recover the amount thereof from the money due to you from the NDPL or recover the same as debt from you.*

4. *You shall also pay the taxes or dues payable to the Government or any other local authority in connection with all the works provided for in this contract and for all materials brought on the site and/or used for the work and shall indemnify NDPL and hold them harmless against any liability on account of any such levies charges or taxes. You shall also make all payments and contributions if any which may have to be made in regard to the workmen employed by you in relation to the wages or other emoluments of such workmen under any statute or rules or regulations or otherwise howsoever and indemnify the NDPL against such payments.*

5. *You shall maintain the total employee data of all the work force deployed under this contract & shall produce the same for verification at any time as & when required. You will also issue photo ID cards to the personnel working under this contract, which shall be duly endorsed by our security officer at site.*

6. *In the event of your not being in a position to provide services specified under this contract or any part thereof for any reason whatsoever, the NDPL will make alternative arrangements at market rates and the cost difference shall be adjusted against you pending/subsequent bills.*

A copy of the said agreement is enclosed and marked as Annexure-III."

5. Mr. Parag Tripathi, the learned Additional Solicitor General, who appeared for the appellant has raised basically the following contentions:

(i) A reference to the clauses of the contract aforesaid shows that the terms thereof satisfy the requirement of sale as specified in Article 366(29-A)(d) inasmuch as according to him there is a transfer of the right to use the goods for valuable consideration. In furtherance of his submission, the learned ASG has further elaborated that since the effective control and possession of the Cabs which have been given on hire are with NDPL, therefore, it can be said that there is a transfer of the right to use goods and it is not required that there should be a transfer of the right to use specific goods.

(ii) The second proposition which has been urged is that since the transaction in question comprises both the elements/aspects of goods and services, i.e. goods are very much present in the transaction in question and since there is a transfer of the right to use such goods, the transaction in question can be taxed and the measure of tax being 100% of the value of the contract will not change the tax imposed which according to him is on goods and not services merely because the total transaction value includes the component/value of services.

6. Mr. S. Ganesh, learned senior counsel, who appeared on behalf of the respondent has in reply submitted as under:-

(i) The transaction in question is not a transaction of sale as envisaged under Article 366(29-A)(d) because the effective control and possession

of the goods, namely the Maruti Omni Cabs, remained with the respondent and not NDPL. The ingredient of control and possession with respect to the goods is a *sine qua non* for making the transaction as one of sale, assuming that Article 366(29-A)(d) applies. Therefore, since effective control and possession remained with the respondent at all times inasmuch as its Driver drives the vehicles and the licences and the permissions are in the name of the respondent and not with NDPL, therefore, it is urged that there is no sale as envisaged under Article 366(29-A)(d). As a follow up to this main argument it was also stated that for a sale of goods it is necessary that there should be identifiable goods and not general goods which could be substituted for the use of the user.

(ii) The second contention of Mr. Ganesh was that the respondent is already paying service tax to the Central Government under the provisions of the Service Tax in the Finance Act 1994 and consequently the transaction in question being services under Central Act, the State Act cannot come in conflict with the Central Act and if this conflict arises the State Act being the DVAT Act must necessarily give way to the provisions of the Service Tax in the Finance Act 1994 of the Centre.

7. Since both the parties have, and as stated above, relied extensively upon the judgment of the BSNL's case with respect to the test of

determination whether the transaction in question is a sale or not, we propose to straightway refer to the relevant paragraphs of the said judgment including those laying down the test for determining whether a transaction is a sale of goods or not. We may also state that though it has not been argued by the respondent on the basis of BSNL's case that the transaction in question cannot be assessable to the tax under the DVAT Act because the contract in question is not severable, but we find that BSNL's case directly and specifically determines this very issue and, therefore, this would be relevant to determine the second issue which has been urged by both the parties.

8. We take up firstly the second contention of the parties viz. whether the transaction in question is one of services or of sale of goods. Further, if the transaction in question contains both the components of a sale of goods and services also, whether such a transaction can only be taxed as a service or can also be taxed as a sale of goods. The related aspect which will also come in, is, if the contract is not severable as per the intention of the parties because separate values have not been fixed for the purposes of sale of goods and for sale of services; whether such a non-severable contract can be split up for taxing the sale of goods or even if it is not split up can the whole value of the contract be taken as the value of the sale of goods.

9. A careful reading of the BSNL's case brings out the following ratio:-

(i) Realizing that by virtue of locus classicus decision in the case of **State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., AIR 1958 SC 560** does not permit a composite contract of both goods and services (viz a works contract) to be taxed as sale of goods and does not permit severing of the contract for the value of goods to be culled out from the same, the need was felt to amend the Constitution to widen the definition of sale from that as was traditionally understood and which meant an agreement to transfer title, payment of consideration, and, transfer of title in the goods. Three proposals were mooted by the Law Commission in its report of 1974 to give the power to the State to tax goods included in works contracts, hire purchase transaction and transfer of controlled commodities by virtue of statutory orders. The Law Commission noted that there can be three actions, one of amending Entry Fifty-four of the State List, second of adding a fresh Entry in the State List or thirdly of inserting in Article 366 a wider definition of sale so as to include works contract. The Law Commission preferred the last alternative and, therefore, the Constitution came to be amended by the Forty-sixth Amendment Act, 1982 to add Sub-Article 29-A which included six sub-clauses. Each of the sub-clauses served to bring transactions where one or more essential ingredients of sale were absent

so that it fell within the ambit of sale and purchase for the purpose of levy of sales tax. By virtue of adding of sub-clauses (b) and (f) it became permissible by legal fiction to divide specific composite contract as a result of which sale element could be isolated and be subjected to tax. {see paras 35,37,39, 40 to 42 of the Judgment in SCC}.

(ii) Except the specific contracts so provided under Article 366(29-A) no other contracts can be artificially severed to tax the sale element with respect to goods as comprised in such composite contracts. Therefore, where the contracts are composite contracts, including therein both aspects of sale of goods and services, such contracts which are other than those specified in Article 366(29-A) (b) and (f), then such other contracts not falling within such sub-clauses of Article 366(29-A) cannot be split up taxing the sale element in the goods component thereof and which was only possible if the parties had in mind or intended that separate rights arising out of sale of goods and if there was no such intention then there is no sale of goods, even if such a contract could be disintegrated. {See paras 44,45,88,92(C) of SCC}.

10. Where the sale is distinctly discernible in the transaction i.e. the contracts are by intention of the parties severable so that there are separate values with respect to goods and services, only then one cannot deny the legislative competence of the State to levy sales tax on the value

of the goods. This, however, does not allow the State to entrench upon the Union List and tax services by including the cost of such services in the value of goods. Even in the composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. Referring to the decision in **Gujarat Ambuja Cements Ltd. & Anr. V. Union of India & Anr.**, (2005) 4 SCC 214 it was held that mutual exclusivity which is referred to in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Though liberal interpretation must be given to the taxing entries, however in substance if the statute is not referable to a field given to the State, then the Court will not by a principle of interpretation allow a statute to include in its field what is not covered in its field. The 'aspect' theory (viz. the aspect of goods in composite contracts) would not apply to enable the value of the services to be included in the sale of the goods or the price of the goods in the value of the service. {See paras 88, 89 and 92(E) of SCC}.

11. The conclusion, therefore, which emerges with respect to the facts of the present case on applying the ratio of the BSNL's case is that, since the contract in question is a composite contract of sale of goods and services, clearly, it is not permissible for the State Legislature by applying

DVAT Act to tax composite contracts comprising of both goods and services. Not only the contracts cannot be artificially split up so as to enable the sale element to be taxed, further, the States cannot treat the contract as only a contract of sale of goods and tax the whole value of the transaction as a sale of goods. Since the parties have not intended the contract to be mutilated/severable inasmuch as no different values are specified in the subject contract towards goods value separately and the value of services separately, it is not permissible by the DVAT Act to impose sales tax on the whole transaction value because that would amount to the State to entrench upon the Union List and tax services by including the cost of such services in the value of the goods. Thus, the contract in question being a composite contract is to be treated as a contract for services and no sales tax can be imposed on the contracts in question. It has also been held by the Constitution Bench of the Supreme Court in its judgment reported as **Godfrey Phillips India Ltd. and Anr. V. State of U.P. and Ors. (2005) 2 SCC 515** that taxing entries must be construed with clarity and precision so as to maintain exclusivity and a construction of a taxation entry which may lead to overlapping must be eschewed. Reference in that case was also made to the judgment in **Kesoram Industries Ltd.'s** case that in our Constitution a conflict of the taxing power of the Union and States cannot arise. Since the contract in

question is taxed as services by the Central Government defining the same as services under the Finance Act, 1994, we would have to thus eschew an interpretation which will lead to overlapping in the taxation entries otherwise the same transaction will be taxed both as services as also goods. To avoid that overlapping, and more particularly in view of the legislative history behind the provision of Article 366(29-A) it becomes clear that a composite contract of both services and goods should be treated as a contract of services assessable to tax under the Finance Act, 1994 as the same has been defined and included therein. Our aforesaid discussion negates therefore the two pleas of the senior counsel for the appellant on the basis of the judgments reported as **State of West Bengal v. Kesoram Industries Ltd. and Ors., (2004) 10 SCC 201** and **Ralla Ram v. Province of East Punjab, AIR 1949 FC 81**, that the measure of taxation being the whole value of the contract cannot mean that the tax is still not a tax on goods and that subject matter of the taxation being the goods, DVAT Act can impose tax on composite contracts on the entire value of the transaction.

12. That takes us to the question that whether the contract in question is at all a contract of sale of goods as envisaged in Article 366(29-A)(d) inasmuch as there is transfer of the right to use for whatever period by

the respondent to NDPL. In order to determine whether there is a transfer of the right to use goods so as to make contracts one of sale under Article 366(29-A)(d) on the point of law both the parties are unanimous that the test is of effective control and possession with respect to the goods. In this behalf, both the parties have relied upon the tests of sale as specified by Dr. A.R. Lakshmanan, J. Appearing in paragraph 97 of the BSNL's case which reads as under:-

“97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:

(a) there must be goods available for delivery;

(b) there must be a consensus ad idem as to the identity of the goods;

(c) the transferee should have a legal right to use the goods—consequently all legal consequences of such use including any permissions or licences required therefore should be available to the transferee;

(d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor—this is the necessary concomitant of the plain language of the statute viz. a “transfer of the right to use” and not merely a licence to use the goods;

(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.”

Sub-paras (b) and (c) of para 97 are important with reference to the facts of the case to determine as to whether or not there is a sale by virtue of transfer of right to use goods as envisaged in Article 366(29-A)(d). The

admitted position which emerges is that the transferee, namely NDPL, has not been made available the legal consequence of the legal right to use the goods viz. the permissions and licences with respect to the goods. In the present case, the permissions and licences with respect to the Cabs are not available to the transferee and remained in control and possession of the respondent. It is the Driver of the vehicle who keeps in his custody and control the permissions and licences with respect to the Maruti Omni Cabs or the said permissions and licences remained in possession of the respondent. These are never transferred to M/s. NDPL. It, therefore, cannot be said that there is a sale of goods by transfer of right to use goods inasmuch a necessary ingredient of the sale being the transfer of right to use the goods is absent, namely, ingredient as stated in para 97(c) of the BSNL's case. The judgments which were cited during the course of arguments, namely, **State of A.P. v. Rashtriya Ispat Nigam Ltd., (2002) 3 SCC 314** and **Aggarwal Bros. V. State of Haryana, (1999) 9 SCC 182** have been duly explained by the Supreme Court in BSNL's case. The crucial factor in this regard differentiating the two cases was the intention to transfer the right to use. Whereas in the case of **Rashtriya Ispat Nigam Ltd.**, there was no intention to transfer the right to use, in the case of **Aggarwal Bros.** it was found that there was an intention to transfer the right to use. In the present case, the judgment of **Aggarwal Bros.** does

not help the appellant inasmuch as there is no intention to transfer the right to use the goods because the licences and permissions with respect to the goods, namely, the Maruti Omni Cabs remained always in the effective control and possession of the respondent and not NDPL.

13. We may note that it has been held in the Division Bench judgment of the Allahabad High Court reported as **Ahuja Goods Agency Ltd. v. State of Uttar Pradesh & Ors., (1997) 106 STC 540** that unless specified vehicles are transferred pursuant to the contract there is no sale of the goods. It was also held that when it is the duty of the transporter to abide by all the laws relating to motor vehicles and excise, the custody remains with the owners of the vehicles and not the persons who hires the vehicles and which again shows that there is no sale. We respectfully agree with the reasoning **Ahuja Goods Agency's** case. In the case before us also there are no identified goods as intended in para 97(B) of the BSNL's case and hence no sale of goods. We also agree with the reasoning of the judgment in **Laxmi Audio Visual v. Assistant Commissioner of Commercial Taxes, 124 STC 426** wherein R.V. Raveendran, J. (as he then was) held that when there is only hiring of audio visual and multi-media equipment, which equipment is at the risk of the owner and possession and effective control remain with the owners then, in such circumstances it cannot be said that the customer

had got the right to use the equipment and there was, therefore, no deemed sale. We may note that there are other Single Bench judgments of the Allahabad High Court which follow the view of the Division Bench in the **Ahuja Goods Agency's** case and we need refer to only one such judgments reported as **Mohd. Wasim Khan v. Commissioner of Trade Tax, U.P., Lucknow, 2006 NTN(Vol.30) 233** in which the contracts were those for providing buses for transportation of the employees of the companies from one place to another and which transaction was held not to be a sale because the Driver and other employees of the vehicles were employees of the owners, the road permit was in the names of the owners who had to take insurance for the vehicles and the workmen and consequently it was held that there was no case of transfer of the right to use the goods because the effective control of the vehicle remained with the owners of the buses. We do not agree with the view of the Division Bench of the Punjab & Haryana High Court in the case of **Harbans Lal vs. State of Haryana, (1993) 362 STC 357** in view of the tests laid down in **BSNL's** case and also because that such a composite contract cannot be artificially split up. Also in the facts of the present case, we have found that control and possession of the vehicles is with the owner and thus on facts also the case is distinguishable.

14. We accordingly, therefore, hold that the present appeal is not entitled to succeed because neither the transactions in question are sale of goods as envisaged in Article 366(29-A)(d) and nor can the composite contracts be split up by taking from it the value of the goods for the purposes of taxing the same under DVAT Act.

15. The appeal is accordingly dismissed leaving the parties to bear their own costs.

VALMIKI J.MEHTA, J

A.K. SIKRI, J

September 8, 2009

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