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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ST.APPL. 16/2008

TATA POWER DELHI DISTRIBUTION LTD Petitioner
Through: Mr. M.P. Devnath, Mr. Abhishek
Anand and Mr. Yogendra Aldak, Advocates.

versus

**COMMISSIONER OF SALES TAX, DELHI &
ORS** Respondents
Through: Mr. Siddharth Dutta, Advocate for R-
1/CST
Mr. Sudhir Kumar, Advocate for R-2/GNCTD.
Ms. Rama Ahluwalia, Advocate for R-3/State of
Maharashtra.

**CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU**

**ORDER
11.03.2016**

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Dr. S. Muralidhar, J:

1. This appeal by the Tata Power Distribution Limited ('TPDL') [earlier known as North Delhi Power Limited ('NDPL')] under Section 9 (2) of the Central Sales Tax Act, 1956 ('CST Act') read with Section 81 of the Delhi Value Added Tax Act, 2004 ('DVAT Act') is directed against the impugned order dated 14th July 2008 passed by the Appellate Tribunal ('AT') dismissing the appeal of the Appellant. The AT upheld the order dated 30th November 2006 of the Objection Hearing Authority ('OHA') which in turn upheld the order dated 7th July 2006 of the Sales Tax Officer/VAT Officer, (Ward 63) declining to issue 'C' forms to the Appellant for the year (for Rs. 98,21,612), 2003-04 (for Rs. 1,33,96,344)

and 2005-06 (for Rs. 1,01,53,180).

2. TPDL is a registered dealer under the Delhi Sales Tax Act, 1975 ('DST Act') [now under the Delhi Value Added Tax Act, 2004] as well as the CST Act. It took some equipment viz., , an LT Load Management System, on lease basis from M/s. RMS Automation Systems Limited, Nasik ('RASL'), Respondent No. 2 herein under a lease agreement dated 25th May 2000. The said lease agreement was originally entered into between RASL [as Lessor] and the Delhi Vidyut Board ('DVB') [Lessee], the predecessor of the Appellant. After the restructuring of DVB, with the Appellant having succeeded the DVB, the latter's rights and liabilities under the aforementioned lease agreement vested in the Appellant. It is stated that in terms of the above agreement, the equipment in question was sent by RASL, the Lessor in Maharashtra to the Appellant, the Lessee in Delhi.

3. By the 46th Constitutional Amendment, Article 366 of the Constitution was amended whereby clause (29A) was inserted to provide that 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, would be deemed to be 'sale'. RASL raised monthly invoices upon the Appellant for the lease charges after duly charging sales tax under the CST Act. For furnishing RASL with the 'C' Forms, the Appellant applied to the Sales Tax Officer/VAT Officer (Ward 63) for the years 2002-03 and 2003-04.

4. It may be mentioned here that the above application was also made for the year 2005-06 and 'C' Form for the said year which was initially refused, was ultimately allowed in appeal. The Appellant further states that for the years 2004-05 and 2006-07, 'C' Forms in relation to the

aforementioned lessee for payment made pursuant to the very same lease agreement between RASL and the Appellant have been issued by the VAT Officer. Therefore, the present case only concerns the denial of 'C' Forms for the years 2002-03 and 2003-04.

5. The reasoning for the VAT Officer declining the request by the order dated 7th July 2006 was that there was no movement of goods from Maharashtra to Delhi during the relevant tax period, and that the ownership rights in the equipment still vested in RASL. As far as years 2002-03 and 2003-04 were concerned, the appeal filed by the Appellant was rejected by the OHA i.e., the Deputy Commissioner on the same ground. The further appeal by the Assessee was dismissed by the AT by the impugned order primarily on the ground that the transaction was not an inter-state sale. In coming to the said conclusion the AT referred to the decisions of the Supreme Court in *20th Century Finance Corporation Limited v. State of Maharashtra (2000) 6 SCC 12* and *Bharat Sanchar Nigam Limited v. Union of India (2006) 3 SCC 1*. The AT came to the conclusion that since the situs of the sale was Delhi and the agreement transferring the right to use the equipment was executed at New Delhi on 25th May 2000 between RASL and DVB, the said transaction could not be said to be an inter-state sale. Consequently, the AT held that the Appellant could not seek for issuance of 'C' Forms under the CST Act.

6. This Court has heard the submissions of Mr. M.P. Devnath, learned counsel for the Appellant, Mr. Siddharth Dutta, learned counsel for Respondent No. 1 (the Commissioner), Mr. Sudhir Kumar, learned counsel for Respondent No. 2 (the GNCTD) and Ms. Rama Ahluwalia, learned counsel for Respondent No. 3 (State of Maharashtra).

7. While admitting this appeal on 22nd October 2008, the following questions of law were framed for consideration:

(1) Whether the AT was correct in law in holding that the transfer of right to use equipment under the impugned transaction was not an interstate sale even though the goods moved from Maharashtra to Delhi pursuant to the lease agreement dated 25th May 2000?

(2) Whether the only pre-condition for issuance of C-Form is that the buyer is a registered dealer and the goods are mentioned in his registration certificate as required for use in electricity generation and distribution?

8. To begin with a reference may be made to the definition of expression 'tax on the sale or purchase of goods' under Article 366 (29-A) which was inserted by the 46th Amendment of the Constitution, published in the Official Gazette on 2nd February 1983. The relevant portion reads as under:

“29A “tax on the sale or purchase of goods” includes-

(a) to (b).....

(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

(e).....

(f).....

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. This was simultaneous with the insertion of Entry 92-A in the Union List (List I) in the Seventh Schedule to the Constitution which reads thus:

“92-A. Taxes on the sale or purchase of goods other than

newspapers, where such sale or purchase takes place in the course of inter-state trade or commerce.”

10. This has to be read along with Entry 54 in the State List (List II) which reads as under:

“54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I.”

11. One of the transactions that is covered by the aforementioned amended definition of ‘sale’ in terms of Article 366 (29-A) of the Constitution is a transaction of sale whereunder the right to use an equipment for valuable consideration is transferred to a lessee by a lessor. It is deemed to be a sale by the lessor in favour of the lessee. Where such sale partakes character of inter-state sale then it is the Parliament which alone has the competence to collect sales tax to the exclusion of the States. Section 2 (g) (iv) of the CST Act defines ‘sale’ to include 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.

12. Section 3 of the CST Act which defines 'inter-state sale' reads thus:

“When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce:-

A sale or purchase of goods shall be deemed to take place in the course of inter-State or commerce if the sale or purchase –

- (a) occasions the movement of goods from one State to another; or
- (b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation I – where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2- Where the movement of goods commences and terminates in the same time it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.”

13. Section 8 of the CST Act set outs the rates of tax on sales in the course of inter-State trade or commerce. Section 9 of the CST Act talks of levy and collection of tax and penalties. Section 9 (1) which is the charging section as far as inter-State sales is concerned, reads as under:

“9. Levy and Collection of Tax and Penalties.—(1) The tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-State trade or commerce, whether such sales fall within clause (a) or clause (b) of Section 3, shall be levied by the Government of India and the tax so levied shall be collected by the Government in accordance with the provisions of sub-section (2), in the State from which the movement of the goods commenced

Provided that, in the case of sale of goods during their movement from one State to another, being a sale subsequent to the first sale in respect of the same goods and being also a sale which does not fall within sub-section (2) of Section 6, the tax shall be levied not collected---

(a) where such subsequent sale has been effected by a registered dealer in the State from which the registered dealer obtained or, as the case may be, could have obtained, the form prescribed for the purposes 1 of clause (a) of sub- section (4) of Section 8 in connection with the purchase of such goods; and

(b) where such subsequent sale has been effected by an unregistered dealer in the State from which such subsequent sale has been effected.

14. A collective reading of the aforementioned provisions reveals that three kinds of transactions are outside the purview of State Sales Tax, i.e., sale

outside the State; sale in the course of import or export of goods; and a sale in the inter-State trade.

15.1 The question as to whether a transaction of lease occasioning the movement of goods from one state to another, which was an inter-state 'deemed' sale, could be declared to be an intra-state sale because of the location of the goods within the state at the time of the transfer of the right to use the goods was the subject matter of the decision of the Constitution Bench of the Supreme Court in *20th Century Finance Corporation Limited v. State of Maharashtra* (*supra*). The question arose in the context of dealers registered under the various State Sales Tax Legislations, for e.g., Maharashtra, Uttar Pradesh, Rajasthan, Andhra Pradesh, Haryana, Karnataka and Tamil Nadu, who had entered into master lease agreements for leasing diverse machinery/equipment in terms of which, the dealers would place purchase orders on the suppliers or manufacturers for supply of individual items or equipment. The dealers disbursed the value of equipment to the suppliers, who at their instance, delivered the equipment to the lessees at specified locations for use. After the equipment was delivered and put to use, a supplementary lease schedule was executed by the lessee acknowledging due receipt of the lease equipment. Such supplementary lease deeds formed an integral part of the master lease agreement. Several States amended their respective sales tax legislation to levy tax on the transactions of transfer of the right to use goods on the basis that the goods were located at the time of their use within their States irrespective of the place where the lease agreement may have been executed. The question that arose was whether a State can levy sales tax on transfer of right to use goods merely on the basis that the goods put to use are located within its State irrespective of the fact that (a) the contract of

transfer of right to use has been executed outside the State; (b) sale had taken place in the course of inter-State trade; and (c) sales are in the course of export or import into Indian territory. The case of the dealers was that the State Legislatures could not frame their respective laws so “as to convert an outside sale or a sale in the course of import or a sale in the course of inter-State trade or commerce into a sale inside the State.”

15.2 After referring to the case law, then the Constitution Bench of the Supreme Court in *20th Century Finance Corporation Limited v. State of Maharashtra* (*supra*) held as under:

“20. the situs of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce, as held in *Bengali Immunity Co. Ltd v. State of Bihar AIR 1955 SC 661*. Further, the State legislature cannot by law, treat sales outside the State and sales in the course of import as 'sales within the State' by fixing the situs of sales within its State in the definition of sale, as it is within the exclusive domain of the appropriate legislature, i.e. Parliament to fix the location of sale by creating legal fiction or otherwise.”

15.3 The Constitution Bench further held as under:

“24. where situs of sale has not been fixed or covered by any legal fiction created by the appropriate legislature, the location of sale would be place where the property in goods passes. The Constitution Bench held, that it was the passing of the property within the State that was intended to be fastened on for the purpose of determining whether the sale was "inside" or "outside" the State.”

15.4 The Supreme Court further held as under:

“...the location or delivery of goods within the State cannot be made a basis for levy of tax on sales of goods. Under general law, merely because the goods are located or delivery of which has been effected for use within the State would not be the situs of deemed sale for levy of tax if the transfer of right to use has taken place in another State. Therefore, the contention, on behalf of the

respondents that there would be no completed transfer of right to use goods till the goods are delivered is to prevail, then the respondents are further required to show that the contract of transfer of right to use goods is also entered into in the said State in which the goods are located or delivered for use. The State cannot levy a tax on the basis that one of the events in the chain of events has taken place within the State. The delivery of goods may be one of the elements of transfer of right to use, but the same would not be the condition precedent for a contract of transfer of right to use goods. Where a party has entered into a formal contract and the goods are available for delivery irrespective of the place where they are located the situs of such sale would be where the property in goods passes, namely, where the contract is entered into.”

15.5 It further held as under:

“28.....where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written contract is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed.”

15.6 Of the conclusions arrived at by the Constitution Bench in *20th Century Finance Corporation Limited v. State of Maharashtra* (*supra*), those in para 35 (a) to (e), which are relevant for the purposes read as under:

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

(a) The State in exercise of power under Entry 54 of List II read with Article 366 (29A) (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 is 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 legal fiction engrafted in Clause (29A) (d) of Article 366 of the Constitution wherein the location or delivery of goods to put to use is immaterial."

16. A careful reading of the above decision of the Supreme Court in **20th Century Finance Corporation Limited v. State of Maharashtra** (*supra*) reveals that the Court categorically ruled that the mere location or delivery of the goods would not determine the situs of sale. Where the property in the goods passed from the seller to the purchaser would differ from case to case. Where the lease agreement occasioned the movement of goods from one State to another then, clearly it would partake of an inter-state sale within the meaning of Section 3 (a) of the CST Act. The observation in para 25 of **20th Century Finance Corporation Limited v. State of Maharashtra**

(*supra*) has to be read as a whole. It is only when the goods are available in the State and the agreement for transfer of the property in goods from the seller to the buyer is executed at that place it can be said that the situs of the sale is where the agreement is entered into. However, as far as the present case is concerned, there is a clear finding in the order of the AT itself that “there is also no doubt about the facts, the goods did move from Maharashtra to Delhi and were used in the distribution of electricity.” The equipment was in fact sent from Maharashtra to Delhi for use by the Appellant (Lessee) in Delhi and this movement was occasioned by the lease agreement which was entered into in Delhi. Even going by the decision of the Supreme Court in **20th Century Finance Corporation Limited v. State of Maharashtra** (*supra*) it cannot possibly be said that the situs of the sale was Delhi only because the agreement was entered into in Delhi. There can be no doubt that the lease agreement in the present case resulted in the movement of the goods from one State of another, and therefore, answers description of the inter-State trade under Section 3 (a) of the CST Act.

17. Learned counsel for the Respondents sought to place reliance on the decision of the Division Bench of the Andhra Pradesh High Court in **G.S. Lamba and Sons v. State of Andhra Pradesh 2015 (324) ELT 316 (AP)** which in turn referred to **20th Century Finance Corporation Limited v. State of Maharashtra** (*supra*) and the decision in **Bharat Sanchar Nigam Limited v. Union of India** (*supra*). In the first place, the Court notes that the facts of the case in **G.S. Lamba and Sons v. State of Andhra Pradesh** (*supra*) did not involve an inter-state sale at all. Para 3 of the said judgment states that the contracts in question

were for providing transportation service for ready-mix concrete by hiring specially designed transit mixers. These transit mixers were “never transferred and the effective control over running and using of these vehicles, as well as the disciplinary control over the drivers, always remained with the Petitioners.” Therefore, the decision in **G.S. Lamba and Sons v. State of Andhra Pradesh** (*supra*) is distinguishable on facts. Even the decision in **Bharat Sanchar Nigam Limited v. Union of India** (*supra*) was concerned with the question as to whether transferring the right to use the telephone instrument/apparatus fell within the description of sale under Section 2 (h) of the Uttar Pradesh Trade Tax Act, 1948. It was held that while giving a telephone connection may result in the transfer of a right to use the goods, there was no such transfer of the right to use where what is provided is a telephone service. The Court is unable to appreciate how the decisions in **Bharat Sanchar Nigam Limited v. Union of India** (*supra*) or **G.S. Lamba and Sons v. State of Andhra Pradesh** (*supra*) is relevant to the issue on hand.

18. Turning to the case on hand, the lease agreement entered into between RASL and DVB has occasioned the movement of goods from Maharashtra to Delhi. The said transaction is deemed to be an inter-state sale within the meaning of that expression in Section 3 (a) of the CST Act. Consequently, question No. 1 is answered in the negative, i.e., in favour of the Appellant and against the Department. It is held that the AT was not correct in law in holding to the contrary.

19. As far as question No. 2 is concerned, it is not the case of the Department that the Appellant does not satisfy the pre-conditions for

issuance of 'C' Forms. The Appellant is a registered dealer and the goods in question find mention in the registration certificate as required for the use in the electricity generation and distribution. Consequently, there was no valid ground to deny the Appellant 'C' Forms in relation to the lease transactions undertaken with RASL during the years 2002-03 and 2003-04. The order dated 30th November 2006 of the OHA and the order dated 14th July 2008 of the AT are hereby set aside. The VAT Officer is directed to issue 'C' Forms as requested by the Appellant for the transactions of the years 2002-03 and 2003-04, not later than two weeks from today. The Appellant will in turn provide those C Forms to RASL forthwith without unnecessary delay. This takes care of the grievance of Respondent No. 2 regarding not being issued 'C' Forms.

20. The appeal is disposed of in the above terms but, in the facts and circumstances of the case, with no orders as to costs.

21. Order be given *dasti*.

S.MURALIDHAR, J

VIBHU BAKHRU, J

MARCH 11, 2016

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