

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Writ Petition No.32971 of 2016

Between

Engineers India Ltd., C-1, Sri Sandhya Serenity,
Vakalapudi Road, Ramanayyapeta, Kakinada, A.P.

... Petitioner

and

1. State of A.P., Rep. by Secretary,
Revenue Dept., Govt. of A.P., Hyderabad
and 3 others

... Respondents

DATE OF JUDGMENT PRONOUNCED: 31-12-2018

HONOURABLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HONOURABLE SMT. JUSTICE T.RAJANI

- | | | |
|---|--|--------|
| 1 | Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes/No |
| 2 | Whether the copies of judgment may be marked to Law Reports/Journals | Yes/No |
| 3 | Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? | Yes/No |

* HONOURABLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HONOURABLE SMT. JUSTICE T.RAJANI

+ Writ Petition No.32971 of 2016

% Date: 31-12-2018

Engineers India Ltd., C-1, Sri Sandhya Serenity,
Vakalapudi Road, Ramanayyapeta, Kakinada, A.P.

... Petitioner

Vs.

\$ 1. State of A.P., Rep. by Secretary,
Revenue Dept., Govt. of A.P., Hyderabad

2. O/o Deputy Commissioner of Commercial Taxes,
Kakinada Division, Kakinada,
Commercial Tax Dept., Govt. of A.P.

3. Commercial Tax Officer, Kakinada Circle, Kakinada,
Commercial Tax Dept., Govt. of A.P.

4. State Bank of India, CA Group BR, New Delhi,
11th and 12th Floors, Jawahar Vyapar Bhawan,
Branch Code: 9996

(R.4 is impleaded as per Court order dt.30-9-2016
in WPMP No.41992/2016)

... Respondents

! Counsel for Petitioner: Mr. S.Ravi, Senior Counsel,
Representing Mr. Rajesh Maddy

Counsel for Respondents 1 to 3: Mr. S.Suri Babu,
Spl. Standing Counsel

Counsel for Respondent No.4:

< Gist:

> Head Note:

? Cases referred:

1. (2000) 6 SCC 12
2. 2016 (4) ALT 685
3. (2009) 2 SCC 326
4. 2013 65 VST 1

HONOURABLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HONOURABLE SMT. JUSTICE T.RAJANI

Writ Petition No.32971 of 2016

Order: (per V.Ramasubramanian, J.)

The petitioner has come up with the above writ petition challenging an order of Assessment passed under the Andhra Pradesh Value Added Tax Act, 2005, for the period 2011-12 to 2013-14.

2. Heard Mr. S. Ravi, learned senior counsel appearing for the petitioner and Mr. S. Suribabu, learned special standing counsel for the Department of Commercial Tax (A.P.).

3. The petitioner is engaged in the business of execution of works contracts. The petitioner entered into an agreement dated 07-12-2010 with the Gujarat State Petroleum Corporation for the Design, Engineering, Procurement, Construction, Commissioning Assistance for the execution of its on-shore Gas Terminal Project at Deen Dayal Field Development at Mallavaram, East Godavari District. According to the petitioner, they either imported or procured equipment and materials on an Inter-State basis, for the purpose of execution of the said contract. The claim of the petitioner was that since they entered into a works contract, they opted to discharge VAT on the actual amount of sale of

goods utilized in the execution of the works contract in terms of Section 4 (7) (a) of the Act.

4. Initially, the petitioner was served with one Form VAT 304 dated 29-01-2013 informing the petitioner of a statutory audit visit, for the financial years 2011-12 and 2012-13. By a letter dated 2-2-2013, the petitioner requested for extension of time. The audit visit was conducted on 11-02-2013 and the petitioner produced the documents sought by the audit party, on three different occasions.

5. A second Form VAT 304 dated 16-03-2013 was served on the petitioner seeking further information and documents, regarding the composition scheme opted for, material supplied to the sub-contractors, details of sale and purchase summaries etc. The petitioner filed a reply on 1-4-2013.

6. After the completion of the audit, a show cause notice dated 23-07-2013 under Rule 25 (5) of the APVAT Rules was served on the petitioner, proposing to disallow input tax credit on the purchase of certain inputs during the financial years 2011-12 and 2012-13, up to December 2012. To this show cause notice dated 23-7-2013, the petitioner submitted their objections on 22-08-2013 and 24-08-2013.

7. Even during the pendency of those assessment proceedings, another Form VAT 304 dated 22-10-2013 was served for the financial years 2011-12 and 2012-13.

By a reply dated 25-10-2013 the petitioner requested reconsideration of the audit, in the light of the fact that a similar audit was under process for the same period. The petitioner also requested for personal hearing.

8. After giving one opportunity of personal hearing, the Officer reserved orders on 27-12-2013. But by an endorsement made on 15-07-2014, the show cause notice dated 23-07-2013 was withdrawn and the matter was transferred to the Assistant Commissioner of Commercial Taxes (Audit), Kakinada, for assessment under Section 21 of the Act. Thereafter, a fresh show cause notice dated 2-3-2015 was served on the petitioner on 18-3-2015 by the Office of the Assistant Commissioner of Commercial Taxes. The petitioner filed a detailed reply on 08-05-2015.

9. However, a notice dated 22-02-2016 was served on the petitioner informing them of the change of the Assessing Authority and calling upon the petitioner to produce relevant records and books of accounts. Following the same, a revised third show cause notice dated 29-03-2016 was issued. The petitioner submitted a reply on 16-06-2016. Thereafter, the 3rd respondent passed the order of Assessment dated 27-08-2016, fastening upon the petitioner, a huge tax liability.

10. Aggrieved by the said Assessment order dated 27-08-2016 and also seeking a prohibition restraining the respondents from giving effect to the assessment arising out

of the revised show cause notice dated 29-03-2016, the petitioner has come up with the above writ petition.

11. Though the petitioner has an effective alternative remedy of appeal to the Appellate Deputy Commissioner, the petitioner seeks to bypass the alternative remedy on the ground that the impugned order has been passed in total violation of the principles of natural justice and that there was inherent lack of jurisdiction on the part of the 3rd respondent to issue the impugned order.

12. The main thrust of the argument of Mr. S. Ravi, learned senior counsel appearing for the petitioner is that what was done by the petitioner was only a sale in the course of Inter State Trade and Commerce and that by ignoring the fact that the sale was made in-transit, the 3rd respondent levied VAT. It is the further contention of the learned senior counsel that works contract is also subject to the provisions of Sections 3 and 6 of the Central Sales Tax Act, 1956, as decided by the Apex Court in **20th Century Finance Corporation Ltd., v. State of Maharashtra**¹. The said decision of the Supreme Court was followed by this Court in **Larsen & Toubro Ltd., v. State of A.P.**², but the said decision was not, according to the learned senior counsel for the petitioner, appreciated in the proper perspective by the respondents. According to the learned senior counsel, even

¹ (2000) 6 SCC 12

² 2016 (4) ALT 685

the CCT Circular dated 7-5-2010 made it clear that sales in-transit to a pre-determined or pre-identified buyer, will not, in any way, alter the Inter State nature of the transaction and hence, all the second and subsequent Inter State Sales falling under Section 6 (2) of the CST Act are eligible for exemption irrespective of whether the sales are made to a pre-determined buyer or not. Whenever a sale takes place in the course of Inter State Trade, the tax can be collected, as held by the Supreme Court in ***A & J Projects and Technologies v. State of Karnataka***³, only by the State from which the movement of goods commenced and not by the destination State. Therefore, it is contended that the impugned order was wholly without jurisdiction. Even the finding of the 3rd respondent that the works contract was an indivisible contract, according to the learned senior counsel, is contrary to the ratio laid down by the Supreme Court in ***Larsen & Toubro v. State of Karnataka***⁴.

13. In the detailed written submissions made on behalf of the respondents, it is contended by Mr. S.Suri Babu, learned Special Standing Counsel for Commercial Taxes Department, that the contract that the petitioner had with Gujarat State Petroleum Corporation, was on OBE (Open Book Estimate) basis; that the contractual consideration was split under the contract into four categories, including the

³ (2009) 2 SCC 326

⁴ 2013 65 VST 1

cost of reimbursable elements; that the procedure for procurement, inspection and expediting material for Project-1 are set out in Clause 2.4 appended to the contract under Section 3; that the petitioner was obliged to engage the services of material handling agents under reimbursable cost elements; that the task of warehouse management, receipt of materials, identification of short-supply, damaged items etc., was with the petitioner; that a reading of the contract in entirety would indicate that the contract is a turnkey project, executed on OBE methodology; that the contracting parties had agreed to route the contractual consideration through an escrow account; that this escrow account was to be operated jointly by the contracting parties; that to facilitate the operation of the escrow account, a forecast of cash flow was to be sent to Gujarat State Petroleum Corporation periodically, to enable them to deposit monies into the escrow account; that as per Clause 22.1.2, the payment for indigenous and imported material should be made by Gujarat State Petroleum Corporation into the escrow account and the invoices should be drawn on Gujarat State Petroleum Corporation; that the materials were thus consigned by the supplier to Gujarat State Petroleum Corporation, although the payment of the suppliers' invoices should be made directly by the petitioner to the suppliers; that the obligation to issue 'C' Forms rested with Gujarat State Petroleum

Corporation, under Clause 22.1.3; that contrary to these clauses, purchase orders were placed by the petitioner on the vendors located outside the State, enabling the vendors to manufacture the goods and raise invoices in the name of GSPC; that after the material got ready, invoices were raised by the vendors located outside the State of Andhra Pradesh in the name of Gujarat State Petroleum Corporation A/c EIL; that they bear the address of Gujarat State Petroleum Corporation and the Lorry Receipts were also raised by the vendors in the name of the petitioner against 'C' Forms issued by the petitioner; that the petitioner was in turn issued with 'E1' declaration forms; that the invoices issued by the vendors did not bear the stamp of transit sale; that the goods were earmarked to the end-users by the vendors located outside the State in view of the fact that the goods are tailor-made; that actually the movement of goods from outside the State vendors to the petitioner and the subsequent sale of the said goods by the petitioner to Gujarat State Petroleum Corporation were two independent sales and not a sale in transit; that no sale consideration flowed from Gujarat State Petroleum Corporation to EIL for the transfer of goods made in the course of sale in transit; that the entire sale consideration was deposited into the escrow account; that though the invoices were raised by the vendors located outside the State in the name of Gujarat State Petroleum

Corporation, the Lorry Receipts contained the name of the consignee as Gujarat State Petroleum Corporation A/c EIL; that therefore it was clear that the goods were dispatched directly in the name of Gujarat State Petroleum Corporation without reflecting the name of the petitioner as the consignee, enabling the petitioner to transfer the Lorry Receipts in favour of Gujarat State Petroleum Corporation; that all the Lorry Receipts raised in the name of Gujarat State Petroleum Corporation were endorsed by the petitioner on the same day when the goods reached Gujarat State Petroleum Corporation site and that the factual matrix of the transactions are at total variance with that of the clauses contained in the agreement and that since these aspects have not been gone into by the Assessing Authority at the time of assessment, the impugned order of assessment could be set aside and the matter remanded back to the Assessing Authority for *de novo* assessment.

14. Before proceeding further, we should point out that in the counter affidavit filed by the 3rd respondent, he has raised objections to the maintainability of the writ petition, on the ground of availability of an alternative remedy of appeal under the Statute. The counter affidavit of the 3rd respondent also attempts to justify the impugned order on merits and the 3rd respondent has prayed in his counter for the dismissal of

the writ petition, both on the ground of availability of alternative remedy and also on merits.

15. But, however, in the detailed written submissions filed by the learned Special Standing Counsel for the respondents 1 to 3/Department, an analysis of the entire transactions with reference to the clauses contained in the contract has been made thread-bare and it is stated in the written submissions that the Assessing Officer had not gone so deep into the matter as was required. This is why in the written submissions made on behalf of the respondents, it is prayed that the assessment order could be set aside and the respondent permitted to make a *de novo* assessment. The reasons for such a stand in the written submissions, are too obvious to go unnoticed. The impugned order has to stand or fall on its own strengths and weaknesses. But the written submissions show that the impugned order requires a pair of crutches to stand. This is why the written submissions seek an order of remand. We shall consider the said request at the appropriate stage.

16. In view of the detailed written submissions made on behalf of the respondents praying only for a remand, it is not necessary for us to deal with the question of availability of alternative remedy. Even otherwise, the availability of alternative remedy is not a bar in cases where there is violation of the principles of natural justice or where there is

inherent lack of jurisdiction or where the proceedings are without the authority on law. The petitioners pitch their claim on the ground of jurisdiction and lack of authority. Therefore, we have to deal only with this limited question.

17. As we have pointed out earlier, the petitioner was served with Form VAT 304, dated 29-01-2013, informing them of a proposed statutory audit visit for the Financial Years 2011-12 and 2012-13. The audit visit was in fact conducted on 11-02-2013. Without proceeding further, a second Form VAT 304, dated 16-3-2013, was issued. The audit visit did in fact take place, followed by a show cause notice dated 23-7-2013 proposing to disallow input tax credit on the purchase of certain inputs during the Financial Years 2011-12 and 2012-13 up to December, 2012. Assessment proceedings were initiated after the petitioner submitted their reply.

18. However, those proceedings initiated pursuant to the show cause notice dated 23-7-2013 after the second audit visit, were abandoned and a fresh Form VAT 304 dated 22-10-2013 was sent. This was the third audit visit for the very same period.

19. After the petitioner pointed out that two audit visits were already over and that an assessment proceeding was in progress, the show cause notice dated 23-7-2013 was withdrawn and the assessment proceedings were abandoned.

20. Thereafter, a fresh show cause notice dated 02-3-2015 was served and the petitioner filed a reply on 08-5-2015. But then the Assessing Authority changed and the petitioner was called upon to produce books of accounts. Thereafter, a revised third show cause notice dated 29-3-2016 was issued which resulted in the impugned order of assessment. Hence it is clear that the respondents were on a fishing expedition and on a hunting spree. Though motive and ill-will cannot, by themselves make an order of assessment a vulnerable one, the manner in which the respondents have proceeded, raises lot of doubts. But we shall not go by the repeated audit visits and the repeated show cause notices, but shall go only by the merits.

21. The impugned order of assessment runs to about 48 pages. What is contained in the first 6 pages, is only a narration of facts. What follows from pages 6 to 32 of the impugned assessment order is only the extract of the reply filed by the petitioner to the show cause notice. From pages 32 to 37, the additional submissions made by the petitioner are extracted. It is only from page 37 onwards that the actual discussion starts.

22. A reading of the order in entirety shows that the axis around which the entire impugned order revolves, is the core question as to whether sales in transit could take place in the course of execution of a works contract or not.

According to the Assessing Authority, the transfer of title occurs only when the goods used in the execution of the works contract are incorporated in the works. But the claim of the petitioner is that sales had actually taken place in the course of inter-State sales trade or commerce.

23. It is interesting to note that the Assessing Authority came to the conclusion that there was no sale in transit, on the ground that the contract was a turnkey project. This is despite the fact that the petitioner has been crying hoarse that the contract followed the OBE (Open Book Estimate) methodology. To come to the conclusion that the contract was a turnkey project, the Assessing Officer has relied upon the brochures uploaded in the web portal of the petitioner. But to come to the same conclusion, the learned Special Standing Counsel for the Department has relied extensively upon the terms and conditions of contract. Therefore, let us have a look at both.

24. In the screenshot taken by the Assessing Authority from the web portal of the petitioner, all that is stated is that the petitioner undertakes EPC (Engineering, Procurement and Construction) contracts, wherein it takes single point responsibility for managing all elements of project execution viz., basic and detailed engineering, procurement, plant erection, construction and commissioning. It is also stated in the web portal that the EPC contracts entered into by the

petitioner fall broadly under two categories viz., (i) Lump Sum Turn Key (LSTK) contracts and (ii) Open Book Estimate (OBE) contracts. Merely because an Open Book Estimate contract is one of the categories of EPC projects, the Assessing Authority came to the conclusion that it is a turnkey project, where the sale of goods takes place only at the time of incorporation of the goods in the course of works contract. The fundamental error on the part of the Assessing Officer was in treating an Open Book Estimate contract as a turnkey project, merely on the basis of presumptions.

25. A serious error of law was committed by the Assessing Authority in thinking that in respect of a works contract, the property in goods cannot pass by transfer of documents of title to the goods, but can pass only when goods are incorporated. There is no basis for such a presumption. The conclusion drawn by the Assessing Officer that the provisions of Section 3(b) and Section 6(2) of the Central Sales Tax Act, 1956 will not apply to inter-State works contract sales, is also contrary to the decision of the Supreme Court in **20th Century Finance Corporation Ltd. v. State of Maharashtra.**

26. Section 3 of the Central Sales Tax Act, 1956 indicates two situations in which sale or purchase of goods will be deemed to take place in the course of inter-State trade or commerce. The first situation is where the movement of

goods takes place from one State to another. The second is where a sale or purchase is effected by a transfer of documents of title to the goods during the movement from one State to another. Section 3 of the Central Sales Tax Act, 1956 reads as follows:

“3. 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 trade 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.

27. Similarly, sub-section (2) of Section 6 of the Central Sales Tax Act, 1956 makes it clear that where a sale of any goods in the course of inter-State trade or commerce is effected by a transfer of documents of title to such goods during their movement from one State to another, any subsequent sale during such movement, effected to a registered dealer, shall be exempt from tax, if the goods are of the description referred to in Section 8(3). This exemption is subject to the registered dealer effecting the sale, fulfilling certain conditions contained in the proviso thereto.

28. Therefore, the conclusion of the Assessing Authority that a works contract carried out on turnkey basis is not covered by Section 3(b) and Section 6(2) of the Central Sales Tax Act, 1956, is completely wrong.

29. In **20th Century Finance Corporation Ltd. v. State of Maharashtra**, three questions arose before a 3-member bench of the Supreme Court. One of the questions was whether a State can levy sales tax on transfer of right to use the goods merely on the basis that the goods put to use are located within its State irrespective of the fact that the sale had taken place in the course of an inter-State trade. Before answering this question, the Supreme Court took note of the decision in **State of Madras v. Gannon Dunkerley** (1959 SCR 379), which led to the Constitution 46th Amendment Act whereby Clause (29A) was inserted in Article 366. Eventually, the Supreme Court held – (i) that in exercise of the power under Entry 54 of List II read with Article 366(29A)(d) of the Constitution, the States cannot levy tax on the right to use goods which is a deemed sale, if such sale takes place in the course of inter-State trade or commerce, (ii) that in the absence of a provision made by the appropriate Legislature creating a legal fiction fixing a situs of sale, the same would be the place where the property in the goods passes and (iii) that 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 and the situs of sale would be the place where the contract is executed.

30. It is clear from the decision of the Supreme Court in **20th Century Finance Corporation** that the works contracts

are also subject to the provisions of Sections 3 and 6 of the Central Sales Tax Act, 1956. In fact, the definition of the expression “works contract” was inserted in Section 2(ja) of the Central Sales Tax Act, 1956, by way of Amendment Act No.18/2005. Once a sale is deemed to take place even in a works contract, in respect of the goods involved in the execution of the works contract, there is no escape from the conclusion that the same will also be subject to the provisions of the Central Sales Tax Act, 1956.

31. As a matter of fact, a Division Bench of this Court, in **Larsen and Toubro Ltd. v. State of Andhra Pradesh**, was concerned with the question whether the goods supplied by the contractor executing turnkey projects, could be considered as subsequent sales exempt from tax under Section 6(2) of the Central Sales Tax Act, 1956 or not. For finding an answer to this question, this Court considered as to whether such contracts were divisible or indivisible. This question assumed significance because prior to the 46th amendment to the Constitution, an indivisible contract would have disabled the revenue from subjecting the goods forming part of a turnkey project, to tax, as it did not constitute a sale of goods. The very liability to pay tax in such cases arose only out of the legal fiction created by Article 366(29A)(b) that an indivisible contract can be fictionally divided into two contracts -- one for sale of goods incorporated in the contract

and the other for services. There can be no dispute about the fact that a works contract, in common parlance, is an entire and indivisible contract. What happens in turnkey projects is that the contractor himself is entrusted with the responsibility of procuring material and of rendering services of erection and installation. The third issue that was taken up for consideration by the Division Bench in **Larsen and Toubro Ltd.**, was as to whether the sale of goods by the contractors to the owners fell within the ambit of Section 6(2) of the Central Sales Tax Act, 1956. While answering the said question, the Division Bench observed as follows:

“The ingredients of Section 6(2) of the Central Sales Tax Act are – (i) there must be a sale of goods in the course of inter-State trade or commerce, (ii) the sale has either occasioned movement of such goods from one State to another or has been effected by transfer of documents of title during their movement from one State to another, (iii) there is a subsequent sale during such movement, (iv) the subsequent sale is effected by a transfer of documents of title to such goods, (v) the sale of goods is to a registered dealer and (vi) the goods are of a description referred to in Section 8(3).”

32. Holding that the provisions of Section 6(2) will prevail over Section 6(1), this Court held that all subsequent sale of goods during their movement from one State to another are exempt from tax and that the object was to avoid cascading effect of multiple taxation. Unfortunately, this aspect was not appreciated by the Assessing Officer. In fact,

the decision in ***Larsen and Toubro Ltd.***, was actually misread by the Assessing Authority.

33. As seen from the written submissions made by the learned Special Standing Counsel, the Assessing Authority was influenced by the fact that the contractual consideration was routed through an escrow account jointly operated by Gujarat State Petroleum Corporation and the petitioner and that invoices were drawn on Gujarat State Petroleum Corporation to whom the materials were consigned by the suppliers, although the payment of the supplier's invoices was to be made by the petitioner from out of an escrow account.

34. Therefore, let us examine the relevant clauses contained in the Contract entered into between Gujarat State Petroleum Corporation and the petitioner herein on 07-12-2010. As seen from the title given to the Contract, it is a "Design, Engineering, Procurement, Construction and Commissioning Assistance for Execution of Onshore Gas Terminal Project on OBE Basis". The contract was divided into four sections, the first dealing with the terms and conditions of Contract, the second dealing with the schedule of prices, the third dealing with the scope of work and the fourth dealing with the abbreviations. Section 1 containing the terms and conditions of the Contract, had four appendices, the first containing the time schedule, the second

containing guarantees, the third containing the list of reimbursable cost elements and the fourth containing the list of Category-A items. Section 2 containing the schedule of prices was divided into two parts, the first dealing with Project 1 and the second dealing with Project 2.

35. In clause 3 of Section 1 of the Contract dealing with the terms and conditions, the Execution Methodology (OBE) was explained. Sub-clauses (a) to (e) of Clause 3.1.1 of Section 1 of the Contract reads as follows:

“3.1.1 GSPC proposes to implement the “Scope of Work” detailed in Section 3 of this Contract Document on an “Open Book Estimate (OBE) method. This method of execution is as follows:

(a) Under OBE mode of Project execution, EIL shall commence residual process design, detailed engineering and initiate procurement of all equipment/materials and construction activities through construction contractors.

(b) Procurement activities shall be taken up by EIL for all equipment/materials and Tendering for works contracts as detailed in Article 3.4 below.

(c) The cost of equipments, materials, site works/site services and their associated indirect costs such as taxes, duties etc required to build the Plant shall form part of reimbursable cost elements. The detailed list of reimbursable cost elements are attached in Appendix-3 to this Contract.

(d) GSPC shall release the payment of reimbursable cost elements to EIL's Escrow account opened for this specific Project. EIL shall disburse payments to vendors, contractors and other agencies engaged by EIL from the Escrow account. EIL will furnish to GSPC a monthly forecast of cash flow towards payment to suppliers, contractors and other service providers based on concluded purchase and work orders.

(e) GSPC shall deposit the amount projected by EIL in this designated account to enable EIL to make payments to

suppliers, contractors and other service providers from this bank account. Procedure for managing the above account shall be agreed separately.”

36. The above Clause appears to have bothered the Assessing Authority too much, as could be seen from the written submissions. As per the above clauses, the cost of procurement of reimbursable elements was to be released by Gujarat State Petroleum Corporation to an escrow account opened in the name of the petitioner. The payments to the vendors are to be made out of the said amount. This is just to ensure that the petitioner is not called upon to invest their own monies even into the cost of materials. This cannot be construed as a purchase by Gujarat State Petroleum Corporation in the first instance, followed by a sale to the petitioner in the second instance and a resale by the petitioner to Gujarat State Petroleum Corporation at the time of incorporation of the goods in the works contracts. ***The fundamental concept of an escrow account is that a financial instrument or an asset is kept with a third party on behalf of two parties, for the purpose of completion of a transaction. The most important aspect of an escrow is that funds are held by the escrow agent until it receives appropriate instructions or until pre-determined contractual obligations have been fulfilled.***

37. Two objectives are sought to be achieved when contracting parties create an escrow account. The first is that the party transferring monies into the escrow account ensures that the funds are utilized specifically for the purpose for which they are transferred. The second is that the party which is allowed to operate the account is not required to invest their own funds for the procurement of materials. This arrangement does not mean that the party transferring funds to the escrow account becomes the immediate owner of the materials. Actually, the expression “reimbursable” appearing in Clause 3.1.1 of the Contract is of significance. That the said term can be understood in only one way, is made clear by Clause 3.1.2 which says that for performing the complete scope of work, Gujarat State Petroleum Corporation will compensate the petitioner in respect of several items including reimbursable elements, which represent the actual amounts payable by the petitioner to suppliers, on supplies.

38. In fact, Clause 3.4 of the Contract lays down a detailed procedure for the petitioner to purchase materials and equipments. The petitioner is obliged under Clause 3.4 to adopt a competitive bidding process for the purchase of materials. It is the fundamental principle of the Law of Contracts that the flow of consideration for a contract can be from anyone, including persons other than the purchaser.

This has been completely lost sight of by the Assessing Authority.

39. Clause 11.0 of the Contract made it clear that the materials/equipments/services to be provided by Gujarat State Petroleum Corporation for the project are given in Article 2.17 of Section 3. The list of items provided by Gujarat State Petroleum Corporation is given in Appendix 3, Part B.

40. Therefore, there was a clear difference made out in the Contract between the items and materials which are owned and supplied by Gujarat State Petroleum Corporation and materials which the petitioner had to procure from third party suppliers.

41. Clause 22.1.2 is sought to be taken advantage of by the Assessing Authority. It reads as follows:

“22.1.2 Payment for indigenous and imported materials shall be made by GSPC to EIL through Escrow account. The invoices shall be drawn on GSPC to whom the materials shall be consigned by the Supplier although payment of the Supplier's invoice(s) shall be made directly by EIL to the Supplier(s).”

42. Merely because invoices were drawn on Gujarat State Petroleum Corporation, it could not have been presumed that there were two independent sales. What the Assessing Authority ought to have seen in the ultimate analysis was that there were only three parties viz., (i) Gujarat State Petroleum Corporation, who was the end user, (ii) the petitioner who was the contractor who procured the

material and (iii) the suppliers of materials. The internal arrangement that the petitioner and Gujarat State Petroleum Corporation had as between themselves, could not be interpreted to mean that there were two different sales.

This is confirmed by Clause 39.2.1, which reads as follows:

“39.2.1 Title to any documents produced or prepared in the performance of the Work shall, upon their production or preparation, pass to GSPC, and shall be delivered to GSPC immediately upon request. However, EIL shall retain record copies of such documents until the expiry of all his obligations under the Contract, subject to the provisions of Article 35.”

43. Therefore, it is clear that the Assessing Authority committed a serious error in law in thinking that there cannot be a sale in transit in respect of works contracts and that Sections 3 and 6 of the Central Sales Tax Act, 1956, may not apply to a works contract. Even in respect of a works contract, a sale in the course of inter-State trade or commerce can take place in transit, by transfer of documents of title. Since the Assessing Authority thought that it was not possible, it was clearly in error on a most important issue of law. Hence, the impugned order is liable to be set aside.

44. Though the learned Special Standing Counsel for the Department requested for an order of remand for a detailed examination, we do not think that it is necessary, in view of the fact that on the interpretation of the terms and conditions of the contract and on the interpretation of the legal issues involved, no other view is possible. Therefore, the

writ petition is allowed and the impugned order set aside.

Pending applications, if any, shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

T.RAJANI, J.

31st December, 2018.
Ksn/Ak

Note:-

1. L.R. Copy to be marked.
2. Website.



HONOURABLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HONOURABLE SMT. JUSTICE T.RAJANI

Writ Petition No.32971 of 2016
(per VRS, J.)



31st December, 2018.
(Ak)