

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

VATAP No. 12 of 2019
Date of decision: 4.2.2020

M/s Singh Construction Company, Kaithal

.. Appellant

v.

State of Haryana and others

.. Respondents

CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present: Mr. Rajiv Agnihotri, Advocate for the appellant.

Ms. Tanisha Peshawaria, Deputy Advocate General, Haryana.

...

AVNEESH JHINGAN, J.

The present appeal is filed under Section 36 of the Haryana Value Added Tax Act, 2003 (for short, 'the Act') against the orders dated 23.10.2017 and 1.8.2018 passed by the Haryana Tax Tribunal, Chandigarh.

The issue involved in the appeal is:-

Whether the 'hot mix material' transferred in a works contract is to be taxed under the Act at the prescribed rates of its constituents or at general rate under the residuary clause?

Entry 54 of List II of Seventh Schedule and Article 286 of the Constitution of India, as they existed during the relevant assessment year and the relevant provisions of the Act are reproduced below:

“Entry 54 of the State List of Constitution of India

54. Taxes on the sale or purchase of goods other than

newspapers, subject to the provisions of entry 92A of List I.

Article 286 of the Constitution of India

286. Restrictions as to imposition of tax on the sale or purchase of goods--

(1) No law of a State shall impose, or authorise 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 the goods into, or the export of the goods out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, insofar 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 (29A) of article 366,

be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of tax as Parliament may by law specify.

Sections 2 (ze) and 7(1) of the Act**2. Definitions**

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(ze) “sale” means any transfer of property in goods for cash or deferred payment or other valuable consideration except a mortgage or hypothecation of or a charge or pledge on goods; and includes-

(i) the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) the delivery of goods on hire-purchase or any system of payment by instalments;

(iv) 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;

(v) the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) 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;

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7. Rates of tax on sale or purchase of goods in the State.

(1) The tax payable by a dealer on his taxable turnover in so far as such turnover or any part thereof relates to,-

(a) the sales of goods not falling within sub-section (2),-

(i) in the case of goods specified in Schedule A, shall be calculated at the rates specified therein;

(ii) in the case of declared goods except those specified in Schedule B, shall be calculated at four per cent or such other rate not exceeding the ceiling specified in clause (a) of section 15 of the Central Act as the State Government may, by notification in the Official Gazette, direct;

(iii) in the case of goods specified in Schedule C, shall be calculated at five per cent or such other rate not exceeding ten percent as the State Government may, by notification in the Official Gazette, direct;

(iv) in the case of other goods, at 12.5 per cent or such other rate not exceeding fifteen per cent, as the State Government may, by notification in the

Official Gazette, direct;

PROVIDED that where any goods are sold in containers or packed in any packing materials, the rate of tax applicable to such containers or packing materials shall, whether the price of the containers or packing materials is charged separately or not, be the same as those applicable to the goods contained or packed therein; and where such goods are exempt from tax, the sale of the containers or packing materials shall also be exempt from tax;

(b) the purchase goods, shall be calculated at four per cent or such lower rate applicable on sale of such goods had it been a sale falling under clause (a);

PROVIDED that the State Government may, by notification in the Official Gazette, direct that the tax shall be calculated at a lower rate.”

Facts in brief are that the appellant is engaged in construction of roads and bridges and is a work contractor. Assessment for the assessment year 2013-14 was finalised by the Assessing Authority vide order dated 23.7.2014. The assessment order was taken up in *suo motu* revision and 'hot mix material' was taxed under the residuary clause at a general rate. The appeal filed before the Tribunal was dismissed on 26.5.2015. The review filed was rejected vide order dated 23.10.2017, hence the present appeal.

After the 46th amendment of the Constitution of India and consequent change in definition of 'sale' definition under various taxation

Acts, the position is that there is a deemed sale of the material transferred in the works contract.

The definition of 'sale' was widened after insertion of Clause (29-A) to Article 366 of the Constitution of India. Section 7 of the Act deals with the rates of tax. It provides that the goods specified in Schedules A, B, C and D to the Act would be taxed at the rates mentioned therein. Section 7(1)(a)(iv) provides that in case of 'other goods', i.e. not covered under Schedules A, B, C and D, the same shall be taxed at 12.5 per cent or such other rate not exceeding fifteen per cent as the State Legislature may notify. In other words, it provides for residuary entry and general rate of tax.

Before dealing with the issue, we quote following decisions:

In **Builders Association of India and others etc. v. Union of India and others**, 1989 (73) STC 370, the Apex Court while dealing with the constitutional validity of 46th amendment and also with the question as to whether the transfer of property involved in execution of works contracts referred to in sub-clause (b) of clause (29-A) of Article 366 of the Constitution is subject to the restrictions and conditions contained in Article 286 of the Constitution, upheld the validity and held restrictions of Article 286 will apply. Relevant portion is quoted below:

“ 32. Before proceeding further it is necessary to understand what sub-clause (b) of clause 29-A of Article 366 of the Constitution means. Article 366 is the definition clause of the Constitution. It says that in the Constitution unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that article. The expression 'goods' is defined in clause (12) of Article 366 of the

Constitution as including all materials, commodities and articles. It is true that in the State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd., (supra) this Court held that a works contract was an indivisible contract and the turnover of the goods used in the execution of the works contract could not, therefore, become exigible to sales-tax. It was in order to overcome the effect of the said decision Parliament amended Article 366 by introducing sub-clause (b) of clause (29-A)'. Sub-clause (b) of clause (29-A) states that 'tax on the sale or purchase of goods' includes among other things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract. It does not say that a tax on the sale or purchase of goods included a tax on the amount paid for the execution of a works contract. It refers to 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. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29-A) of Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per sub clauses (a) to (f) of clause (29-A), the latter part of clause (29-A) says that '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. Hence, a transfer of property in goods' under sub clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29-A) of Article 366 of the Constitution is, therefore, to enlarge the scope of 'tax on sale or purchase of goods' wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clause (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression 'tax on the sale or purchase of goods' in Entry 54 of the State List, therefore, includes 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 also. The tax leviable by virtue of sub- clause (b) of clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution. The position is the same when we look at Article 286 of the Constitution. Clause (1) of Article 286 says that no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase

takes place--(a) out- side the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Here again we have to read the expression 'a Tax on the sale or purchase of goods found in Article 286 as including the transfer of goods' referred to in sub-clause (b) of clause (29-A) of Article 366 which is deemed to be a sale of goods and the tax leviable thereon would be subject to the terms of clause (1) of Article 286. Similarly the restrictions mentioned in clause (2) of Article 286 of the Constitution which says that Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1) of Article 286 would also be attracted to a transfer of goods contemplated under Article 366(29A)(b). Similarly clause (3) of Article 286 is also applicable to a tax on a transfer of property referred to in sub-clause (b) of clause (29-A) of Article 366. Clause (3) of Article 286 consists of two parts. Sub-clause (a) of clause (3) of Article 286 deals with a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State or commerce, which is generally applicable to all sales including the transfer, supply or delivery of goods which are deemed to be sales under clause (29-A) of Article 366 of the Constitution. If any declared goods which are referred to in Section 14 of the Central Sales Tax Act, 1956 are involved in such transfer, supply or delivery, which is referred to in clause

(29-A) of Article 366 the sales tax law of a State which provides for levy of sales tax thereon will have to comply with the restrictions mentioned in section 15 of the Central Sales Tax Act, 1956. Clause (b) is an additional provision which empowers Parliament to impose any additional restrictions or conditions in regard to the levy of sales tax on transactions which will be deemed to be sales under sub-clause (b) or sub-clause (e) or sub-clause (d) of clause (29-A) of Article 366 of the Constitution. We do not find much substance in the contention urged on behalf of the States that since sub-clause (b) of clause (3) of Article 286 of the Constitution refers only to the transactions referred to in sub-clauses (b), (c) and (d) of clause (29-A) of Article 366, the transactions referred to under those three sub-clauses would not be subjected to any other restrictions set out in clause (1) or clause (2) or sub-clause (a) of clause (3) of Article 286 of the Constitution. It may be that by virtue of sub-clause (b) of clause (3) of Article 286 it is open to Parliament to impose some other restrictions or conditions which are not generally applicable to all kinds of sales. That however cannot take the other parts to Article 286 inapplicable to the transactions which are deemed to be sales under Article 366 (29A) of the Constitution. We are of the view that all transfers deliveries and supplies of goods referred to in clause (a) to (f) of clause (29-A) of Article 366 of the Constitution are subject to the restrictions and conditions mentioned in clause

(1), clause (2) and sub-clause (a) of clause (3) of Article 366 of the Constitution and the transfers and deliveries that take place under sub-clauses (b), (c) and (d) of clause (29-A) of Article 366 of the Constitution are subject to an additional restriction mentioned in sub-clause (b) of Article 286(3) of the Constitution.

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40. We are surprised at the attitude of the States which have put forward the plea that on the passing of the 46th Amendment the Constitution had conferred on the States a larger freedom than what they had before in regard to their power to levy sales-tax under Entry 54 of the State List. The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that sub-clause (b) of Article 366 (29A) should be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of Entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under clause (29A) of Article 366 is to be found only in entry 54 and not outside it. We may recapitulate here the observations of the Constitution Bench in the case of Bengal Immunity Company Ltd. (supra) in

which this Court has held that the operative provisions of the several parts of Article 286 which imposes restrictions on the levy of sales tax by the States are intended to deal with different topics and one could not be projected or read into another and each one of them has to be obeyed while any sale or purchase is taxed under Entry 54 of the State List.”

[Emphasis supplied]

In **Gannon Dunkerley & Co. v. State of Rajasthan, (1993) 88**

STC 204, the Supreme Court held as under:

“34. 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.

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48. A question has been raised whether it is permissible for the State Legislature to levy tax on deemed sales falling within the ambit of Article 366 (29-A)(b) by prescribing a uniform rate of tax for all goods involved in the execution of a works contract even though different rates of tax are prescribed for sale of such goods.

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In our opinion, therefore, it would be permissible for the State Legislature to tax all the goods involved in the execution of a works contract at a uniform rate which may be different from the rates applicable to individual goods because the goods which are involved in the execution of the works contract when incorporated in the works can be classified into a separate category for the purpose of imposing the tax and a uniform rate may be prescribed for sale of such goods.”

In Larsen and Toubro Limited and another v. State of Karnataka and another, 2014(1) SCC 708, the Supreme Court summarised the legal position as under:

“101. In light of the above discussion, we may summarise the legal position, as follows:

(i) For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the property in those goods must be transferred to a third party either as goods or in some other form.

(ii) For the purposes of Article 366 (29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. are

intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

(iii) Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term “works contract” in Article 366 (29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366 (29-A)(b) limits the term “works contract”.

(iv) Building contracts are species of the works contract.

(v) A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

(vi) The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366 (29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

(vii) A transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

(viii) Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b) there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.

(ix) The expression “tax on the sale or purchase of goods” in Entry 54 in List II of Seventh Schedule when read with the definition clause 29-A of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

(x) Article 366 (29-A)(b) serves to bring transactions where essential ingredients of ‘sale’ defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of

movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

(xi) Taxing the sale of goods element in a works contract under Article 366 (29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods.”

[Emphasis supplied]

From the above cited decisions, the position emerges that the goods involved in the works contract are taxed as deemed sales. The restrictions under Article 286 of the Constitution of India would apply on the State Legislature while taxing the works contract. The State Legislature has power to prescribe uniform rate of tax on the goods involved in the works contract inspite of the fact that different rates are prescribed under the Act for the constituents involved therein. Further that identity of the goods transferred is lost in the process does not prevent them from being goods.

The contention of learned counsel for the State that the goods when being incorporated were transferred in some other form and hence ingredients lose their identity, cannot be accepted, as there is a deemed

sale of the ingredients of 'hot mix material' and the loss of identity of goods does not prevent them from being goods for the purpose of deemed sale.

The State of Haryana has not prescribed any uniform rate for material used in the works contract. Cement, bitumen, rori etc. which are to be deemed to be sold cannot be taxed at general rate by resorting to residuary clause, these are to be taxed as per the rates prescribed. The residuary clause will come into play only in case the goods are not covered under any of the Schedule to the Act. Even otherwise it would restrict the full play to be given to the deeming fiction of sale of goods involved in works contract.

There is another angle to view the contention of the State, if the argument is taken to the logical conclusion and it is held that transfer in works contract is not of the ingredients of hot mix material but of the new product, in that eventuality the restrictions of Article 286 of the Constitution of India and Sections 14 and 15 of the Central Sales Tax Act, 1956 would not apply for taxing the deemed sale. Such an eventuality would be against the law laid down by the Apex Court that restrictions of Article 286 of the Constitution of India will apply and that 46th amendment of the Constitution of India has only given a deeming fiction of sale of goods involved in the works contract and has not given separate or equivalent Entry in List II for levy of tax on sale or purchase of goods.

A different aspect of the issue involved in the present case came up before the Supreme Court in **State of Karnataka and another v. Durga Projects Inc.**, (2018) 4 SCC 633. The State of Karnataka had prescribed for a uniform rate of tax for works contract from 1.4.2006, it was argued

deemed to be providing the uniform rate for the goods involved in the works contract. The contention was rejected and it was held that the scheme of Karnataka Act envisaged specific rates of tax for the goods falling in the Schedule to the Act and the general rate was provided “in respect to other goods” i.e. goods not falling in the Schedule. Relevant portion is quoted below:

“19. The core of the submissions which have been ably projected before the Court by Mr Devadatt Kamat is that the State legislature had in fact prescribed a uniform rate for works contracts, prior to 1.4.2006 in Section 4(1)(b) under which a rate of 12.5% was provided. In his submission, declared goods would be assessed separately; while the balance of the goods in a works contract would be assessed on the total turnover, which is incorporated under Rule 3(1)(c). We find ourselves unable to accept the submission. In our view, it would be far-fetched to accept that in enacting Section 4(1)(b), the legislature intended to prescribe a uniform rate of tax, prior to 1.4.2006, for goods incorporated in a works contract. The scheme legislated upon in Section 4(1) envisaged specific rates of tax on goods falling within the Second, Third and Fourth Schedules. What Section 4(1)(b) provided was a residual entry under which a rate of 12.5% was provided ‘in respect of other goods’. The expression ‘in respect of other goods’ meant goods other than those falling in the Second, Third and Fourth Schedules. Declared goods

specified in Section 14 of the Central Sales Tax Act, 1956 were comprehended in Serial No.20 of the Third Schedule to the KVAT Act 2003 and attracted a rate of 4%, which applied to goods in that Schedule. As a result of the deeming definition of the expression sale, a transfer of property in goods involved in the execution of a works contract become exigible to tax. Exigibility to tax, it is settled law, is distinct from the rate of tax and the measure of the tax. In *Gannon Dunkerly & Co*, this court expressed the view that it is open to the states to provide a uniform rate of tax on goods transferred in the course of the execution of a works contract. The exigibility to tax is not (as it cannot be) dependent on the state prescribing a uniform rate of tax for goods involved in works contracts. That the KVAT Act 2003 did not provide a uniform rate of tax prior to 01.04.2006 on goods involved in the execution of works contract also becomes apparent when we read the amendment which introduced Section 4(1)(c) by Act 4 of 2006. As a result of the amendment, the legislature provided that the rate of tax in respect of the transfer of property in goods involved in the execution of a works contract would be as provided in the Sixth Schedule. The Sixth Schedule elucidates works contracts of various descriptions and elucidates the associated rates of tax for each distinct category. For declared goods, Section 4(1)(c) is expressly subject to Sections 14 and 15 of the CST Act 1956.

Hence declared goods involved in the execution of a works contract are taxable at the rates mentioned in Section 15 of the CST Act while all other goods involved in the execution of a works contract are taxable at the rate prescribed in the Sixth Schedule upon the amendment. The amendment introducing Section 4(1)(c) took effect on 1 April 2006. The amendment is not clarificatory. It was with effect from 1 April 2006 that the State legislature mandated a uniform rate of tax on goods involved in the execution of works contracts as provided in the Sixth Schedule. The position as it existed upto 31 March 2006 was altered with effect from 1 April 2006. We are, therefore, unable to accept the submission of the State that upto 31 March 2006. Section 4(1)(b) envisaged a uniform rate for the transfer of goods involved in the execution of a works contract.

In view of discussion above, it is held that the goods transferred in execution of works contract will not be taxed at general rate but as per the rates prescribed of constituents of the 'hot mix material'.

The appeals are allowed.

(AVNEESH JHINGAN)
JUDGE

(AJAY TEWARI)
JUDGE

4.2.2020
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Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No