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HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION (T) NO. 128 OF 2015

M/s Ultratech Cement Limited, a Company duly incorporated under the Companies Act, 1956, having its Registered Office at B-Wing, Ahura Centre, 2nd Floor, Mahakali Caves Road, Andheri- East, Mumbai- 400093 and Office at Ravinagar, Raipur 492001 (C.G.), through its Authorized Signatory of the Company Shri Anil Purohit, S/o Shri Suraj Prakash Purohit, aged about 32 years, resident of Hirmi Cement Works (Township), Hirmi, District Balodabazar-Bhatapara (C.G.)

… Petitioner

versus

1. State of Chhattisgarh, through Secretary, Department of Commercial Taxes, Mantralaya Bhavan, Raipur (C.G.)
2. Commissioner of Commercial Tax, Vanijyik Kar Bhavan, Civil Lines, Raipur (C.G.)
3. Additional Commissioner, Commercial Tax, Raipur (C.G.)
4. Divisional Deputy Commissioner of Commercial Tax, Raipur (C.G.)

… Respondents

For Petitioner	:	Mrs. Smiti Sharma, Advocate.
For Respondents	:	Mr. Rahul Jha, Govt. Advocate.

Hon'ble Shri Justice P. Sam Koshy

C A V Order

Reserved on : 18.11.2022
Pronounced on : 07.12.2022

1. Challenge in the present Writ Petition is to the Order dated 30.5.2015 (Annexure P-6) whereby the Revisional Authority i.e. the Additional Commissioner, Commercial Tax, Raipur in Revision Case No.29/R/2015-Regional under Section 49(1) of the Chhattisgarh Value Added Tax Act, 2005 (for short, "the VAT Act") has affirmed the Order dated 22.12.2014 (Annexure P-5) passed in Case No.104/2010-Regional by the Assessing Officer i.e. the Divisional Deputy Commissioner, Commercial Tax, Division-I, Raipur.

2. The issue involved in the instant case is the levy of Value Added Tax (for short, “VAT”) on the lease charges paid by the Railways Department to the Petitioner Company. The levy of tax was under Section 2(s)(vi) of the VAT Act for the assessment year 2009-10. The assessment for the year 2009-10 was completed on 22.12.2014. In the course of assessment, the Assessing Officer assessed the income of Rs.29,20,347/- as lease rent obtained by the Assessee from the Railways Department. Treating the said receipt of lease rent by the Petitioner Company from the Railways Department as deemed sale, tax was assessed on the above mentioned amount at the rate of 18% which came to around Rs.4,08,849/-.

3. This Court on an earlier occasion had dismissed the present Writ Petition vide Order dated 5.12.2017. However, subsequently, the Writ Petition was reviewed and vide Order dated 4.11.2022, the Review Petition was allowed by this Court and the matter has again come for hearing and is now being decided on merits by this Order.

4. Crux of the matter in brief is that the Indian Railways had floated a Scheme known as “Own Your Wagon Scheme” to which the Petitioner Company expressed their interest in purchasing Wagons and for which necessary proposal was put forth by them. The proposal was approved by the Railways Board. In respect of the said approval of the proposal put forth by the Petitioner Company, two Contracts under the “Own Your Wagon Scheme” were entered into between the President of India through the Chief Marketing and Sales Manager, South Eastern Railways and the Petitioner Company as it then was known as “M/s Larsen & Turbo Limited”.

5. The said Contracts were signed in Kolkata in the year 1996. As per the Contracts, the Wagons proposed to be purchased by the Petitioner Company were to be manufactured by two different Companies approved by the Ministry of Railways, Government of India, namely – M/s Texmaco Limited, Kolkata

(West Bengal) and M/s CIMMCO Birla Limited, Bharatpur (Rajasthan). As per the Contract/Agreement, the Wagons manufactured for and on behalf of the Petitioner Company were directly/straightaway handed over to the Railway Authorities from where they were manufactured. M/s CIMMCO Birla Limited handed over their manufactured Wagons to the Station Superintendent, Bharatpur Railway Station (Western Railways). As regards the Wagons manufactured at M/s Texmaco Limited, the same were handed over to the Station Master, Belgharia Railway Station (West Bengal) under the then South Eastern Railways.

6. After the Wagons were manufactured and handed over to the Indian Railways at Bharapur (Rajasthan) and Belgharia (West Bengal), the Petitioner Company started getting lease rent from the Railways. It is the tax i.e. VAT on the said lease rent for the assessment year 2009-10 for which the lease rent on Rs.29,20,347/- at the rate of 18% which came to Rs.4,08,849/- which was assessed by the Assessing Officer treating it to be the lease rent obtained for transfer of right to use under Section 2(s)(vi) of the VAT Act.

7. Learned Counsel for Petitioner submits that the said assessment of tax by the State Authorities is *per se* bad, for the reason that *firstly* the Agreement was executed at a place outside the territories of the State of Chhattisgarh, *secondly*, the Wagons purchased by the Petitioner Company also were not delivered or stationed within the territories of the State of Chhattisgarh. Thus, it was the contention of learned Counsel for Petitioner that once when as per the Agreement, the goods i.e. the Wagons stood transferred immediately on being manufactured to the Railway Authorities and the transfer being made at Bharatpur (Rajasthan) and Belgharia (West Bengal) both being outside the State of Chhattisgarh and even thereafter the Wagons not being stationed within the territories of the State of Chhattisgarh, the amount received as lease charges cannot be accepted to be a taxable income under the VAT Act.

8. Learned Counsel for Petitioner further submits that, in respect of transfer of right to use any goods, the situs of sale would be the place where the Agreement transferring the right to use is executed. The tax could have been levied by the Respondents only in the event of intra-state sale and where the sale brings the goods purchased within the territories of the State of Chhattisgarh. Hence, alleging lack of jurisdiction for the Authorities, the Wagons being not delivered into the State of Chhattisgarh and also the two impugned Orders being without properly dealing with the aspect of the Agreement being entered into outside the State of Chhattisgarh, the same deserve to be set-aside/quashed.

9. Learned Counsel for Petitioner, in support of her contentions, apart from relying upon the case of "**20th Century Finance Corpn. Ltd. & Anr.** Vs. **State of Maharashtra**" [**2000 (6) SCC 12**]**,** has also relied upon the case of "**State of Madras** v. **Gannon Dunkerley & Co. Ltd.**" [**AIR 1958 SC 563**], "**Builders Association of India** v. **Union of India**" [**1989 (2) SCC 645**] and "**Gannon Dunkerley & Co. Ltd.** v. **State of Rajasthan**" [**1993 (1) SCC 364**].

10. Learned State Counsel on the other hand submits that the lease agreement in the instant case was signed in 1996 on 19.3.1996 to be precise. The agreement was signed in Calcutta (now Kolkata). The Petitioner is a Company with its Registered Office at Mumbai. Thus, relying upon the *Explanation* provided to Section 2(s)(vi) of the VAT Act, learned State Counsel submits that as such the sale or purchase shall be deemed sale for the purposes of this Act to have taken place in the State of Chhattisgarh irrespective of the place where the contract of sale or purchase might have been made. Learned State Counsel thus prayed for the rejection of the present Writ Petition.

11. Having heard the rival contentions put forth on either side, the moot question which requires adjudication in the instant case is, as to whether the imposition of tax under the VAT Act on lease charges received by the Petitioner Company from the Railways is proper, legal and justified or not.

12. Article 366 of the Constitution of India provides that, unless the context otherwise requires, the expressions of the terms used under this Article shall have the meanings as assigned respectively to this terminology. Clause 29 of the Article 366 deals with “tax on income” which includes a tax in the nature of an excess profits tax. Likewise, clause 29A of Article 366 deals with “tax on the sale or purchase of goods”. For ready reference Clause 29A of Article 366 is reproduced herein under:-

> **“29A.** “tax on the sale or purchase of goods” includes-
>
> (a) a tax on the transfer, otherwise than in pursuance of a contact, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;
>
> (c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;
>
> (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
>
> (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,
>
> and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;**”**

13. The Assessing Officer in the Commercial Tax Department of the State of Chhattisgarh has held that VAT is leviable on the Petitioner Company under Section 2(s)(vi) of the VAT Act. For ready reference, Section 2(s)(vi) of the VAT Act is reproduced below:-

> **"2. Definitions. -**
>
> xxx xxx xxx
>
> **(s)** "*Sale*" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or for other valuable consideration and includes**-**
>
> xxx xxx xxx
>
> **(vi)** a transfer of the right to use any goods including leasing thereof for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;**"**

14. With the aforesaid statutory provisions, when we look into the issue involved in the present case, all that is required to be seen is, whether the lease charges received by the Petitioner Company from the Railways could be brought within the ambit of the VAT Act or not.

15. In addition to the Definition of "*Sale*" under sub-section (s) of Section 2 of the VAT Act and the relevant portion of which, i.e., clause (vi) which has been reproduced in the preceding paragraph, what is also relevant to take note of is the "*Explanation"* that has been provided under sub-section (s) of Section 2 of the VAT Act. For ready reference, the *Explanation* portion is being reproduced herein under:-

> **"Explanation**:- (a) Notwithstanding anything contained in the Sales of Goods Act, 1930 (III of 1930), where a sale or purchase of goods takes place in pursuance of a contract of sale, **such sale or purchase shall be deemed for the purposes of this Act to have taken place in the State of Chhattisgarh irrespective of the place where the contract of sale or purchase might have been made**, if the goods are within the State-
>
> (i) in the case of specific or ascertained goods, at the time the contract of sale or purchase is made; and

(ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase by the seller or by the purchaser, where the assent of the other party is prior or subsequent to such appropriation; and

(b) where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of clause (a) shall apply as if there were separate contracts in respect of the goods at each of such places;**"**

16. The Definition of "tax on the sale or purchase of goods" is provided under sub-clause (d) of clause 29A of Article 366 of the Constitution of India, which reads as under:-

"(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;**"**

17. The VAT Act has an enactment by the State Legislature in Entry 54 under List II - State List of the Seventh Schedule of the Constitution of India, which for ready reference is also being reproduced herein below:-

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

18. There is yet another Entry in the Constitution of India introduced by the Sixth Amendment in 1956 whereby Entry 92A was inserted in List I of the Seventh Schedule, which also for ready reference is being reproduced as under:-

"92A. 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.**"**

19. The aforesaid provisions of law came up for consideration before the Hon'ble Supreme Court in the matter of "**20th Century Finance Corpn. Ltd. & Anr.** Vs. **State of Maharashtra**" [**2000 (6) SCC 12**] and the Apex Court in its Judgement in paragraphs 24, 25, 26, 27 & 35 has held as under:-

"24. The aforesaid decisions unambiguously laid down that 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.

25. It was then urged on behalf of respondents that, it is the location of goods where they are put to use would furnish the situs of sale. According to them, there would be no completed transfer of right to use goods until the goods are delivered. We have traced the legislative history of sales tax in this country only to show that, excepting where the appropriate legislature by creating legal fiction fixed the situs of sale on location or delivery of goods for consumption like omitted Explanation to Article 286(1)(a), there is no authority to show that mere location or delivery of goods would be the situs of sale. Here, we would like to cite an appropriate illustration given in the decision in Bengal Immunitys case (supra) only to resolve the controversy before us. The illustration given is as under:

> **"**Take, for instance, a case where both the seller and the buyer reside and carry on business in Gurgaon in the State of Punjab. Let us say that the seller has a godown in the State of Delhi where his goods are stored and that the buyer has also a retail shop at Cannought Circus also in the State of Delhi. The buyer and the seller enter into a contract at Gurgaon for the sale of certain goods and a term of the contract is that the goods contracted to be sold will be actually delivered from the sellers godown to the buyers retail shop, both in the State of Delhi, for consumption in the State of Delhi. Pursuant to this contract made in Gurgaon in the State of Punjab, the buyer pays the full price of the goods at Gurgaon and the seller hands over to the buyer also at Gurgaon a delivery order addressed to the seller's godown-keeper in Delhi to deliver the goods to the buyers retail shop.
>
> As a direct result of this sale the sellers godown-keeper, on the presentation of this delivery order, actually delivers the goods to the buyers retail shop at Connaught Circus for consumption in the State of Delhi. On one view of the law, the situs of such a sale would be Gurgaon. We need not decide that it is, because that type of case is not before us and there may be other views to consider, but it is certainly a possible view.
>
> It is also possible to hold that this is not inter-State trade or commerce, because there is no movement of goods across a State boundary. Again, we need not decide that because that also may be controversial. But given these two postulates the transaction would fall squarely within the Explanation and yet it would not come within clause (2), for there is no movement of the goods across the border of any State and both the seller and the buyer are in the same place. Surely, the Explanation will, in presenti, govern such cases irrespective of whether Parliament has lifted the ban under clause (2).

> If these postulates are accepted then by virtue of clause (1)(a) read with the Explanation the State of Delhi alone will be entitled to impose a tax on such a sale or purchase and the State of Punjab will be precluded from doing so by reason of the fictional situs assigned to such a sale or purchase by Explanation, although the contract was made, price was paid and symbolical or constructive delivery of the goods by the handing over of the delivery order took place in Gurgaon in the State of Punjab.**"**

We, therefore, find that 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.

26. Next question that arises for consideration is, where is the taxable event on the transfer of the right to use any goods. Article 366(29A)(d) empowers the State legislature to enact law imposing sales tax on the transfer of the right to use goods. The various sub-clauses of clause (29A) of Article 366 permit the imposition of tax thus: sub-clause (a) on transfer of property in goods; sub-clause (b) on transfer of property in goods; sub-clause (c) on delivery of goods; sub-clause (d) on transfer of the right to use goods; sub-clause (e) on supply of goods; and sub-clause (f) on supply of services. The words and such transfer, delivery or supply. In the latter portion of clause (29A), therefore, refer to the words transfer, delivery and supply, as applicable, used in the various sub-clauses. Thus, the transfer of goods will be a deemed sale in the cases of sub-clauses (a) and (b), the delivery of goods will be a deemed sale in case of sub-clause (c), the supply of goods and services respectively will be deemed sales in the cases of sub- clauses (e) and (f) and the transfer of the right to use any goods will be a deemed sale in the case of sub-clause (d). Clause (29A) cannot, in our view, be read as implying that the tax under sub-clause (d) is to be imposed not on the transfer of the right to use goods but on the delivery of the goods for use. Nor, in our view, can a transfer of the right to use goods in sub-clause (d) of clause (29A) be equated with the third sort of bailment

referred to in Bailment by Palmer, 1979 edition, page 88. The third sort referred to there is when goods are left with the bailee to be used by him for hire, which implies the transfer of the goods to the bailee. In the case of sub-clause (d), the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use the goods. In our view, therefore, on a plain construction of sub-clause (d) of Clause (29A), the taxable event is the transfer of the right to use the goods regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used. And further contract in respect thereof is also required to be executed. Given that, the locus of the deemed sale is the place where the right to use the goods is transferred. Where the goods are when the right to use them is transferred is of no relevance to the locus of the deemed sale. Also of no relevance to the deemed sale is where the goods are delivered for use pursuant to the transfer of the right to use them, though it may be that in the case of an oral or implied transfer of the right to use goods, it is effected by the delivery of the goods.

27. Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods.

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

(a) The States in exercise of power under Entry 54 of List II read with Article 366 (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.**"**

20. The High Court of Orrisa in "**M/s Shrei International Finance Ltd.** Vs. **State of Orissa & Ors."** [**2008 (Supp.-I) OLR-764**] in somewhat identical set of facts has held that since the sale or purchase was in the course inter-state trade and commerce, the State of Orissa has no jurisdiction to levy tax on the lease rent received. The taxable event is the transfer of right to use goods and not the right to use goods or the use of goods. Therefore, the right to use goods or the use of goods is not the relevant factor to justify the levy of tax.

21. It is pertinent to mention at this juncture that a Single Bench of the Madhya Pradesh High Court on identical set of facts in the case of "**M/s Raymond Limited & Anr.** v. **Commercial Tax Officer & Ors.**" in **W.P. No.757/1999** had dismissed the said Writ Petition at the first instance. However, on an Appeal, the Division Bench in **L.P.A. No.317/1999** had allowed the Appeal of **"M/s Raymond Limited**" purely relying upon the decision rendered by the Hon'ble Supreme Court in the case of "**20th Century Finance Corpn. Ltd.**" (supra).

22. For all the aforesaid facts and circumstances and also the Judgment of the Hon'ble Supreme Court in the case of "**20th Century Finance Corpn. Ltd.**" (supra) and the subsequent Judgments of various High Courts including the High Court of Chhattisgarh, this Court is of the opinion that the Orders of the

assessment so made by the Assessing Authority and the rejection of the Revision by the Revisional Authority both being in contravention to the provisions of law and also contrary to the Judgments of the Hon'ble Supreme Court, the same thus would not be sustainable and therefore both the Orders deserve to be set-aside/quashed.

23. As a consequence, the Order dated 22.12.2014 (Annexure P-5) so also the Order dated 30.5.2015 (Annexure P-6) both stand set-aside/quashed, with consequences to flow.

24. The Writ Petition accordingly stands allowed.

Sd/-
(P. Sam Koshy)
Judge

/sharad/