(112)

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL, DELHI
Sh. Narinder Kumar, Member (Judicial) & Sh. Rakesh Bali, Member (Administrative)

Appeal No.770/ATVAT/2008.
Date of decision: November 09th, 2021.

M/s. Rajora Builders.
F-35, Green Park,
New Delhi .....Appellant

v.

Commissioner of Trade & Taxes, Delhi ..... Respondent

Counsel representing Appellant : Shri S.K.Verma.
Counsel representing respondent : Shri Pradeep Tara.

JUDGMENT

1. Appellant has challenged order dated 13/01/2009 passed by the Learned Additional Commissioner –I (hereinafter referred to as the First Appellate Authority).

2. The matter pertains to the year 2004-05.

3. On 31/03/2005, assessment of the turnover of the appellant was made by the Assessing Officer/STO (ward - 100) in view of the provisions of Section 16 of Delhi Sales Tax on Work Contract Act, 1999 (hereinafter referred to as DSTWC Act, 1999) read with section 23(3) of the DST Act, 1975, and thereby demand of Rs.27,45,956/- was made. The appellant challenged the default notices of assessment by way of objections. Learned Objection Hearing Authority-First Appellate Authority disallowed to the appellant exemptions from tax as regards purchases, which according of the appellant were inter-state sales.

4. As regards item 'Steel', the Assessing Authority observed that from the purchase details of this item, it was found that no local tax had been suffered and that only central tax had been charged. Accordingly, the Assessing Authority framed assessment by observing in the manner as :-

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"The dealer deals in above items. Quarterly returns have been prescribed and filed at the time of assessment proceeding. A penalty of Rs. 25,000/- is imposed.

In response to ST-13 notice Sh. Sanjay Kumar Rajora, partner alongwith POA appeared before the undersigned and filed sale summary, audited balance sheet. List of tax paid purchases alongwith invoices. Filed (sic) a copy of detailed consortium agreement for execution of works of constructions. As per summary statement the dealer has claim labour services, tax paid declared good, exempted good supplies by the contractee. Field four TDS certificates without receipted challans. Hence, the claim is disallowed. The (sic) has not procure(sic) invoice of payment received giving details of payment. After going through the purchase bills of steel it is found that no local tax has been suffered, only central tax has been charged and details of labour & services rendered. Exempted goods, the claim of exemption in the return and sale summary are not admissible. However, the exemption for labour and service @ 15% as laid down in Rule 5 of DST on works contract Rule. 1991 is allowed. Nothing adverse. If found, adverse the case will be reopened.

The local assessment is framed as under –

GTO	Rs. 3,57,26,836.00
Labour charges @ 15%	Rs. 53,59,025.00
Taxable @ value 8%	Rs. 3,03,67,811.00
Tax Assessed	Rs. 24,29,425.00
TDS Paid	NIL
Interest	Rs. 2,91,531.00
Penalty	Rs. 25,000.00
Tax Balance	Rs. 27,45,956.00

The dealer is liable to pay a sum of Rs. 27,45,956/- as per enclosed demand notice".

5. Feeling dissatisfied with the assessment made on 31/03/2005, the appellant filed appeal before the First Appellate Authority. After

hearing arguments, First Appellate Authority disposed of the appeal while observing as under:-

> "The claim of the appellant to exempt the purchase of declare/ inter-state purchased goods, treating the same as sales under section 3 of Central Sales Tax Act is not valid, because in the contract there is nothing mentioned that these goods are to be procured from a particular manufacturer of outside Delhi. Almost all the brands mentioned in the contract are available in Delhi and goods of same brand and quality could be obtained within Delhi. Further, mere checking of goods by DJB before its use does not qualify the transaction for treating it under Central Act. In fact the whole transaction consists of two sales, one is from the outside dealer to the appellant,, covered by Central Act and other is from appellant to DJB by way of Works Contract and to be taxed under local act. In view of this, the disallowance of claim by the Ld. AA for these goods is upheld.
>
> Also I am of the considered view that the penalty for non –filing of returns imposed by the AA is right, keeping in view of the quantum of turnover.
>
> Regarding the claim for deduction on account of local tax-paid goods, deductions for labour and services and credit for TDS certificates submitted I have the opinion that ends of justice would meet if one more final opportunity is allowed to the appellant to appear before the Assessing Authority to submit his claim for aforesaid deductions along with Books of Accounts, invoices, details of payments and any other document to the satisfaction of the assessing authority.
>
> Accordingly the case is hereby remanded back to the Assessing Authority for considering the aforesaid issues only. Rest of the order shall remain unchanged."

6. Hence this appeal.

7. Arguments heard. File perused.

Case of Inter-state purchase

8. Learned Counsel has referred to the provisions of section 3 of

Central Sales Tax Act, 1956 (here-in after referred to as the CST Act, 1956) and then to the provisions of section 7 of Delhi Value Added Tax Act, 2004 (here-in after referred to as the DVAT Act, 2004) to submit that where a sale takes place in the course of inter-state trade or commerce, no tax can be levied by the State on any such sale of goods. Submission is that present case pertains to such transaction of purchase of goods by the appellant, which can be deemed to have taken place in the course of inter-state trade or commerce, within the meaning of Section 3 (a) of CST Act, 1956 and Section 8 of DST Act, there as on being that the purchase occasioned the movement of goods from one State to another.

Further, it has been submitted that the transaction pertains to goods which were imported for use in works contract, in terms of contract between the appellant and Delhi Jal Board, and as such the same was covered by the provisions of Section 3 of CST Act, and as such this inter-state transaction was not liable to tax under DST Act,1975 and DSTWC Act, 1999.

While challenging the impugned order passed by learned First Appellate Authority, learned counsel for the appellant has referred to grounds of appeal and also cited certain decisions, mentioned in the memorandum of appeal, and contended that the learned First Appellate Authority did not at all discuss the said decisions and as such the impugned order can safely be said to be cryptic and a non speaking order.

Learned counsel for the appellant has referred to definition of 'sale' as available u/s 2(g) of DVAT Act and pointed out that a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, is covered by clause (ii) of the said definition.

Reference has also been made to the provisions of Section 9 of

Delhi Sales Tax Act, 1975, (here-in-after referred to as DST Act, 1975). Submission is that provisions of section 7 of DVAT Act are almost similar to the provisions of Section 9 of CST Act,1976. Further, reference has been made to provisions of section 9 of CST Act 1956 to highlight that tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-state trade or commerce shall be levied by the Govt. of India and the tax so levied shall be collected by the Govt. in accordance with provisions of sub-section (2) in the State, from where the movement of the goods commenced.

Items were to be purchased from companies named in contract

9. Learned counsel has submitted that it is not a concomitant that it should be specified in the contract that goods should be purchased from outside the State.

Learned counsel for the appellant has contended that in a works contract case, terms and conditions of the contract are of much significance. While referring to the contract arrived at between the appellant and Delhi Jal Board, it has been submitted that the appellant was at liberty to purchase goods from any place out of Delhi, and the only restriction was that the same were to be purchased from the companies named therein.

It has been contended by learned counsel for appellant that the appellant had only one works contract in Delhi and in this situation the goods purchased by the appellant could not be diverted or used in any other contract.

Case of one transaction and not of two transactions

10. Ld. Counsel for the appellant has argued that this is a case where the whole transaction is only of one sale and not of two sales, as observed in the impugned order passed by the Ld. First Appellate

Authority.

Further, it has been submitted that movement of goods was part of the contract and there was a link between the contract and the goods purchased. It has been submitted that DJB was not required to place an order, for the purposes of claim, by the dealer, of the said exemption from tax u/s 5(4) of the Act and under the provisions of section 3(a) of CST Act, no commercial privity contract is required under this provision of law.

Reference has also been made to decision in "K.G. Khosla and Co. (P) Ltd. Vs. Deputy Commissioner of Commercial Taxes, 17 STC 473 (SC), which was a case of no possibility of goods being diverted.

In support of his submissions, learned counsel has referred to decision in ABB Ltd' v. Commissioner, decided by our own Hon'ble High Court on 28/9/2012 and also to the decision in **Commissioner vs. ABB Ltd.,** decided by Hon'ble Apex Court on 5/4/2016, wherein reliance was placed on the decision in **K.G. Khosla and Co. (P) Ltd. case (supra).**

Learned counsel for the appellant has also referred to decision in **State of Karnataka vs. ECE Industries Ltd.**, 144 STC 605 (KAR); and **State of M/s. Kerala vs. Metro India Pvt. Ltd.**, OT Revision NO. 143 of 2017 decided by the Hon'ble High Court of Kerala on 19/6/2020.

Contentions on behalf of Revenue

11. On the other hand, ld. Counsel for the revenue has submitted that the appellant has not been directed to pay tax under CST Act,1956 or DVAT Act,2004 and rather, tax has been levied under the provisions of Section 16 of DSTWC Act, 1999 and Section 23(3) of DST Act, 1975.

Ld. Counsel for the revenue has referred to the four returns

submitted by the appellant in Form –IV. This Form –IV was framed on the basis of Rule 4(1), Rule 6(2)(iii) of Delhi Sales Tax on Works Contract Rules, 1999. Ld. Counsel for the revenue has pointed out that in Column No. 2(a) of the return the appellant –dealer did not claim any deduction on account of contract value of transaction in the course of inter-state trade or commerce under Section 3 of CST Act, 1956.

Further, it has been pointed out that actually under Column 6(b) of the returns, the appellant claimed deductions of tax paid declared goods as if used in the same form, as per Rule 5(1)(c). The contention is that when in column no.2, the appellant mentioned 'NIL' in each return, the appellant could not take advantage by referring to the provisions of Section 3 of CST Act or to contend that no tax could be levied in respect of the said transactions.

Further submission is that it was for the appellant – dealer to submit evidence in support of its claim for deductions as shown in the returns, but the appellant did not submit any evidence in support of its claim in the returns. The contention is that in the given situation, the Assessing Authority rightly rejected the claim of the appellant as regards the said deductions.

Further, it has been submitted that provisions of Section 3(1) of CST Act, come into application only where the goods have moved in pursuance to the contract from one State to another, but the appellant – dealer failed to bring on record any material to prove its claim in this regard.

Learned counsel for the Revenue has submitted that present case is actually covered by the provisions of section 16 of DSTWC Act of 1999. While referring to the returns for the concerned tax period, learned counsel for the Revenue has drawn attention to column No. 4

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and column No. 6(b) and further submitted that it is case of the appellant that it purchased goods from outside Delhi against form-C.

Reference has been made to decision in **ECHO Builders v. Commissioner, Department of Trade and Taxes and Another**, W.P.(C) No.7022/2015, wherein refund sought by the appellant was held to be inequitable, on the ground of acquiescence in seeking the refund.

Contention of learned counsel for the Revenue is that as observed in the impugned order, the scrutiny of bills of steel revealed that local sales tax had not been charged on these items and as such the claim of the dealer – appellant for tax paid goods was rightly disallowed.

While referring to the decision in ABB's case (supra), it has been submitted that facts of the said case are distinguishable from the facts of the case in hand. To point out distinction, learned counsel has referred to the letter issued by DMRC listing out the approved/authorised list of suppliers, reproduced in judgment.

Main thrust of learned counsel of the revenue is that as per contract arrived at between the DMRC and appellant therein, in addition to the names of the approved vendors name of the City/ State/ Country where the said approved vendors were situate, were specified, but herein, there is no specification by DJB regarding place / location of the vendors i.e. from whom the goods were to be purchased by the appellant.

Further it has been pointed out by learned counsel for the Revenue that in ABB Ltd.'s case, suppliers of the goods were approved by the DMRC, but, herein, it is not case of the appellant.

As further submitted, in ABB Ltd.'s case, goods were custom made, for use by DMRC in its project, but here it is not case of the appellant.

It has also been pointed out that in ABB Ltd.'s case, packed goods were specially marked as meant for DMRC use in its project, but here it is not case of the appellant that the goods purchased by it were specially marked as meant for use by DJB.

Learned counsel for the Revenue has also referred to clause 13 of the contract in ABB Ltd.'s case (supra), where there was provision of inspection by the contractor even during manufacturing. The submission is that there was no such provision in the contract between the appellant and DJB.

Further it has been submitted that in ABB Ltd.'s case, movement of goods was within the knowledge of DMRC but here it is not case of the appellant that movement of goods was within the knowledge of DJB. Learned counsel for Revenue has contended that in view of observations made by Hon'ble Apex Court in para No.7,8 and 9 in ABB's case, appellant is not entitled to any exemption as claimed.

Learned counsel for revenue has also relied on decision in **J.D.P. Associates v. State of Tamil Nadu**, (2003) 131 STC 334, wherein the dealer had failed to prove movement of goods as a result of contract. He has also referred to decision in **Hydrotec Engineers India Private Limited v. State of Kerala and Another**, (1997) 107 STC 420, to contend that therein property in the goods did not pass to the buyer until the goods were fixed or supplied as per the specification of the works order, and as such the sales in that case were held to have not taken place in the state of Tamil Nadu where the materials were brought and consequently, that was not a case of inter-state sale and rather, the transactions were liable to be taxed.

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One of the contentions raised on behalf of Revenue is that in a case where a dealer makes purchases by way of inter State sales and issues statutory forms - C-forms- to the supplying dealer, such buying dealer would not be entitled to claim exemption u/s 5(iv) of the Act 1999.

Ultimately, learned counsel for the Revenue has urged that the impugned order passed by learned OHA disallowing the claim of the appellant seeking exemption in view of inter-State sale of goods, deserves to be up-held and as such the appeal be dismissed.

In reply, Learned counsel for appellant has referred to decision in ABB's case decided by Hon'ble High Court of Delhi and L & T's case reported in 021 VIL 632 ORI, and submitted that these cases pertained to statutory forms also and there is no merit in the contention of learned counsel of the Revenue that in a case where a dealer makes purchases by way of inter State sales and issues statutory forms to the supplying dealer, such buying dealer would not be entitled to claim exemption u/s 5(4) of the Act 1999.

Learned counsel for the appellant has reiterated that this being a case of works contract, in view of the provision of section 3(a) of CST Act and section 5(4) of the Act of 1999, appellant is entitled to exemption from payment of tax. Ultimately, it has been urged that the impugned order passed by learned OHA disallowing the claim of the appellant seeking exemption in view of inter-State sale of goods, deserves to be set-aside.

Appeal restricted only to a limited point

12. It is noteworthy that the appeal has been filed challenging the impugned order passed by Learned OHA as it relates to inter-State sales in the course of works contract, being taxed, and the ground is that the impugned order has been passed without any authority of law.

Discussion

13. The matter pertains to the year 2004-05. Assessment of the turnover of the appellant was made by the Assessing Officer/STO (ward -100), on 31/03/2005, in view of the provisions of Section 16 of Delhi Sales Tax on Work Contract Act, 1999 read with section 23(3) of the DST Act, 1975 (hereinafter referred to as DSTWC Act, 1999), and thereby demand of Rs.27,45,956/- was made.

While making assessment, as regards item 'Steel', the Assessing Authority observed that from the purchase details of this item, it was found that no local tax had been suffered and that only central tax had been charged.

It is significant to note that it was only in the objections filed by the dealer before Learned OHA, exemption was sought by the dealer for the first time, by way of declaration that the goods purchased by the dealer were inter-state sales, and same be treated as sales under section 3 of Central Sales Tax Act. In the concerned returns filed by the dealer, admittedly, no exemption on this ground was sought by the dealer.

It is pertinent to mention here that in the course of arguments, learned counsel for appellant has candidly admitted that in the returns, appellant did not claim deduction under column 2 (a) and that rather, deduction was claimed in the said returns, only as described against column no. 4.

Column No. 4 pertains to "less contract value for labour & service [see Rule 5(1)(e) & 5(2)]". Clause (b) of column 6 of the return provides for 'other deductions'pertaining to "contract value of tax paid declared goods if used in the same form [see Rule 5(1)(c)]"

It is significant to note that it was only in the objections filed by the dealer before Learned OHA, exemption was sought by the dealer

for the first time, by way of declaration that the goods purchased by the dealer were inter-state sales, and same be treated as sales under section 3 of Central Sales Tax Act.

The question arises as to whether in the given situation, the dealer could seek exemption from payment of tax on the ground of inter-state sales, when no such exemption was sought while submitting the returns?

On this point, Learned counsel for the appellant has referred to the four returns filed by the appellant with the Revenue, for the tax period and submitted that the same were submitted by way of computation and self assessment, and that since OHA deals with the objections in continuation of the assessment proceedings, even if no exemption of tax available u/s 5(4) of the Act of 1999 was claimed in said returns, it was for the OHA to allow exemption in accordance with law. The contention is that there cannot be any estoppels against statute. Reference has been made to decision in **M/s Dhingra Constructions Co. v. Commissioner, Department of Trade and Taxes and Another**, W.P. © No.517/2010 decided on 7.12.2011 by our own Hon'ble High Court.

It is settled that if a particular turnover is not taxable under the Act, it cannot be taxed on the basis of estoppel of any other equitable doctrine. In other words, if a particular turnover is not exigible to tax, Assessing Authority has no power to impose tax on turnover, not exigible to tax. As a result, the dealer would be entitled to challenge such an assessment which levies tax on the turnover that is actually not exigible to tax. The remedy is to file objections. Since proceedings by way of objections against the notices of default assessment are in continuation of the proceedings conducted by the Assessing Authority, even if no such exemption was sought initially while filing returns, the dealer would be entitled to raise the point of entitlement to such

exemption. In Echo's case (supra), cited by counsel for the revenue, even though Hon'ble Court allowed petitioner therein to file its refund claim (that was not filed within the stipulated period) for a certain period with all requisite documents, within the specified time, the Revenue was directed to process the refund application on merits and pass appropriate orders of refund.

In this situation, we hold that there was no bar against the dealer in agitating this legal point of inter-state sales seeking exemption by filing objections before Learned OHA.

Even otherwise, Learned OHA has not rejected claim of the appellant on the ground that such exemption was not sought while filing returns or that the returns were required to be revised or that the same were not revised. So, there is no merit in the contention raised by learned counsel for the Revenue in this regard.

Reasons given by Learned OHA rejecting the claim-objections of dealer

14. Learned OHA rejected the claim of the dealer-appellant, while observing that said claim was not valid due to the following four reasons:

(A) That in the contract there was nothing mentioned that these goods were to be procured from a particular manufacturer of outside Delhi;

(B) That almost all the brands mentioned in the contract were available in Delhi and goods of same brand and quality could be obtained within Delhi.

(C) That mere checking of goods by DJB before its use did not qualify the transaction for treating it under Central Act.

(D) That in fact the whole transaction consists of two sales, one was from the outside dealer to the appellant, covered by Central Act

and other was from appellant to DJB by way of Works Contract and to be taxed under local Act.

It may be mentioned here that present appeal has been filed only on limited ground of inter-State sales in the course of works contract being taxed, alleging that the impugned order has been passed without any authority of law.

Whether appellant is entitled to any exemption on the ground of inter-State sales in the course of works contract?

Relevant provisions of law

15. Before discussion on the subject, relevant provisions of law need to be reproduced for ready reference.

Section 2(1) (u) of DSTWC Act, 1999

Section 2(1) (u) of DSTWC Act, 1999, defines works contract as under:-

> "Work Contract" includes any agreement for carrying out for cash or for deferred payment or for any valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement , repairing or commissioning of any movable or immovable property but shall not includes such contracts as may be prescribed."

Rule 5 of DSTWC Rules, 1999, Computation of Taxable Turnover of Sales

> "Rule 5(1)(c). All amounts for which declared goods specified under section 14 of the Central Sales Tax Act, 1956 are transferred by the dealer in execution of works contract provided that the goods are transferred as the same goods and in the same from as they were purchased on which tax has been paid."

Section 5(4) of DSTWC Act, 1999

"No such tax shall be leviable on the turnover of sales on transfer of property in goods, whether as goods or in some other form involved in the execution of works contract, if such transfer from the contractor to the contractee constitutes a sale in the course of inter-State trade or commerce under section 3 or a sale outside the State under section 4 or a sale in the course of import or export under section 5 of the Central Sales Tax Act, 1956."

Section 8 of DST Act, 1975, certain sales and purchases not liable to tax

"Nothing in this Act or the rules made there under shall be deemed to impose, or authorize the imposition of a tax on any sale or purchase of any goods when such sale or purchase takes place-

(i) In the course of inter-state trade or commerce; or

(ii) Outside Delhi; or

(iii) In the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation- Section 3,4, and 5 of the CST Act, 1956 (74 of 1956) shall apply for determining whether or not a particular sale or purchase takes place in the manner indicated in clause (i), clause(ii) or clause(iii) of this section".

Section 14 of CST Act, 1956, available under chapter-IV, pertains to certain goods which have been declared to be of special importance in inter-state trade or commerce. As per serial No. iv of the said section, Iron and Steel is one of the such goods.

As regards expression 'declared goods', learned counsel for the appellant has referred to chapter IV of DVAT Act and submitted that as the "steel" goods were not transferred by the appellant to Delhi Jal Board in the form these were purchased, same are not covered by this expression.

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16. To counter the findings recorded by learned OHA that goods could be purchased in Delhi also, reference has been made by learned counsel for the appellant to decision in A. V. Fernandez vs The State of Kerala, AIR 1957 SC 657,

Learned counsel for the appellant has submitted that tax can be levied only on sale of goods and not only on goods, and then contended that DVAT Act saved the provisions of section 16 of DST Act and of Act of 1999. While referring to the decision in **Builders Associations India and Ors. v. Union of India & Ors., (1989) 73 STC 370,** learned counsel for the appellant has contended that as per settled law, statute enacted by the State must be inconsonance with Article 286 of the Constitution of India.

In **Larsen and Toubro Ltd. v. The State of Bihar (now Jharkhand) and Ors.,** CWJC No. 3731 of 1998, 2/11/2007, Hon'ble Court observed in para 51, as under -

"51. The aforesaid discussion leads to the following conclusions:

(1) In exercise of its legislative power to impose tax on sale or purchase of goods under Entry 54 of the State List read with Article 366(29A)(b), the State Legislature, while imposing 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 is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State trade or commerce or a sale outside the Slate or a sale in the course of import or export.

(2) The provisions of Sections 3, 4 and 5 and Sections 14 and 15 of the Central Sales Tax Act, 1956 are applicable to a transfer of property in goods involved in the execution of a works contract covered by Article 366(29A)(b).

(3) While defining the expression sale in the sales tax legislation it is open to the State Legislature to fix the situs of a deemed sale resulting from a transfer falling within the ambit of Article 366(29A)(b) but it is not permissible for the State Legislature to define the expression sale in a way

as to bring within the ambit of the taxing power a sale in the course of inter-State trade or commerce, or a sale outside the State or a sale in the course of import and export.

(4) The tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract falling within the ambit of Article 366(29A)(b) is leviable on the goods involved in the execution of a works contract and the value of the goods which are involved in execution of the works contract would constitute the measure for imposition of the tax.

(5) In order to determine the value of the goods which are involved in the execution of a works contract for the purpose of levying the tax referred to in Article 366(29A)(b), it is permissible to take the value of the works contract as the basis and the value of the goods involved in the execution of the works contract can be arrived at by deducting expenses incurred by the contractor for providing labour and other services from the value of the works contract.

(6) The charges for labour and services which are required to be deducted from the value of the works contract would cover (i) labour charges for execution of the works, (ii) amount paid to a sub-contractor for labour and services; (iii) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract; (iv) charges for planning, designing and architects fees; and (v) cost of consumables used in execution of the works contract; (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services; (vii) other similar expenses relatable to supply of labour and services; and (viii) profit earned by the contractor to the extent it is relatable to supply of labour and services.

(7) To deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the assessing authority the legislature may prescribe a formula for deduction of cost of labour and services on the basis of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be

incurred in normal circumstances in respect of that particular type of works contract. It would be permissible for the legislature to prescribe varying scales for deduction on account of cost of labour and services for various types of works contract.

(8) While fixing the rate of tax it is permissible to fix a uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rates of tax fixed in respect of sales or purchase of those goods as a separate article.

Reference has also been made to the decision in **Gannon Dunkerley & Co. vs State of Rajasthan,** AIR 1989 STC 1371, (73 STC 370). In the said decision, following observations were made therein by Hon'ble Apex Court:

"It is not permissible for the State Legislature to make a law on such a deemed sale which constitutes a sale in the course of inter-State trade under Section 3 of the Central Sales Tax Act or an outside sale under Section 4 or sale in the course of import or export under Section 5 of the Central Sales Tax Act".

Following observations by Hon'ble Mr. Justice A.K. Ganguly, Hon'ble the Chief Justice,madein**Srei International Finance Ltd. vs. State of Orissa,**(2008) 106 CALLT 192, cited on behalf of appellant:

".....law is well settled that any State law with respect to "deemed sales" covered by clauses (a) to (b) of clause (29A) of Article 366 must conform to the requirements of Article 286 and the provisions of the Central Sales Tax Act. For the purposes of taxation, a 'deemed sale' cannot be distinguished from an ordinary sale".

In **Commissioner of Sales Tax, UP v. Bakhtawar Lal Kailash Chand Arhti,** 4(1992) 87 STC 196, cited on behalf of the appellant, Hon'ble Apex Court explained the scope of section 3(a) by observing as under:

"According to clause (a) of Section 3, an inter-State sale or purchase is one which occasions the movement of goods from one State to another. In

other words, the movement of goods from one State to another must be the necessary incident - the necessary consequence - of sale or purchase. A case of cause and effect - the cause being the sale/purchase and the effect being the movement of the goods to another State, what is important is that the movement of goods and the sale must be inseparably connected".

Learned counsel for appellant has also referred to decision in **I.D.L. Chemical Limited v. State of Orissa** (2007) 10 VST 644, wherein Hon'ble Apex Court observed that if the contract triggered the inter-state movement of goods, it amounted to inter-state sale.

Reference has also been made to decision in **State of Orissa vs. K.B. Saha and Sons Industries (P) Ltd.** (1976) 32 STC 629, wherein Hon'ble Apex Court, after referring to the various cases, on interpretation of provisions of section 3(a) of CST Act, observed as under –

"In order to decide whether a sale is an inter-State it is sufficient that the movement of goods should have been occasioned by the sale or should be incidental thereto.

What is important is that the movement of goods and the sale must be inseparably connected. It is not necessary that there should be an existence of contract of sale incorporating the express or implied provision regarding inter-State movement of goods. Even if hypothetically it is stated that such a requirement is necessary in the facts of the present case such implied stipulation does exist."

17. In order to point out as to how the principles stated above were applied by the Hon'ble Courts to the particular facts of each case, on behalf of appellant, reference has also been made to the following decisions :–

(i) Cooperative Sugars (Chittur) Ltd. vs. State of Tamilnadu 90 STC 1: 1993 suppl. (4) SCC 42;

(ii) Hanuman Mining Corporation Ltd. Vs. Commissioner of Sales-Tax (MP) (1968) 25 STC 60

(iii) Oil India Ltd. vs. Superintendent of Taxes &Ors 35 STC 445;

(iv) M/s Asea Brown Boveri Ltd. v. The State of Karnataka, STA No. 23/2010, decided by Hon'ble Karnataka High Court, on 19/3/2014.

In the case of Cooperative Sugars (Chittur) Ltd.'s case(supra) the Tamil Nadu Government permitted the appellant which had a sugar factory at Kerala, to procure sugarcane from specified areas in Tamil Nadu. Pursuant to this, the appellant opened office in that area and took delivery of sugarcane from the farmers in Tamil Nadu. Then, sugarcane was transported to the factory in Kerala. The State of Tamil Nadu levied purchase tax on the purchases made by the appellant under the TNGST Act.

Hon'ble Apex Court held that it was a case of inter-state sale. Following relevant observations are reproduced for ready reference:

> "It must, therefore, be held that this is a case where the movement of goods was occasioned by sale by the farmers or by the purchase by the appellant, whichever way one looks at it. The movement of the sugarcane from Tamil Nadu to Kerala is the incident of, and is inextricably connected with the sale/purchase. The purchase and transport are but parts of one transaction. They cannot be dissociated in this case. There is no break between the purchase and the movement of the goods to another State viz., Kerala. It is immaterial, in such a case whether the sale/purchase takes place within Tamil Nadu or within Kerala. So long as the movement of goods is an incident of the sale/purchase, it amounts to an inter-State sale/purchase. It is not also necessary that the contract of sale must expressly provide for movement of goods. Itis sufficient if the movement of goods is implicit in the sale. In our opinion, the High Court was not right (in holding) in the facts and circumstances held established by it in this case that the sale and movement of goods are unconnected and dissociated transactions. They are not".

In **Hanuman Mining Corporation Ltd.' case (supra)**, the appellant averred to have sold manganese ore from the State of Madhya Pradesh to different parties outside the State on F.O.R. basis. The goods were loaded by the seller in the wagons indented by the purchasers. However, the contract provided that the first weighment made at a place outside the State would form the basis for the weight and final payment of price.

Hon'ble High Court took the view that the sales took place in Madhya Pradesh, as the out of State purchaser took delivery in that State after paying bulk of sale consideration and that the weighment outside the State was not a condition of sale. But the view was reversed by the Hon'ble Apex Court. Hon'ble Supreme Court observed in the manner as -

> "On a scrutiny of the terms of the contract, it is clear that the first weighment at the Gondia weigh-bride was the basis of the fixation of price of the manganese ore and therefore, the parties necessarily contemplated the movement of the goods to the Gondia weigh-bride and the weighment of the goods at Gondia in performance of the terms of the contract. In our opinion, the movement of goods across the frontier was a direct and necessary consequence of the important covenant with regard to the fixation of price. It follows that the sales under the eight contracts were inter-State sales within the language of Section 3(a) of the Central Sales Tax Act."

In **Oil India Ltd.'s case (supra)** also the test applied was whether parties contemplated that there should be movement of goods from the State to another in pursuance of the contract of sale; that the facts in that case were that crude oil was supplied by the appellant from the oil fields in Assam the refinery of IOC in Barauni (Bihar State) through the pipeline constructed by the appellant; that Clause (12) of the Agreement provided that the appellant shall arrange for the

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construction of pipelines and other facilities for the transport of crude oil to be produced by it to the refinery at Barauni.

Hon'ble Apex Court observed that the construction of pipelines by the appellant was a pointer to the conclusion that the parties contemplated movement of goods from the State of Assam to the State of Bihar.

Reference has been made to the following observations made by the Hon'ble Court -

> "Even though clause 7 of the supplemental agreement does not expressly provide for movement of the goods, it is clear that the parties envisaged the movement of crude oil in pursuance to the contract from the State of Assam to the State of Bihar. In other words, the movement of crude oil from the State of Assam to the State of Bihar was an incident of the contract of sale. No matter in which State the property in the goods passes, a sale which occasions "movement of goods from one State to another is a sale in the course of inter-state trade". The inter-State movement must be the result of a covenant express or implied in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding interstate movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale."

Learned counsel for the appellant has urged that in order to constitute an inter-state sale within the meaning of sec.3 (a) of CST Act, there need not be an express covenant or stipulation in the contract; and also that if it can be clearly inferred from the contract that both the parties contemplated the inter-state movement of goods consequential to or as an incident of the contract, section 3(a) is attracted. In other words, according to the counsel, if the inter-state

movement is necessarily incidental to the implementation of the contract, that satisfies the requirement of section 3(a).

On behalf of the appellant, reference has been made to decision in **M/s Asea Brown Boveri Ltd. v. The State of Karnataka,** STA No. 23/2010, decided by Hon'ble Karnataka High Court, decided on 19/3/2014. Facts of the said case, as available in para 3,4,& 5, read as under:

> "3.The assessee is a company incorporated under the provisions of the Companies Act, 1956 and a dealer registered under the provisions of the Act. The assessee is engaged in the manufacture and sale of electrical and electronic goods as well as in execution of works contract.
>
> **3.1** M/s. Karnataka Power Transmission Corporation Limited (for short "KPTCL) came about with a Bid Enquiry dated 14th May 2001 for Accelerated Power Development Programme in Bijapur and O&M Division on total Turnkey basis consisting of supply of all equipments/materials, erection , testing and commission (for short "the project"). As per one of the clauses in Bid Enquiry Document/General Conditions of Contract, (for short "the Bid Document") the contractor was obliged to procure from the manufacturers, who comply with certain qualified requirements, the materials such as transformers, ACSR conductors, Insulators, CC/PCC Polies, 11 KV G.O.S., Fuse Units, Lighting Arrestors 9 KV, LT Fixed Capacitors, Electronic Trivector Meters and Metering Boxes. It also stipulated the qualified requirements. Clause 1.06.00 in the Bid Document pertains to general requirements under Chapter "General Information and Scope of Works" which provided that all the equipments/materials to be submitted for inspection by a duly authorized representative of the KPTCL. It further provided that inspection would be at any stage of manufacture, dispatch or at site, at the option of the Engineer, or when the equipments were dispatched/about to be dispatched and if found unsatisfactory as of workmanship or quality, the same were liable to be rejected. It further stated that a successful bidder/contractor would grant free access to the places of manufacture to the authorized representative of the Engineer at all times when the works related to the manufacture were in progress.

4. The assessee had participated in the bidding process and was declared successful bidder and accordingly, awarded the contract vide letter dated 19-4-2002 for execution of the project on total turnkey basis consisting supply of all equipments/materials, erection, testing and commissioning. As per the letter of award dated 19th April 2002, the assessee submitted its acceptance vide their letter dated 24th April 2002 and proceeded to execute the contract agreement with KPTCL on 26th April 2002.

5. The contract agreement that was executed between the assessee and the KPTCL, made a specific reference to the terms and conditions which were to be adhered to by the assessee in accordance with the Bid Document dated 14th May 2001. As per the terms and conditions, as stated earlier and stipulated in the Bid Document, the assessee was supposed to procure the equipments/materials only from vendors/ manufacturing units who satisfied the requirements as stated therein. The assessee, had accordingly indentified the vendors/manufacturers, many of whom were located outside Karnataka, at the places such as, Baroda, Chennai, Hyderabad, Mumbai etc. After seeking approval, as stipulated in the Bid Document and the contract agreement, in respect of vendors/manufacturers, they delivered the goods so purchased at the said Development Programme namely, Bijapur, O & M Division and were not meant to be diverted elsewhere. In other words, the goods so procured were purely for employment in the said project at Bijapur. There does not appear to be any dispute that the works contract allotted to the assessee was completed by them as per the terms and conditions stipulated in the contract agreement which were to be adhered to by the contractor in accordance with the Bid Document dated 14thMay 2001."

In that case, the argument advanced on behalf of the assessee was that in view of the provisions contained in Section 5B read with the definition of "taxable turnover" as occur in Section 2(1) (u-1), the assessee is not liable to pay tax on the goods procured by him from outside the State; that the goods, which the assessee procured in the course of inter-stat trade, the tax was paid by the assessee, under the Central Act to the States from which the goods were purchased. In this way, it was submitted that the assessee was not liable to pay any tax under section 5-B of the Act.

It is submitted that further it was argued therein for the purpose of Section 3(a) of the Central Sales Tax Act, 1956 (for Short "the Central Act") it is not necessary that the contract of sale must itself provide for and cause the movement of goods; but such movement should be the result of a covenant in the contract or is an incident of that contract. In support, he placed reliance upon the following judgments: -

"K.G. Khosla and Co. (P) Ltd. Vs. Deputy Commissioner of Commercial Taxes, 17 STC 473 (SC);

Union of India Vs. K.G. Khosla and Co. Ltd., 43 STC 457(SC);

State of Maharashtra Vs. Embee Corporation 107 STC 196 (SC);

Larsen and Toubro Ltd. VS. Commercial Taxes 132 STC 272 (AP); Indure Ltd. Vs. Commercial Tax Officer, (2010) 9 SCC 461;

ABB Ltd. Vs. Commissioner, Delhi (2012) 55 VST 1;

Mitsubishi Corporation Vs. State of Karnataka, (2012) 53 VST 48;

State of Karnataka Vs. ECE Industries Ltd., 144 STC 605 (KAR)."

It is urged that submission by learned counsel of the appellant in the above cited case was that the goods purchased by the assessee in the course of inter-state were not meant to be delivered elsewhere but purely for employment in the development programme of the KPTCL.

Therein, on the other hand, contention by learned counsel for the Revenue was that the assessee being a contractor, purchased goods and then used in execution of works contract awarded by the KPTCL; that as submitted, the assessee purchased the goods from different States and stored at his place and, therefore, the second revisional authority rightly held that the purchase of goods from outside the State for the purpose of execution of works contract as per the specification given by KPTCL and storing at his godown was not amounting to inter-State falling under section 3(a) of the Central Act; that the works undertaken by the assessee amounted to works contract which was

exigible to tax under section 5B of the Act as the assessee only purchased the goods and thereafter incorporated the said goods in execution of the works contract at Bijapur for KPTCL.

Further, it was submitted that therein one of the contentions was that the goods were not moved from out of the State as a result of the contract and movement of goods was not incidental to the Contract, since in the Bid Enquiry Document, there was no mention of inter-State vendors. It was therefore urged there that it could not be said that the goods were moved in pursuance of the Contract.

In the given facts and circumstances, the following question cropped up for decision by the Hon'ble High Court -

> "whether on the facts and in the circumstances of the case and in law the turnover pertaining to inter-state purchases of goods and its use in execution of the work contract (the said project) was liable to tax under section 5-B of the Act. In other words, whether the assessee is entitled for grant of exemption in respect of the turnover pertaining to inter-State purchases of goods used in the execution of the said project (woks contract)."

Therein, reliance was placed on decision in the case titled as K.G. Khosla Company (P) Ltd. Vs. Deputy Commissioner of Commercial **Taxes, AIR 1966 SC 1216. In K.G. Khosla's case,** the question considered by the Hon'ble Supreme Court was whether the sales by the assessee to the Government Departments were in the course of import and exempt from taxation under Section 5(2) of the Central Act. The assessee therein was entirely responsible for the execution of contract and for the safe arrival of the goods at the destination. Under the contract, the consignee was entitled to reject the goods. The manufacturers consigned the goods to the assessee by ship from Belgium under bills of lading and the goods were cleared at Madras Harbour by the assessee's clearing agent and dispatched for delivery to the Southern Railway in Madras and Mysore.

Here, it is submitted on behalf of appellant that in the above cited case, Hon'ble Supreme Court answered the question holding that the expression "occasions the movement of goods" occurring in Section 3(a) and Section 5(2) of the Central Act had the same meaning; and that the movement of goods from Belgium into India was incidental to the contract. It is submitted that there was no possibility of the goods being delivered by the assessee for any other purpose and therefore, the sale took place in the course of import of goods within Section 5(2) of the Central Act and said sale was exempted from taxation.

Learned counsel for appellant has referred to decision in **Indure Limited Vs. C.T.O. and Ors.,** 2010 (9) SCC 461, and submitted that the questions that fell for consideration of Hon'ble Supreme Court were whether import of MS Pipes by the respondents was pursuant to term of contracts between appellant No. 1 and National Thermal Power Corporation Limited (for short "NTPC"), and whether import of said M.S. Pipes and supply thereof by appellant No. 1 to NTPC constituted integral and inseparable part of contracts between them.

Hon'ble Apex Court held that there was no reason why it was denied in respect of MS Pipes, wherein it was observed that import had been occasioned only on account of the covenant entered into between the assessee and NTPC and the imported pipes were used exclusively for erection and commissioning of the plant; and further that the revenue, in that case, had failed to establish that those pipes were not used in the plant of NTPC.

In **Larsen & Toubro Limited Vs. Commissioner of Commercial Tax**, [2003] 132 STC 272, relied on behalf of appellant,Hon'ble Andhra Pradesh High Court observed that the entire project had to be completed by the assessee which included installation of machinery and supervision upto certain point of time,

that is to say, the contract was composite in nature; that the appellant had also to install the machinery and watch the performance for a period of 15 months; that after being satisfied with the quality of goods, clearance was given, and the movement of goods occasioned pursuant to the contact. The goods reached the given destination. It is submitted that therein Central Sales tax was paid to the State of Maharashtra.

It is submitted that having regard to the fact that there were two facets of the contract, supply of goods and installation of machinery with the labour of the assessee, the contract was a divisible contract. It has also been submitted that the transaction was an inter-State transaction and not an intra-State transaction, and as observed, the turnover arising on that transaction could not be brought under the net of the Andhra Pradesh Act.

In **ABB Limited Vs. Commissioner of Delhi, Value Added Tax**, [2012] 55 VST 1 Delhi, (supra) our own Hon'ble High court, relied on by learned counsel for the appellant, it was observed:

> "In the opinion of this court, the Tribunal fell into error in assuming that no attract section 3(a) of the Act, the agreement has to expressly stipulate for inter-State movement of goods, and the fact that in performance of the contract, the appellant would have to move the goods from other States to Delhi would not suffice. In this context, in Oil India Ltd. (1975)35 STC 445 (SC) where it was very pertinently held that "It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of an incidental to the contract of sale".

When the matter came up before Hon'ble Apex Court, it was observed as under –

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"Such movement of goods was within the knowledge of DMRC because there was total ban on setting up/ working of heavy industries in Delhi and the DMRC had approved 18 places within the country from where the equipments and goods had to be supplied. These included the premises and factories of the respondent also".

Hon'ble Apex Court held:

"On facts, therefore, it was rightly held by the High Court that the inter-state movement of goods was within the contemplation of the parties and it can be reasonably presumed that such movement was to fulfill the terms of the contract and therefore the transaction was covered by Section 3(a) of the CST Act.

The law on this issue was also considered by the High Court in correct perspective after noticing the case of Tata Iron and Steel Co. Ltd. v. S.R. Sarkar that where the goods moved from one state to another as a result of a covenant in the contract of sale it would be clearly a sale in the course of inter-state trade. The conclusion of the High Court on this issue also finds ample support from the following case laws which were noticed by the High Court:

(1) Oil India Ltd. v. The Superintendent of Taxes and Ors. (1975) 35 STC 445 (SC);

(2) English Electric Company of India Ltd. v. The Deputy Commercial Tax Officer and Others (1976) 38 STC 475 (SC) ;

(3) South India Viscose Ltd. v. State of Tamil Nadu (1981) 48 STC 232 (SC);

The salient features flowing out as conditions in the contract and the entire conspectus of law on the issues as noticed earlier, leave us with no option but to hold that the movement of goods by way of imports or by way of inter-state trade in this case was in pursuance of the conditions and/or as an incident of the contract between the assessee and DMRC".

In **State of Karnataka Vs. ECE Industries Ltd.,** [2006] 144 STC 605, Hon'ble Court observed as under –

"The respondent-company engaged in the business of manufacture, supply and installation of lifts and elevators had its branch office at Bangalore procured orders from customers in Karnataka. Lifts and elevators were manufactured in its factory at Uttar Pradesh according to the design and specifications of the customers and the manufactured items after being tested were dismantled and dispatched to the customers place in the State of Karnataka by way of stock transfers.

The works contract was executed by the branch office by installation and commissioning of the lifts and elevators at the customers place. After receipt of the report from intelligence wing the assessing authority reopened the assessment for the assessment years 1990-91 and 1991-92 and passed reassessment orders under section 12-A of the Karnataka Sales Tax Act, 1957 and levied penalty u/s 12-A(1-A) of the Act. The returns filed by the respondent for the years 1994-95, 1995-96 and 1996-97, were rejected and best judgment assessment was made under section 12(3) of the Act read with rule 18(1) of the Karnataka Sales Tax Rules, 1957. The respondent aggrieved by those orders filed appeals before the appellate authority but they were rejected by a common order dated December 26, 2000."

"Where the description of the goods is clear and the goods of that description are dispatched then the goods so dispatched can be taken as appropriated to the contract unconditionally and dispatches from ne State to another to an indentified customer result in inter-State sale. Merely, because the goods are installed and commissioned in the State, it cannot be said that it is a local sale exigible to levy under section 5-B of the Act on the ground that the actual transfer of property used in the works contract took place in the State of Karnataka and, therefore, the Tribunal was justified in the coming to the conclusion that the transaction in question was not eligible to levy of tax under section 5 B of the Act."

In **State of Maharashtra Vs. Enbee Corporation** [1997]107 STC 196, it was observed that the word 'sale' defined in Section 2(g) of the Central Act and employed in Section 3 and other sections of the Central Act would embrace not only completed contract but also the contract of sale or agreement of sale if such contract of sale or

agreement of sale provided for movement of goods or movement of goods is not incident of contract of sale. Hon'ble Apex Court observed as under:-

> "31.1 It is now well settled that if a contract of sale contains a stipulation for such movement, the sale would, of-course, be a inter-State trade. But it can also be inter-State sale even if the contract of sale does not itself provide for movement of goods from one State to another but such movement would be result of a covenant in the contract of sale or is an incident of such contract. (See Union of India Vs. Khosla and Company). It is true, in the instant case, the contract of sale did not require or provide that goods should be moved from other States to the State of Karnataka at Bijapur. But it is not true to say that for the purpose of Section 3(a) of the Central Act it is necessary that the contract of sale must itself provide for and cause the movement of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale. A sale which occasions movement of goods from one State to another is a sale in the course of inter-State trade, no matter in which State the property in goods passes. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement, and it is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be sufficient if the movement was in pursuance of and incidental to the contract of sale. In the present case, the movement of goods from one State to another may or may not be as a result of a covenant but definitely it was an incident of the contract."

Reference may also be made to decision in State of Kerala v. M/s Metso Minerals India (P) Ltd., OT.Rev.No.143 of 2017, by Hon'ble High Court of Kerala at Ernakulam on 19th of June, 2020.

So, a sale in the course of inter-State trade has three essential ingredients : (i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-State movement of goods; (ii) the goods must actually move from one State to another,

pursuant to such contract of sale; the sale being the proximate cause of movement; and (iii) such movement of goods must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes placed independent of a contract of sale would not fall within the meaning of inter-State Sale.For reference, decision in State of A. P. vs N.T.P.C. Ltd., AIR 2002 SC 1895.

Following factors are also of much significance in this regard:

1. There should be an agreement to sell which contains a stipulation (express or implied) regarding movement of goods from one State to another.

2. Movement of goods and the sale must be inseparably connected. For reference, decision in CST, UP v. Bakhtawar Lal Kailash Chand Arhti-(1992)87STC196. The movement or despatch of goods from one State to another should be under a covenant or incident of contract of sale with the buyer. (For reference, decision in Tata Iron and Steel Co. (TISCO) v. SR Sarkar-(1960)11STC 655(SC).

3. Even if buyer takes delivery from the seller, it can be inter-State sale if movement of goods to other State is a necessary part of transaction. For reference, decision in Mohanlala Hargovandas v. State of MP-(1955)6 STC 687(SC).

18. It is well settled that a sale occasions the movement of goods from one state to another within section 3 (a) of the CST Act, when the movement is the result of a covenant or incident of the contract of sale. Let's see as to what are the salient features of the contract between the dealer-appellant and DJB.

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Relevant parts of the contract read as under –

"Cement

"Only from manufactures such as ACC, L&T, J.P. Rewa, Vikram, Birla Jute, Gujarat Ambuja and Cement Corporation of India, as approved by Engineer-in-Charge.

Test report from manufactures for each lot purchased shall be submitted before use.

Mandatory test of cement as required by CPWD specifications 1996 or latest edition of specification at Delhi (till date of receipt of tender) and as per provisions of relevant BIS order shall also be got done by the Engineer-in-Charge as and when considered necessary.

Supply of cement shall be taken in 50 kg bags bearing manufacture's name and ISI marking. Samples of cement from the lot arranged by the contractor shall be taken by the Engineer-in-Charge and got tested in accordance with provisions of relevant BIS codes.

In case test results indicate that the cement arranged by contractor does not conform to the relevant BIS codes the same shall stand rejected and shall be removed from the site by the contractor at his own cost within a week's time of written order from the Engineer-in-Charge to do so.

In case the quantity of cement required for the completion of entire work is less than 20 tonnes, the Engineer-in-Charge may allow its purchase from the local dealers. In that case the entire lot will be purchased at one time and use of the same shall be allowed only after its testing from the lab and on its conformity to the required specification.

The cement shall be brought at site in bulk supply of approximately 50 tonnes or as decided by the Engineer-in-charge.

The contractor shall construct cement godowns at the site of work for storing the materials safe against damages from sun, rain, dampness, fire theft etc. The godowns shall have a minimum storage capacity of 2000 bags of cement. Nothing extra shall be paid on this account.

The cement bags shall be stacked on pucca floor consisting of two layers of dry bricks laid on well consolidated earth at a level of at least one foot above ground level. These stacks shall be in rows of 2 and 10 bags high with a minimum 2'-9" clear space all round. The bags should be placed horizontally continuous in each line.

Cement and steel etc, once brought at site shall not be removed without written permission of the department.

The contractor shall facilitate the inspection of the cement godown by the Engineer-in-Charge. On specific demand by the representative of the owner, the invoices shall be produced in original for verification.

The contractor shall supply free of charge the cement required for testing. The cost of tests shall be borne by the contractor/Department in the manner indicated below:

i) By the contractor, if the results show that the cement does not conform to relevant BIS code.
ii) By the Department, if the results show that the cement conforms to BIS codes.

The actual issue and consumption of cement on work shall be regulated and proper accounts maintained as provided in the contract/ CPWD manual. The theoretical consumption of cement shall be worked out as per procedure prescribed in the contract and shall be governed by conditions laid therein.

Cement brought to site and cement remaining unused after completion of work shall not be removed from site without written permission of the Engineer-in-Charge.

The day to day receipt and issue accounts of cement shall be maintained by the Junior Engineer-in-Charge and signed daily by the contractor or his authorized agent.

Steel

The contractor shall procure TOR/ TMT steel reinforcement bars conforming to relevant BIS code from the manufactures viz. TISCO, Rathi, SAIL, RIL, or as approved by the Engineer in charge.

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The contractor shall have to obtain and furnish manufacturers test certificates to the Engineer-in-Charge in respect of all supplies of steel brought by him to the site of work.

Samples shall also be taken and got tested by the Engineer-in-Charge as per the provisions in this regard in relevant BIS codes. In case the test result indicated that the steel arranged by the contractor does not conform to BIS code, the same shall stand rejected and shall be removed from the site of work by the contractor at his cost with in a week's time from written orders from the Engineer-in-Charge to do so.

The steel reinforcement shall be brought to the site in bulk supply of 10 tonnes or more or as decided by the Engineer-in-Charge.

In case the requirement of the steel is less than 10 tonnes, the Engineer-in-Charge may allow its purchase from the local market but the same shall be allowed for use after its testing from the lab and its conformity to the required specifications."

As regards the observations by learned OHA that in the contract there was nothing mentioned that these goods were to be procured from a particular manufacturer of outside Delhi, it is significant to note that case of the Revenue is not that the goods purchased by the dealer-appellant were from any manufacturer other than the approved manufacturer or that the goods were not purchased from other State(s).

It can also be inter-State sale even if the contract of sale does not itself provide for movement of goods from one State to another but such movement would be result of a covenant in the contract of sale or is an incident of such contract, as observed in Union of India Vs. Khosla and Company.

When it stands established that goods were purchased from approved manufacturers and that too from another State, even if the contract did not specifically provide about purchase of the goods from

out-station supplying dealer(s), in view of the above decisions that it would be enough if the movement was in pursuance of or incidental to the contract of sale, we find that it was a case of inter-state sale or purchase.

Consequently, the reason given by the Learned OHA that almost all the brands mentioned in the contract were available in Delhi and goods of same brand and quality could be obtained within Delhi, also does not help the Revenue to say that it was not a case of inter-state sale or purchase.

Another reason given by the Learned OHA that mere checking of goods by DJB before its use did not qualify the transaction for treating it under Central Act, also does not help the Revenue to say that it was not a case of inter-state sale or purchase. Checking or Inspection of goods before use was a pre-caution on the part of the DJB to rule out possibility of use of any spurious or sub-standard goods or goods which were not as per standard agreed to between the parties. It is not case of the Revenue that any goods were found to be of sub-standard or did not meet the prescribed standard. In the given situation, checking or inspection of goods cannot be said to be a factor to reject the claim of the dealer-appellant that it was a case of inter-state sale or purchase of goods.

Had it been a case of possibility of diversion of goods by the dealer for use somewhere else, then it would have been a different matter. But Learned OHA did not record any finding that it was a case of possibility of diversion of goods by the dealer.

Case of one transaction and not of two transactions

19. In the impugned order, Learned OHA observed that in fact the whole transaction consisted of two sales, one was from the outside dealer to the appellant, covered by Central Act and other was from appellant to DJB by way of Works Contract and to be taxed under

local Act.

Ld. Counsel for the appellant has argued that this is a case where the whole transaction is only of one sale and not of two sales, as observed in the impugned order passed by the Ld. First Appellate Authority.

Further, it has been submitted that movement of goods was part of the contract and there was a link between the contract and the goods purchased.

It has been rightly contended on behalf of appellant that DJB was not required to place an order for supply of goods, as no commercial privity contract was required under this provision of law for the purposes of claim, by the dealer, of the said exemption from tax u/s 5(4) of the Act and under the provisions of section 3(a) of CST Act, in the peculiar facts and circumstances of the case.

In ABB's case, a case of sale in the course of import, Hon'ble High Court of Delhi observed that common thread of reasoning which runs through all the decisions is that to determine whether the sale was in the course of import, the Court has to see whether the movement of goods through was integrally connected with the contract for their supply, and further that questions such as passing of title, or whether the end user has a privity of contract with the supplier, or where the consideration flows from, are not determinative or decisive of the issue. This issue is decided accordingly against the Revenue.

Conclusion

20. Here, the matter pertains to the year 2004-05. Assessment was made by the Assessing Officer on 31/03/2005.

Case of the appellant from the very beginning is that it used to execute works contract. This fact has not been disputed by the

Revenue. Even assessment was framed in view of the provisions of Section 16 of Delhi Sales Tax on Work Contract Act, 1999 (hereinafter referred to as DSTWC Act, 1999)read with section 23(3) of the DST Act, 1975.

In the impugned order, Learned OHA nowhere observed that sale or purchase did not occasion the movement of concerned goods from one State to another.

Section 8 of DST Act, 1975 provides that certain sales and purchases are not liable to tax. Under this provision, nothing in this Act or the rules made there-under imposes or authorizes imposition of a tax on any sale or purchase of any goods when such sale or purchase takes place in the course of inter-state trade or commerce or outside Delhi; or in the course of the import of the goods into, or export of the goods out of, the territory of India.

From the material available on record, we find that it is a case of turnover of sales on transfer of property in certain goods involved in the execution of works contract.

In view of the foregoing discussion, we find that this is a case where sale and purchase occasioned the movement of goods from one State to another and same is deemed to have taken place in the course of inter-state trade or commerce. In the peculiar facts of present case, the three decisions cited by counsel for the Revenue i.e. Binani Bros's; JDP Associates's; and Hydrotec Engineers India's case do not come to the aid of the Revenue. Therefore, the finding recorded by Learned OHA in the impugned order that claim of the appellant to exempt the purchase of declare/ inter-state purchased goods, treating the same as sales under section 3 of Central Sales Tax Act, was not valid, deserves to be set aside.

We also find that this is a case where on account of transfer of property in concerned goods involved in the execution of works contract, from the dealer-appellant - contractor to the contractee i.e. DJB constituted sale in the course of inter-state trade or commerce under section 3.

Applying the provisions of section 5(4) of DSTWC Act, 1999 to the facts of this case, we find that no VAT tax was leviable on the turnover of the concerned goods involved in the execution of works contract, which constituted a sale by the dealer-appellant to DJB in the course of inter-State trade or commerce.

Whether claim of exemption on statutory forms disentitles the appellant to claim that it was a case of inter-state sale or purchase-

21. One of the contentions raised on behalf of Revenue is that in a case where a dealer makes purchases by way of inter State sales and issues statutory forms - C-forms- to the supplying dealer, such buying dealer would not be entitled to claim exemption u/s 5(4} of the Act 1999.

In reply, Learned counsel for appellant has referred to decision in ABB's case (supra) and submitted that these cases pertained to Central sales and statutory forms also, and that there is no merit in the contention of learned counsel of the Revenue that in a case where a dealer makes purchases by way of inter State sales and issues statutory forms to the supplying dealer, such buying dealer would not be entitled to claim exemption u/s 5(4) of the Act 1999.

So far as statutory forms are concerned, same are got issued by the purchasing dealer for being furnished to the selling dealer, who in turn furnishes the same to the Commissioner to avail of the benefit admissible under CST Act.

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Section 8 of DST Act, 1975 provides that certain sales and purchases are not liable to tax. Under this provision, nothing in this Act or the rules made there under imposes or authorizes imposition of a tax on any sale or purchase of any goods when such sale or purchase takes place in the course of inter-state trade or commerce or outside Delhi; or in the course of the import of the goods into, or export of the goods out of, the territory of India.

As discussed above, this is a case where sale and purchase occasioned the movement of goods from one State to another and same is deemed to have taken place in the course of inter-state trade or commerce.

Result

22. In view of the above findings, the appeal is allowed and as a result, impugned order is set aside as regards disallowance of the claim of the dealer-appellant seeking exemption from levy of VAT in respect of transaction and turnover of inter-state sales of goods, connected with works contract, between the dealer-appellant and Delhi Jal Board, in view of provisions of DSTWC Act, 1999 read with DST Act, 1975. Learned OHA to frame assessment, while allowing exemption to the dealer, in view of the decision in this appeal.

Copy of the order be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date : 09/11/2021

9/11/21

(Rakesh Bali)
Member (A)

9/11/2021

(Narinder Kumar)
Member (J)

Appeal No. 770/DVAT/2008/1520-27 Dated: 11/11/21

Copy to:-

(1) VATO (Ward-)
(2) Second case file
(3) Govt. Counsel
(4) Secretary (Sales Tax Bar Association)
(5). PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch.
(6) Dealer
(7) Guard File
(8) AC(L&J)
(9) Commissioner (T&T)

REGISTRAR