A M/S. B.G. SHIRKE CONSTRUCTION TECHNOLOGIES (P) LTD.

v.

THE ADDL. COMMISSIONER OF COMMERCIAL TAXES

FEBRUARY 2, 2007

B [DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Sales Tax:

Karnataka Sales Tax Act, 1957; ss. 8-A(5)(a), 20(5), 22(A)(1) and 24 C *and Notification No. FD.43, CSL 94(iv) dated 31.3.94:*

Exemption Notification—Assessee-dealer engaged in manufacture of pre-fabricated pillars, column etc. purchasing Tower Cranes availing rebate in tax in terms of the Notification—Applicability of Notification—Held: A crane is a hoisting machine used to lift and move heavy loads—Tower cranes D *a have built in jacks to raise the crane through opening in the floor as building goes up—Cranes are taken apart and lowered after completion of buildings—High Court rightly observed that Tower cranes could not be considered as industrial inputs either as component or as raw materials of any other goods—Hence the claim made by the assessee untenable and not* E *sustainable—However, in the facts and circumstances of the case, levy of penalty of rupees five lakhs would suffice.*

Appellant-assessee is a dealer engaged in the construction of houses for Karnataka Housing Board. It manufactures pre-fabricated pillars, columns, beams etc., and then used them for the execution of the civil works F **contract. During the assessment year 1995-96 the assessee had purchased Tower Cranes from another registered dealer and had availed concessional rate of tax at 4% on the purchases by producing declaration in Form No.37. However, the assessing authority found that the assessee company had not fulfilled all the conditions prescribed under the exemption Notification** G **No.FD.43.CSL 94(iv) dated 31.3.1994, therefore, it was not eligible to claim any benefit under the Notification. The Authorities had initiated proceedings under Section 8-A(5)(a) of the Karnataka Sales Tax Act and came to the findings that the nature of the business activity carried on by the assessee is not manufacturing or processing of goods for sale and, therefore, it has contravened the specified conditions of the Notification. Thus, the authorities**

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held the assessee liable to pay differential amount of tax and also penalty in terms of Section 8A(5)(a) of the Act. Aggrieved, the assessee filed an appeal before the first appellate authority. The authority allowed the appeal. The revisional authority reversed the orders passed by the first appellate authority, however, the amount of penalty was reduced by 50%. Appellant filed an appeal under Section 24(1) of the Act before the High Court. The High Court held that the order passed by the authorities did not warrant any interference. Hence the present appeal.

Appellant-assessee contended that the authority empowered to issue the Notification had made it abundantly clear that the dealer who effects the sale of machinery can take the benefit of the said Notification only after fulfilling the other two conditions mentioned therein i.e. (1) that the dealer should produce a declaration in Form 37 duly filled in and signed by the manufacturing industrial unit, the purchasing dealer and (2) satisfactorily prove that what has been sold to a registered dealer is an industrial input for use by it as a component part of raw material or packing material for manufacture and sale inside the State; and that a narrow construction has been put on the expression "industrial input". By giving a broader interpretation, it should have been held that the assessee was entitled to get the benefit of the Notification.

Partly allowing the appeal, the Court

HELD: 1. A crane is a hoisting machine used to lift and move heavy loads. There are different types of cranes and Tower Crane is one such crane which is mostly used to construct high rise buildings. It has been noted by the High Court that most Tower Cranes also called "Climbing Cranes", have built in jacks that raise the cranes through openings in the floor as the building goes up. The cranes are taken apart and lowered after completion of the buildings. As rightly observed by the High Court the Tower Cranes cannot be considered as industrial inputs for use either as a component part or as a raw material of any other goods. [Para - 13] [253-G-H; 254-A]

2. Assessee had purchased the Tower Cranes in the year 1995 and had availed concessional rate of tax of 4% on the said purchase by producing declaration in Form-37 in terms of Section 5A of the Karnataka Sales Tax Act. Revisional authority has elaborately discussed the legal and factual position to conclude that the claim made by the assessee was untenable and not sustainable. In fact, the High Court has also analysed the position in great detail. The view expressed by the High Court about the non-acceptability

A **of the claim and levy of tax and penalty is. However, so far as the question of quantum of penalty is concerned, the legitimate amount which was to be collected by the Revenue was not deposited by the assessee because of the claim at concessional rate of tax. Considering the quantum of tax involved and the period for which the amount was withheld, levy of penalty of rupees five lakhs would suffice. [Paras 15 and 16] [254-F-H; 255-A-B]**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 439 of 2007.

From the final Judgment and Order dated 14.7.2005 of the High Court of Karnataka at Bangalore in S.T.A. No. 1/2003.

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U.U. Lalit, Nikhil Majithia, Joseph Pookkatt and Prashant Kumar for the Appellant.

Sanjay R. Hedge, Anil K. Mishra, Vikrant Yadav and Sashidhar for the Respondents.

The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J. Leave granted.

1. Challenge in this appeal is to the judgment rendered by a Division Bench of the Karnataka High Court dismissing the appeal filed by the appellant under Section 24(1) of the Karnataka Sales Tax Act, 1957 (in short the 'Act'). Appellant called in question legality or otherwise of the orders passed by the Additional Commissioner of Commercial Taxes, Zone-II, Gandhinagar, Bangalore, dated 12.6.2002.

2. Background facts in a nutshell are as follows:

The appellant is a dealer registered under the provisions of the Act. It is borne on the files of the Deputy Commissioner of Commercial Taxes (Assessment), 46th Circle, Bangalore. The main activity of the appellant is construction of mass houses for Karnataka Housing Board. For its business activity, the appellant manufactures pre-fabricated pillars, columns, beams etc., and then those items are used for the execution of the civil works contract.

3. During the financial year ending on 31.3.1996, i.e. assessment year 1995-96 the assessee had purchased Tower Cranes from another registered dealer and had availed concessional rate of tax at 4% on the said purchases

by producing declaration Form No.37. While computing the tax liability of the assessee for the assessment year 1995-96, the assessing authority had noticed that the Tower Cranes so purchased by the assessee are nothing but machinery covered under Sl. No.1(iii) of Part 'M' of the Second Schedule to the Act and since the company had not fulfilled all the conditions prescribed under the notification No.FD.43.CSL 94(iv) dated 31.3.1994, it was not eligible to claim any benefit under the notification and, therefore, had initiated proceedings under Section 8-A (5)(a) of the Act. In the said proceeding, it was the stand of the assessee-appellant that it is an industrial unit located in the State and the purchase of the machinery made by it is used in the manufacturing of goods for sale and, therefore, eligible and also entitled to take the benefit of the notification issued by the State Government dated 31.3.1994. The assessing authority, after considering the objection of the assessee, came to the conclusion that the nature of the business activity carried on by the assessee is not one of manufacturing or processing of goods for sale and, therefore, it has contravened the specified conditions under the notification. Accordingly, he raised a demand of an amount equal to the difference between the tax payable and tax paid amounting to Rs.10,71,745/- and also penalty amounting to Rs.18,00,531/- as envisaged under Section 8A(5)(a) of the Act.

4. Aggrieved by the aforesaid order, the assessee carried the matter in an appeal before the first appellate authority. The said authority allowed the appeal and set aside the orders passed by the assessing authority, on the ground that the assessee satisfied all the conditions prescribed in the notification and, therefore, was entitled to take the benefit of the notification issued by the State Government dated 31.3.1994.

5. The Additional Commissioner of Commercial Taxes, being of the view that the order passed by the first appellate authority is erroneous and also prejudicial to the interest of the revenue, initiated proceedings under Section 22-A (1) of the Act, and came to the conclusion that the first appellate authority was not justified in allowing the appeal and in setting aside the order passed by the assessing authority dated 3.3.2001. The revisional authority, who revised the orders passed by the first appellate authority assigned several reasons. However, the amount of penalty was reduced by 50%. Appellant filed an appeal under Section 24(1) of the Act.

6. Stand of the appellant before the High Court was that the Assessing Authority was not justified in holding that the assessee had contravened the conditions specified in the notification issued by the State Government dated

A 31.3.1994 and, therefore, levy of penalty under Section 8A(5)(a) of the Act was not justified. On the contrary, stand of the respondent-State was that since the assessee did not satisfy all the conditions specified in the notification, the Assessing Authority as well as the Revisional Authority were justified in directing the assessee to pay the amount equal to the difference between tax payable and the tax paid under the Act and also in levying the penalty B for contravention of the conditions specified in the notification dated 31.3.1994. The High Court after analyzing the notification came to hold that the order passed by the authorities did not warrant any interference.

7. Learned counsel for the appellant submitted that the authority C empowered to issue the notification had made it abundantly clear that the dealer who effects the sale of machinery can take the benefit of the notification only after fulfilling the other two conditions mentioned in the notification i.e. (1) that the dealer should produce a declaration in Form 37 duly filled and signed by the manufacturing industrial unit i.e. the purchasing dealer and (2) satisfactorily prove that what has been sold to a registered dealer is an D industrial input for use by him/it as a component part of raw material or packing material for manufacture and sale inside the State.

8. The High Court observed that what was purchased by the appellant by the appellant is a "Tower Crane". By no stretch of imagination the High Court observed that "Tower Crane" would be considered as an industrial E input for use either as a 'component part' or as a 'raw material' of any other goods. Accordingly, the appeal was dismissed as noted above.

9. In support of the appeal, learned counsel for the appellant submitted that a narrow construction has been put on the expression "industrial input". F By giving a broader interpretation, it should have been held that the appellant was entitled to get the benefit of the notification.

10. Per contra, learned counsel for the respondent supported the judgment and orders of the authorities below and the impugned judgment of the High Court.

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11. In order to appreciate the rival submissions the notification which forms focal point of controversy is to be quoted. The same reads as follows:

> "In exercise of the powers conferred by Section 8-A of the KST Act, 1957 (Karnataka Act 25 of 1957, the Government of Karnataka hereby H reduces with effect from the first day of April, 1994, the rate of tax

payable by a dealer under Section 5 of the said Act to four per cent on,

(i) raw edible oil when sold to a manufacturer in the State for processing of refined oil; and

(ii) Machinery covered under Sl. No.1(iii)(a) of part M of II Schedule when sold to an Industrial Unit located in the State for use by such unit in the manufacturer or processing of goods for sale.

Subject to the condition that the dealer produces before the assessing authority a declaration in Form 37 duly filled in and signed by the said manufacturer or industrial unit, as the case may be and subject to further condition that all the provisions relating to taxation of industrial inputs under Section 5-A of the said Act shall apply mutatis mutandis to the notification."

12. Stand of the appellant before the High Court and in this appeal is that the appellant is a civil contractor and it manufactures pre-fabric beams and column for sale and, therefore, is an industrial unit. Though the High Court had reservation about accepting this stand, it held that it did not intend examination of that issue. The expressions "industrial inputs" "'component parts" and "raw material" have been explained in the explanation appended to this provision itself. The expression "industrial inputs" means either component part or raw material or packing material. The expression "raw material" means any material from which another product can be made through the process of manufacture, either by itself or in combination with another material; or a processing of any other solvent (including chemicals) used for testing analysis or research used in the solvent extraction process or a catalyst required in the manufacturing process, but it does not include fuels and consumable stores of similar types. All these conditions require to be satisfied by the dealer effecting the sale of machinery of all kinds to an industrial unit to claim reduced rate of tax under the notification.

13. There is no dispute that a crane is a hoisting machine used to lift and move heavy loads. There are different types of cranes and Tower Crane is one such crane which is mostly used to construct high rise buildings. It has been noted by the High Court that most Tower Cranes also called "Climbing Cranes", have built in jacks that raise the cranes through openings in the floor as the building goes up. The cranes are taken apart and lowered after completion of the buildings. As rightly observed by the High Court the Tower Cranes cannot be considered as industrial inputs for use either as a

A component part or as a raw material of any other goods.

14. The residual question is the quantum of penalty. The Assessing Authority had imposed penalty of Rs.18,00,531/- The sum was reduced to 50% of the amount by the revisional authority. Section 8A(5)(a) which is relevant provision relating to imposition of penalty reads as follows:-

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"Where any restriction or condition specified under sub Section (2) in respect of goods taxable at the point of sale is contravened or is not observed by the purchaser of such goods, notwithstanding that such a purchaser is not a dealer or that the sale value of such goods is less than the turnover specified in sub Section (5) of Section 5, such purchaser shall be liable to pay an amount equal to the difference between the tax payable at the rates specified under the Act and the tax paid at the rates specified under the notification on the goods purchased in respect of which such contravention or non-observance has taken place, as if the provision of the notification under sub-Section (1) did not apply to such purchases and in addition, such purchaser shall also be liable to pay by way of penalty a sum not exceeding the amount equivalent to the amount of tax leviable on the sale price of such goods."

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15. The outer limit of the amount of penalty is a sum not exceeding the amount equivalent to the amount of tax leviable on the sale price of the goods. It has been accepted by the respondent that the amount of tax payable is Rs.10,28,875/- though originally it was calculated at Rs.10,71,745/-. The appellant had purchased the Tower Cranes to the extent of Rs.1,71,47,917.80 in the year 1995 and had availed concessional rate of tax of 4% on the said purchase by producing declaration in Form-37 i.e. declaration prescribed under Section 5A of the Act.

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16. Learned counsel for the appellant has submitted that there was a finding recorded by the Joint Commissioner of Commercial Taxes (Appeals) under Section 20(5) of the Act that the order of the Assessing Authority imposing tax and penalty was not maintainable. The revisional order passed by the Additional Commissioner, Commercial Tax under Section 22(A)(1) of the Act set aside such order. Since there was a finding in favour of the assessee-appellant, the inevitable conclusion is that the claim of the assessee to avail concessional rate of tax was based on a possible view. We find no substance in that plea. Revisional authority has elaborately discussed the legal and factual position to conclude that the claim made by the assessee-

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appellant was untenable and not sustainable. In fact, the High Court has also analysed the position in great detail as noted above. We concur with the view expressed by the High Court about the non-acceptability of the claim and levy of tax and penalty. However, so far as the question of quantum of penalty is concerned, it is to be noted that the legitimate amount which was to be collected by the Revenue was not deposited by the assessee-appellant because of the claim at concessional rate of tax. Considering the quantum of tax involved and the period for which the amount was withheld, we are of the view that levy of penalty of rupees five lakhs would suffice. The amount shall be deposited within a period of one month from today if not already done. The appeal is allowed, so far as the quantum of penalty is concerned only and dismissed so far as other aspects are concerned. There shall be no order as to costs.

S.K.S. Appeal Partly allowed.