

Larsen & Toubro Limited vs Additional Dy.Commr.Of Commrl.Taxes ... on 5 September, 2016

Equivalent citations: AIR 2016 SUPREME COURT 4310, 2016 (4) AKR 841, (2016) 8 SCALE 602, 2016 (9) SCC 780, AIR 2016 SC (CIVIL) 3009, (2017) 1 KCCR 13, 2018 (182) AIC (SOC) 34 (SC)

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Bench: Rohinton Fali Nariman, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2956 OF 2007

LARSEN & TOUBRO LIMITED APPELLANT(S)	
VERSUS		
ADDITIONAL DEPUTY COMMISSIONER		
OF COMMERCIAL TAXES & ANR. RESPONDENT(S)	

W I T H

CIVIL APPEAL NO. 2318 OF 2013

A N D

CIVIL APPEAL NO. 7241 OF 2016

J U D G M E N T

A.K. SIKRI, J.

Same parties are entangled in these three appeals which arise out of the provisions of the Karnataka Sales Tax Act, 1957 (hereinafter referred to as the 'Karnataka Act'). Two appeals are preferred by the assessee, viz. Larsen & Toubro Ltd., and one appeal is filed by the Revenue, i.e. the Sales Tax Department of Karnataka.

The assessee is doing the business of engineers and contractors and in this process it, inter alia, executes projects under contracts with public sector undertakings, local bodies as well as the Union and the State Governments, besides private sector. The assessee is registered under the Karnataka Act and files its returns for payment of sales tax thereunder. The contracts which are secured by the

assessee are the works contracts and a part thereof is generally assigned to sub-contractors. For example, in Civil Appeal No. 2956 of 2007, the assessee had secured a contract to construct an indoor stadium styled 'Sree Kanteerava Indoor Stadium' in Bengaluru and the assessee assigned the work of finding their own materials and laying foam concrete to M/s. Lloyd Insulation (India Limited). This sub-contractor was registered with the Deputy Commissioner of Commercial Taxes, Assessment-IX City Division, Bengaluru, and accordingly it had submitted returns and paid taxes for the execution of the works contract and was duly assessed under Sections 5-B and 6-B of the Karnataka Act. A certificate dated April 10, 1998 to that effect had been marked before the authorities.

Likewise, returns are filed by the assessee as well on regular basis. In the course of the assessment, the assessee submitted that the sub- contractors were the parties who executed the works contract and since the transfer of property involved in such execution had already been taxed, the appellant cannot be taxed again under Section 6-B of the Karnataka Act there being only one taxable event for the purpose of Article 366(29A)(b) of the Constitution of India. In nutshell, it was the submission of the assessee that value of the work entrusted to the sub-contractor could not be taken into account while computing total turnover of the assessee for the purpose of taxation under the Karnataka Act. This submission of the assessee was, however, negated by the Assessing Officer as well as the Karnataka Appellate Tribunal. In the revision filed under Section 23 of the Karnataka Act, the appellant raised the following questions:

(i) Is the assessee liable to turnover tax under Section 6-B of the Karnataka Sales Tax Act, 1957 on the payment made to the sub-contractor in spite of the fact that the sub-contractor had declared the turnover and paid taxes?

(ii) Since the payment made to the sub-contractor does not amount to turnover within Section 2(i)(v) of the Karnataka Sales Tax Act, 1957, can such payment be part of total turnover as per Section 2(1)(u-2) of the Karnataka Sales Tax Act, 1957?

The High Court decided the aforesaid questions against the assessee and thereby affirmed the view taken by the Appellate Tribunal which resulted in dismissing the revision petition of the assessee vide judgment dated February 03, 2006. This judgment is the subject matter of challenge in Civil Appeal No. 2956 of 2007, which pertains to the Assessment Year 1997-1998.

Likewise, for the Assessment Year 2002-2003 (Civil Appeal No. 2318 of 2013), the assessee has been meted out the same treatment whereby the work awarded to the sub-contractors, who are the registered dealers and have paid sales tax in respect of the works undertaken by them, has been added in the total turnover of the assessee for the purposes of levying tax. However, here the matter is remanded to the Assessing Officer for ascertaining the liability of the assessee under Section 5-B as well as Section 6-B of the Karnataka Act in respect of total turnover of the assessee.

On the other hand, outcome of the proceedings in respect of the Assessment Year 1999-2000 (Civil Appeal No. 7241 of 2016) has taken a U-turn. For this Assessment Year, though the Assessing Officer as well as the Appellate Tribunal had included the cost of work awarded to the

sub-contractors, the High Court has held that value of the work awarded to the sub-contractors cannot be included for computing the total turnover of the assessee and has, thus, allowed the revision petition preferred by the assessee. Against that order, the Revenue is in appeal.

The aforesaid brief resume of the three appeals makes it clear that the question of law involved in all these three cases is the same, though the two sets of judgments of the High Court are contrary to each other.

It may be pointed out at this juncture itself that in the case of this very assessee same question of law had arisen, albeit in the context of Andhra Pradesh Value Added Tax Act, 2005 (hereinafter referred to as the 'Andhra Pradesh Act'). This Court has decided the issue in its judgment known as State of Andhra Pradesh & Ors. v. Larsen & Toubro Limited & Ors.[1] (hereinafter referred to as 'Andhra Pradesh judgment'). The question of law is answered in favour of the assessee. Taking aid of the said judgment, the assessee has argued that the instant appeals should be decided in its favour. On the other hand, plea of the Revenue is that that view taken by the High Court, which is in favour of the Revenue, is the correct view and should be maintained having regard to the provisions of the Karnataka Act. The endeavour of the Revenue is to demonstrate that the provisions of the Andhra Pradesh Act are materially different than that of the Karnataka Act and, therefore, the judgment in the Andhra Pradesh case need not be followed.

Before advertng to the aforesaid judgment of this Court, it would be advisable to take note of the various provisions of the Karnataka Act.

For our purposes, definitions of 'sale', 'taxable turnover', 'total turnover' and 'turnover' are material, which are reproduced below:

“2(i)(t) “Sale” with all its grammatical variation and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, and includes, –

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

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

xx xx xx 2(i)(u-1) “Taxable turnover” means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed, but shall not include the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India;

(u-2) "Total turnover" means the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax, including the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India;

(v) "Turnover" means the aggregate amount for which goods are bought or sold, or supplied or distributed or delivered or otherwise disposed of in any of the ways referred to in clause (t) by a dealer, either directly or through another, on his own account or on account of others, whether for cash or for deferred payment or other valuable consideration." Since we are dealing with the sales tax under the Karnataka Act, obviously the said tax is on 'sale'. 'Sale' is defined as transfer of the property in goods by one person to another in the course of trade or business for consideration and it, inter alia, includes a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. Thus, even in respect of works contract whenever there is a transfer of property in goods, that is deemed as 'sale'. An essential element to constitute a transaction as 'sale' is the transfer of property in goods. Aggregate amount for which the goods are bought or sold, or supplied or distributed or delivered or otherwise disposed of, in any of the ways referred to under Section 2(t), by a dealer is treated as 'turnover' within the meaning of Section 2(v) of the Karnataka Act. There are two variants of this turnover known as 'taxable turnover' and 'total turnover', the definitions whereof are already reproduced above. 'Total turnover' is defined as aggregate turnover in all goods of a dealer at all places of business in the State. However, from this aggregate turnover, certain deductions are permissible under the provisions of the Karnataka Act and when those deductions are allowed from the total turnover, we get 'taxable turnover' on which a dealer is liable to pay tax.

Section 5-B of the Karnataka Act is the charging section in respect of execution of the works contract and it reads as under:

"5-B Levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts – Notwithstanding anything contained in sub-section (1) or sub-section (3) or sub-section (3-C) of Section 5, but subject to sub-section (4), (5) or (6) of the said section, every dealer shall pay for each year, a tax under this act on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in column (3) of the said Schedule." There is a levy of turnover tax as well, which is provided under Section 6- B of the Karnataka Act. At the relevant time, this provision was in the following form:

"6-B Levy of Turnover Tax. – (1) Every registered dealer and every dealer who is liable to get himself registered under sub-section (1) and (2) of Section 10 whose total turnover in a year is not less than the turnovers specified in the said sub-sections, whether or not the whole or any portion of such turnover is liable to tax under any other provisions of this Act, shall be liable to pay tax. –

(i) at the rate of one and half per cent of the total turnover, if the total turnover is not more than one thousand lakh rupees in a year; or

(ii) at the rate of three per cent of the total turnover, if the total turnover is more than one thousand lakh rupees in a year;

Provided that the rate of tax payable for any year shall be at one and half per cent on the turnovers up to one thousand lakh rupees and at three per cent on the turnovers exceeding one thousand lakh rupees, if, the total turnover in the year immediately preceding that year was not more than one thousand lakh rupees.” On a plain reading of Sections 5-B and 6-B of the Karnataka Act, it can be seen that Section 5-B deals with levy of tax on transfer of property in goods involved in the execution of the works contract. It is, thus, a special provision made for imposing sales tax on works contract and tax is payable on 'taxable turnover of transfer of property in goods'. Additionally, in those cases where total turnover of a registered dealer in an year is not less than the turnover specified in sub-sections (1) and (2) of Section 10, such a dealer is liable to pay tax at the rate specified in Section 6-B of the Karnataka Act.

The question for determination is: for calculating the turnover for the purpose of payment of turnover tax under Section 6-B of the Karnataka Act, whether payments made to sub-contractor are to be included while calculating the total turnover?

Mr. N. Venkatraman, learned senior counsel appearing for the appellant/assessee, made a fervent plea for not including such payments made to the sub-contractor, as component of total turnover, because of the reason that the sales tax is payable on the transfer of property and the 'turnover' also meant aggregate amount for which goods are bought or sold, etc. Therefore, transfer of property in goods was the necessary concomitant in ascertaining the sale and, thus, in the process calculating the turnover/total turnover. It was submitted that there was no sale of goods involved in the execution of a works contract as in such contracts the property does not pass as movables. Tracing the history of works contract, the learned senior counsel submitted that in the case of *The State of Madras v. Gannon Dunkerley & Co. (Madras) Limited*[2], while speaking of a building contract, this Court held that the property in goods involved in the execution of a works contract does not pass as movables but on the theory of accretion on the principle *quicquid plantatur solo, solo cedit*, i.e. whatever is attached to the soil, becomes part of it. The Constitution (Forth-Sixth Amendment) Act, 1982 inserted Article 366(29- A)(b) to neutralise the judgment in *Gannon Dunkerley & Co.* only to the extent that an indivisible contract was deemed to be divisible and did not undo the principle. He argued that this Court, interpreting Article 366(29- A)(b) in *Builders' Association of India & Ors. v. Union of India & Ors.*[3], reiterated that in a works contract property in goods passes out as movable but on the theory of accretion. It was further submitted that the property passes by accession just once which, by a fiction, is taxed as a sale. The Article also identifies the transferor and transferee effecting the deemed sale and deemed purchase. The taxable person is the contractor executing the works contract so that the main contractor, who assigns the work to another person to execute the work, cannot be a transferor, nor any property in goods vest in the main contractor, when the contract is executed by a sub-contractor.

Proceeding further, by taking the aforesaid line of argument, the learned senior counsel submitted that if the point of view of the Revenue is accepted, it would amount to double taxation inasmuch as sub-contractors were also registered dealers who had paid sales tax under the Karnataka Act and by including the payments made to them in the total turnover of the assessee, tax was sought to be levied on the same amount all over again. On the aforesaid premise, the learned senior counsel for the assessee submitted that precisely this argument in law has been accepted by this Court in the Andhra Pradesh judgment. He referred to the discussion contained in the said judgment in extenso.

Mr. K.N. Bhat, learned senior counsel appearing for the Revenue, per contra, heavily relied upon the reasoning given by the High Court in the judgment which has taken the view in favour of the Revenue. He submitted that one had to keep in mind the distinction between Section 5-B and Section 6-B of the Karnataka Act by pointing out that when it comes to levy of turnover tax, it speaks of 'total turnover', whereas tax payable under Section 5-B is on the 'taxable turnover'. He submitted that since we are concerned with the levy of tax under Section 6-B of the Karnataka Act, total turnover becomes relevant and, therefore, the value of the work entrusted to the sub-contractors is includible at the hands of the assessee. He further submitted that the High Court was right in pointing out that sales tax is leviable at a single point, whereas turnover tax is leviable at a multi-point, both at the hands of the main contractor and sub- contractor and, therefore, the question of double taxation does not arise.

After bestowing our due consideration to the respective submissions, we find that the position taken by the assessee has to prevail, which appears to be meritorious. This result follows even from the bare perusal of the Karnataka Act and Rules. For this purpose, it becomes important to refer to clause (c) of sub-Rule (1) of Rule 6 of the Karnataka Sales Tax Rules, 1957. Rule 6 deals with determination of total and taxable turnover and clause (c) reads as under:

“6. Determination of total and taxable turnover. – (1) The total turnover of a dealer, for the purposes of the Act, shall be the aggregate of. – xx xx xx

(c) the total amount paid or payable to the dealer as the consideration for transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract; and includes any amount paid as advance to the dealer as a part of such consideration.

xx xx xx” What is significant is that total amount paid or payable to the dealer as a consideration for 'transfer of property in goods', which is involved in execution of the works contract, is to be treated as 'total turnover'.

This Rule, thus, specifically restricts the total turnover in respect of those goods, alone, where the property has been transferred. Thus, transfer of property in goods, becomes necessary event and unless there is a transfer of property, the amount paid is not to be included in the total turnover. The amount paid to the sub-contractor is not for transfer of property in goods. When matter is examined from this angle, the ratio laid down by this Court in the Andhra Pradesh judgment clearly applies inasmuch as in that case also the Court noticed that Section 4(7) of the Andhra Pradesh Act

indicated that the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works. The Court held that the value of the goods which constitute the measure for the levy of tax is the value of goods at the time of the incorporation of the goods in the works. The Court further found that same was the position contained in Rule 17(1)(a) of the Andhra Pradesh Value Added Tax Rules, 2005.

It is not in dispute that the facts and the issue involved were identical, i.e. the assessee had assigned parts of the construction work to sub- contractors who were registered dealers. These sub-contractors had purchased goods and chattels like bricks, cement and steel and, where necessary, supply and erect equipments such as lifts, hoists, etc. The materials were brought to the site and they remain the property of the sub- contractor. The site was occupied by the sub-contractor and the materials were erected by the sub-contractor. In this backdrop, after taking note of some provisions of the Andhra Pradesh Act, the Court explained the legal position in the following manner:

“16. By virtue of Article 366(29-A)(b) of the Constitution, once the work is assigned by the contractor (L&T), the only transfer of property in goods is by the sub-contractor(s) who is a registered dealer in this case and who claims to have paid taxes under the Act on the goods involved in the execution of the works. Once the work is assigned by L&T to its sub- contractor(s), L&T ceases to execute the works contract in the sense contemplated by Article 366(29-A)(b) because property passes by accretion and there is no property in goods with the contractor which is capable of a retransfer, whether as goods or in some other form.

17. The question which is raised before us is whether the turnover of the sub-contractors (whose names are also given in the original writ petition) is to be added to the turnover of L&T. In other words, the question which we are required to answer is whether the goods employed by the sub-

contractors occur in the form of a single deemed sale or multiple deemed sales. In our view, the principle of law in this regard is clarified by this Court in Builders' Assn. of India as under: (SCC p. 673, para 36) “36 ... Ordinarily unless there is a contract to the contrary in the case of a works contract, the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building.” (emphasis supplied by us)

18. As stated above, according to the Department, there are two deemed sales, one from the main contractor to the contractee and the other from sub-contractor(s) to the main contractor, in the event of the contractee not having any privity of contract with the sub-contractor(s).

19. If one keeps in mind the abovequoted observation of this Court in Builders' Assn. of India the position becomes clear, namely, that even if there is no privity of contract between the contractee and the sub- contractor, that would not do away with the principle of transfer of property by the

sub-contractor by employing the same on the property belonging to the contractee. This reasoning is based on the principle of accretion of property in goods. It is subject to the contract to the contrary. Thus, in our view, in such a case, the work executed by a sub- contractor, results in a single transaction and not as multiple transactions. This reasoning is also borne out by Section 4(7) which refers to the value of goods at the time of incorporation in the works executed. In our view, if the argument of the Department is to be accepted, it would result in plurality of deemed sales which would be contrary to Article 366(29-A)(b) of the Constitution as held by the impugned judgment of the High Court. Moreover, it may result in double taxation which may make the said 2005 Act vulnerable to challenge as violative of Articles 14, 19(1)(g) and 265 of the Constitution of India as held by the High Court in its impugned judgment.” This *raison d’etre* shall apply, in full force, while answering the question even in the context of the Karnataka Act.

We, therefore, hold that the value of the work entrusted to the sub- contractors or payments made to them shall not be taken into consideration while computing total turnover for the purposes of Section 6-B of the Karnataka Act. As a consequence, the two appeals which are filed by the assessee are allowed and the appeal preferred by the Revenue is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

.....J. (A.K. SIKRI)J. (ROHINTON FALI
NARIMAN) NEW DELHI;

SEPTEMBER 05, 2016.

[1] (2008) 9 SCC 191 [2] AIR 1958 SC 560 [3] (1989) 2 SCC 645