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Income Tax Appellate Tribunal - Bangalore

Karnataka Power Transmission ... vs Assessee

THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH 'A'

BEFORE SHRI GEORGE GEORGE K, J.M. AND
SHRI A MOHAN ALANKAMONY, A.M.

ITA Nos.1011, 1013, 1015, 1017 & 1019/Bang/2010
(Asst. years 2005-06 to 2009-2010)

M/s Karnataka Power Transmission Corporation Ltd.,
Major Works (S) Division, Hassan. - Appellant
vs
The Income-tax Officer,
TDS Ward, Mysore. - Respondent

Appellant By : Shri S Parthasarathy &
Shri Chythanya, K. K, Advocate
Respondent By : Shri G V Gopala Rao, CIT-I

ORDER

PER BENCH :

These five appeals instituted by KPTCL, Mysore Division - a State Government Public Sector Company - are directed against the consolidated order of the Ld. CIT (A), Mysore, in ITA Nos: 17 to 21/CIT(A)/MYS/09-10 dated: 31.8.2009 for the assessment years 2005-06 to 2009-10.

2. The KPTCL, ['the assessee' in short] had raised ten identical grounds for the AYs under dispute, out of which, ground Nos: 1 and 10 being general no specific issues involved, they have become non-consequential. In Page 2 of 12 2 ITA Nos.1011, 1013, 1015, 1017 & 1019/Bang/2010 the remaining grounds, the substances of issues raised are reformulated as under:

> (i) the Ld. CIT (A) ought to have accepted the explanation offered and refrained from confirming the levy of tax and interest u/s 201 (1) and 201(1A) of the Act: that the assessee was not a defaulter and the provisions of s.201(1) and 201(1A) of the Act were not applicable;
>
> (ii) the CIT (A) ought to have appreciated that the with regard to the value of materials supplied to the contractors, they belong to the assessee and, thus, the question of deduction of tax at source by applying the provisions of s. 194C of the Act would not arise; &

> (iii) without prejudice, the CIT(A) ought to have appreciated that the recipient having paid the tax on the amount received from the assessee, there was no obligation on the part of the assessee to pay tax u/s 201(1) of the Act as ruled by the Hon'ble Supreme Court and, thus,, levy of tax as well as interest u/s 201(1A) are liable to be cancelled.

3. As the issues raised were identical pertaining to the same assessee, they were heard, considered together and disposed off in this common order for the sake of convenience and clarity.

4. Briefly stated, the assessee was a State Government Public Sector company, carrying on the business of transmission of electricity from electricity generating points to various electrical sub-stations in the State through the network of transmission lines and sub-stations. The assessee's premises were subjected to an operation u/s 133A of the Act on 28.1.2009 to verify the compliance with TDS provisions. During the course of survey, it was noticed that the assessee had entered into agreements with various contractors for setting up of electrical sub-stations. The sub-stations were Page 3 of 12 3 ITA Nos.1011, 1013, 1015, 1017 & 1019/Bang/2010 established in order to segregate the load of one station or to improve the reliability of power supply and to meet the increasing demand for power supply. It was noticed by the Revenue during the verification of the agreements that the assessee had entered into separate agreements for supply of materials, erection work and for civil work portion etc., It was, further, noticed that when the assessee was deducting tax at source while making payments on civil work and erection portion, however, no TDS was effected on payments towards supply of material portion. During the course of proceedings u/s 201(1) and 201(1A) of the Act, it was the view of the AO that as the assessee ought to have deducted tax at source on the supply of material portion also, it was required to explain such inaction on the part of the assessee.

5. Brushing aside the assessee's detailed explanation, the AO went ahead in concluding, after detailed reasons recorded in the impugned orders under challenge, that the assessee should have deducted tax at source on the supply portion also which it had failed to do so, the assessee was treated as an 'assessee in default' and, accordingly computed the taxes as well as interest thereon u/s 201 and u/s 201(1A) of the Act for the assessment years under dispute.

6. Aggrieved, the assessee took up the issues with the Ld. CIT (A) for relief. After due consideration of the lengthy contentions put-forth by the assessee's A.R., perusing the observations made by the AO in her impugned orders under challenge, analyzing the provisions of s.194C of the Page 4 of 12 4 ITA Nos.1011, 1013, 1015, 1017 & 1019/Bang/2010 Act, extensively quoting the rulings in the cases on which the assessee had placed strong reliance, the Ld. CIT (A) had observed thus:

> "(On page 12) 6...........................In view of the fore-going, it is held that considering the nature of the contract which is found to be composite, the appellant was liable to deduct tax on supply portion of the contract also. The AO's action in demanding tax and mandatory interest u/s 201 (1A) is, therefore, upheld. Ground Nos.1 to 4 are dismissed in view of the discussion made above.

> In ground No.5, the appellant has raised the contention that the recipient has paid the tax on the amount received from the appellant. In the written submissions, the appellant has referred to the decision of Supreme Court in the case of Hindustan Coco Cola Beverage P. Ltd. v. CIT 293 ITR 226 in this connection. No details or evidence was, however, given at the time of appeal hearing. At the time of last hearing, the appellant asked for more time for producing confirmation from contractors regarding tax payment. However, since sufficient opportunity has been provided to the appellant, no further time was given. In the absence of any supporting details and evidence on the above ground, appeal fails."

7. Agitated, the assessee has come up with the present appeals.

During the course of hearing, the forceful submissions made by the Ld. A R are summarized as under:

> (i) S. 201(1) was not at all applicable in the case of the appellant as there was no requirement to deduct tax at source. S. 201 require a person who is required to deduct any sum in accordance with the provisions of the Act. Here, as there was no requirement to deduct any sum, s.201(1) is not applicable;

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(ii) The appellant floats tenders for supply of goods, erection and civil engineering works. For supply of goods, an agreement was executed. Some of the significant clauses contained in the tender were that -

'35.2. In case of award of contract, a divisible contract covering the entire scope of the partial/total turnkey package will be entered into with the successful bidder. There shall be three separate contracts as under:

(a) for supply of goods; (b) for erection works; & (c) for civil engineering works.' '37.3. For contractor supplied equipments/materials: 37.3.1. Transfer of the title in respect of equipment and materials supplied by the contractor to the KPTCL pursuant to the terms of the contract shall pass on to the KPTCL with negotiation of dispatch documents.' 37.3.2. This transfer of title shall not be construed to mean the acceptance and the consequent 'taking over' of equipment and materials. The contractor shall continue to be responsible for the quality and performance of such equipment and materials and for their compliance with the specifications until 'taking over' and the fulfillment of guarantee provisions of this contract.' '3.2. the scope of work shall also include supply/erection/civil works* portion of all such items which are not specifically mentioned in the contract documents but, which are needed for successful, efficient, safe and reliable operation of the equipment unless otherwise specifically excluded in the specifications under 'exclusions or letter of award.

(iii) 3.5. It is expressly agreed to by the contractor that notwithstanding the fact that the contract is termed as supply, for convenience of operation of the other contracts, namely, erection contracts

and civil contracts* are also the integral parts of the composite contract on single source responsibility basis sand the contractor is bound to perform the total contract in its Page 6 of 12 6 ITA Nos.1011, 1013, 1015, 1017 & 1019/Bang/2010 entirety and non-performance of any part or portion of the contract shall be deemed to be a breach of the entire contract. [*the clause shall be suitably modified in the agreement of supply/erection/civil works portion]'

(iv) the dispute between the appellant and the AO was mainly with regard to the agreement for supply and the AO had treated the agreement for supply of goods as part of the composite contract which, according to the appellant, was a wrong interpretation arrived at by the AO, considering only some portion of the documents referred to in her order;

(v) though the complete contract work was awarded to a single contractor, still such contract was required to execute separate agreements for each of the work which means three contracts were documented separately and were considered as three contracts for all practical purposes;

- the materials/equipments purchased were in the absolute ownership of the appellant and it was the appellant who supplied these materials for performing the other two contracts by the contractor. With regard to the supply, it was only a contract of sale for purchase of such materials/equipments which were purchased for consideration with a specific requirement;

- the intention was quite clear that right from step one, both the parties knew that there would be three contract agreements that were to be executed and honoured separately;

- thus, the transaction between the appellant and the contractor while executing the agreement for supply of goods was essentially one of sale of goods and certainly not in the nature of works contract;

- relies on the case laws:

CIT v. Munni Lal and Company (2008) 298 ITR 250 (Raj) CIT v. Dy. Chief Accounts Officer, Markfed, Khanna (2008) 304 ITR 17 (P& H) CIT v. Reebok India Co. (2008) 306 ITR 124 (Del); Sr. Accts. Officer (O&M), Haryana Power Generation Corpn. Ltd. v. ITO (2006) 103 TTJ(Del)584 CIT v. Girnar Food and Beverage P. Ltd. (2008) 306 ITR 23 (Guj) CIT v. Hindustan Lever Ltd. (2008) 306 ITR 25 (Guj) Page 7 of 12 7 ITA Nos.1011, 1013, 1015, 1017 & 1019/Bang/2010

- thus, the transaction with reference to the contract agreement for supply of materials will not fall within the meaning of s.194C of the Act and consequently the appellant cannot be held to be an assessee in default, and, therefore, s.201(1)and 201 (1A) have no application to the case of the appellant;

(vi) the appellant had entered into three separate agreements may be with the same contractor for (1) supply of goods or materials/equipments (2) for erection works and (3) civil engineering works. It was only for sake of convenience that a contractor was allowed to supply materials or equipments since he was well informed about the quality of goods or materials which were required for the

construction work. Once the contractor supplies the goods/materials/equipments, the appellant becomes the owner for all practical purposes and the contractor will have no control over such goods;

- as held by the Supreme Court in the case of State of A.P v. Kone Elevators (I) Ltd. (2005) 140 STC 22,, the materials purchased from the contractor were supplied for commissioning of the sub-stations. The purchases have duly been reflected in the accounts of the appellant and the ownership of goods vested with the appellant and at no given point of time it was owned by the contractor to suggest that these materials were part of the materials supplied by the contractor in the course of works contract;

(vii) it was not the case of the revenue that the contractor had failed to fulfill the tax obligation and that the Government was deprived of the taxes due. As held by the S.C. in the case of Hindustan Coco Cola Beverage P.Ltd. v. CIT (2007) 293 ITR 226 (SC),' where the payee has already paid the tax on the income on which there was a short deduction of tax at source, recovery of ax cannot be made once again from the tax deductor.'

- the appellant was not obliged to deduct tax at source from the payment made for purchase of materials from the contractors who undertook the other works of erection and civil engineering and in lieu Page 8 of 12 8 ITA Nos.1011, 1013, 1015, 1017 & 1019/Bang/2010 of various judicial pronouncements, the appellant was not obliged to deduct tax at source.

- That the appellant was under the bona fide belief that there was no liability to deduct tax when payments were made towards supply of materials/equipments. The bona fides of the appellant was further proved by the fact that the appellant had deducted tax at source when payments were made towards the other two contracts viz., erection and civil engineering works. Thus, there was reasonable cause for non-deduction of tax, if any, while making the payment towards supply of materials/equipments which was in accordance with the proviso to s.201(1) and that the appellant cannot be held to be a defaulter to enforce the demand us 201(1) of the Act.

- Relies on the case law in the case of ITO v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2001) 247 ITR 305 (Guj) & In the case of Power Grid Corporation of India Ltd. v. ACIT (2007) 108 ITD 340.

(viii) Every purchase (supply) was recorded by the appellant as such sand was taken into the stock and issued therefore. This aspect is relevant in view of the budget proposals presented on 6th July, 2009, that clause 60 of 2009-10 Union Budget seeks to substitute s.194C w.e.f. 1.10.2009 7.1. To buttress his arguments, the Ld. AR came up with a paper book containing 1 - 143 pages which consist of inter alia copies of (i) tender notification; (ii) tender from Lekhashree Electricals; (iii) awards of 'civil works', 'erection of equipments' and 'supply of materials'; (iv) contract agreement(s) of 'civil works', 'erection of equipments' and 'supply of materials' etc.,

8. Before venture to address to the issues referred supra, we would like to point out that almost identical issues were raised by the assessee's counter-part - KPTCL BANGALORE DIVISION - in its appeals in ITA Nos. Page 9 of 12 9 ITA Nos.1011, 1013, 1015, 1017 & 1019/Bang/2010 112 to 115 and

162 to 165/Bang/2010 dated 10th March, 2011 before this Bench.

8.1. The facts were elaborately discussed and submissions of both the Ld. A.R as well as the Ld. D.R. were considered at length in those appeals.

After considering the detailed rival submissions and on a perusal of materials on record, this Bench had decided the issue in the following manner -

> (Quote) "11.6. In taking into account the facts and circumstances of the issues which have been meticulously analyzed and also extensively quoting the various judicial pronouncements on the issues in the fore-going paragraphs, we are of the considered view that the authorities below were not justified in treating the assessee - KPTCL - as an 'assessee in default' u/s 201(1) and also charging interest u/s 201(1A) of the Act for the following reasons:
>
> - the assessee cannot be categorized as an 'assessee in default' when there was no obligation on the part of the assessee to deduct tax u/s 194C of the Act for supply portion;
>
> - amendment of s. 194C through Finance Act(No.2) of 2009, clarify deduction doesn't extend to supply of materials (portion);
>
> - the materials in question were purchased from the suppliers by the assessee and given to the contractor(s) for carrying out the work of civil, erection, etc.,
>
> - the contract between the assessee and the contractor was a 'contract for supply' and NOT for 'contract of work' and the Revenue had consistently refused to see the reason and to recognize the distinct meaning - SUPPLY and WORK;

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- it was wrongly visualized that the equipments, materials component parts were fabricated and installed at work site premises;

- it was wrongly presumed that the contracts entered into between the assessee and the contractor were composite contract and an indivisible contract whereas there were three separate contracts, viz., (i) supply of materials; (ii) for erection & (iii) for civil work portion;

- Instruction to Bidders (Section -II -ITB) under clause

14. Taxes and duties [source P 123 of PB - AR] it has been made implicitly clear that -

"14.1. As indicated in clause 35.2 of section ITB of the Bid Document, in case of Award of contract, a Divisible Contract covering the entire scope of the partial/total turnkey package will be entered into

with the successful bidder, there shall be three separate contracts as under:

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(i)     For supply of goods
(ii)    For erection works
(iii)   For Civil Engineering works
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Thus, tender clearly gives breaks-up of separate agreements reflecting separate consideration;

- through a single bidding process, all the contracts were awarded distinctly which do not mean that they were composite contract;

- The Hon'ble Apex Court in the case of Hindustan Coca Cola Beverages P. Ltd. v. CIT reported in 293 ITR 226(SC) had ruled that "It is not disputed that the circular no. 275/201/95-IT(B) dated January 29, 1997 issued by the Central Board of Direct Taxes declaring that "no demand visualized under section 201(1) of the Income- tax Act should be enforced after the tax deductor has satisfied the officer-in- Page 11 of 12 11 ITA Nos.1011, 1013, 1015, 1017 & 1019/Bang/2010 charge of TDS, that taxes due have been paid by the deductee-assessee";

- When there was no obligation on the part of the assessee to deduct tax on supply portion, there was no question of charging interest u/s 201(1A) of the Act;

- We have also duly perused the case laws on which the Ld. CIT (A) had placed strong reliance. However, we are of the considered view that those decisions were clearly distinguishable to the facts and circumstances of the issues under consideration.

11.7. In a nut-shell -

(i) when the assessee was under no obligation to deduct tax u/s 194C of the Act towards the payments made on supply portion, the assessee's case doesn't fall within the ambit of the provisions of s.201(1) of the Act and, thus, the assessee cannot be treated as an 'assessee in default'; and

(ii) that when the assessee was not required to deduct tax towards the payment on supply portion, there was no question whatsoever in charging interest u/s 201(1A) of the Act.

It is ordered accordingly."(un-quote).

8.2. As the issues before us in these appeals are similar to that of the issues and also in conformity with the said findings in the case of KPTCL, Bangalore Division referred supra, we are of the considered view that the findings recorded thereto hold good for the present appeals too. It is ordered accordingly.

Page 12 of 12 12 ITA Nos.1011, 1013, 1015, 1017 & 1019/Bang/2010 8.3. For the sake of reference, a copy of the order in the case of KPTCL, BANGALORE DIVISION in ITA Nos. 112 to 115 and 162 to 165/Bang/2010 dt: 10.3.2011 is annexed hereto.

9. In the result:

The assessee's appeals for the assessment years 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10 u/s 201(1) and u/s 201(1A) of the Act are allowed.

Encls : Appeal Nos.112 to 115 & 162 to 165/Bang/2010 Dt.10/3/2011 The order pronounced on 23rd day of March, 2011 at Bangalore.

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          Sd/-                                        Sd/-
      (A MOHAN ALANKAMONY)                      (GEORGE GEORGE K)
      ACCOUNTANT MEMBER                         JUDICIAL MEMBER
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Copy to :- 1.The Assessee 2. The Revenue 3. The CIT(A) concerned.

4. The CIT concerned. 5. The DR 6. GF By Order MSP/23.3.

Assistant Registrar, ITAT, Bangalore.