IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Commercial Tax Revision No. 24 of 2010

Commissioner,
Commercial Tax, Uttarakhand,
Dehradun. ……. Revisionist.

Versus

M/s Jai Durge,
Narain Niwas, Kankhal,
District Haridwar. ...……. Respondent

Mr. Mohit Maulekhi, Brief Holder for the State of Uttarakhand / revisionist.
Mr. S.K. Posti, Advocate for the respondent.

Dated: 10th April, 2018

Coram: Hon'ble K.M. Joseph, C.J.
Hon'ble Sharad Kumar Sharma, J.

K.M. JOSEPH, C.J. (Oral)

The revisionist called in question the order dated 01.06.2009 passed by the Commercial Tax Tribunal, Uttarakhand, by which the Tribunal allowed the Appeal filed by the respondent assessee and set aside the order of the Appellate authority and also modified the order passed by the Assessing officer and set aside the tax imposed and declared the dealer (respondent)exempted from tax. The amount got deposited by the dealer along with returns, if not realized from the contractee Department, be refunded to the dealer as per the Rules.

2. The substantial question of law, which is framed by the revisionist, reads as follows:-

> "Whether the learned Tribunal was justified in declaring that payment of Rs. 18,98,008, in absence of any material of evidence or single whisper of evidence, was made towards the job Work and was not sale?"

3. We heard Mr. Mohit Maulekhi, learned Brief Holder on behalf of the State / revisionist. We also had heard Mr. S.K. Posti, learned counsel for the respondent.

4. The Assessing Officer, in this case, by the order which was modified by the Tribunal, proceeded to estimate the turnover of the assessee for the Assessment Year 1987-88 at Rs. 40 lakhs. The tax was assessed at Rs. 5,28,000/-. The respondent-assessee was assessed on the basis that it had manufactured and sold cement tiles to a Government Department (**hereinafter referred to as the contractee**). The Assessing Officer entered the following findings in passing the order:

Form 3-D has not been filed by the assessee. The agreement, under which the tiles were supplied, was not produced. No Account books and Bill books have been presented for scrutiny. Though the assessee claims the benefit of the order passed by the Member, Trade Tax Tribunal for the previous Assessment Year 1986-87, wherein the Tax Tribunal construed the transaction as the job work, the officer has not proceeded on the said basis. It was found by him that the supply of cement tiles was in large quantity and the Department had provided a lot of facilities to the dealer. He was of the view that it was but natural that the rate of the cement tiles was very less. The Assessing Officer relied on the judgments of the Hon'ble Supreme Court in the case of **M/s Chandra Bhan Gosain vs. State of Orissa** reported in **1963 -14 STC 866**, as also, in the case of **Commissioner Sales Tax vs. M/s Sabarmati Udyog Sahkari Mandali** reported in **1976 STI SC 119**. It was found that the facts of the present case are similar to that of the said case as the Department had provided facilities of land, material, electricity etc. to the contractor, and the skill and labour was of the contractor. Price of the cement has been deducted from the bills of the contractor, but there is no reference to sand and gravel made in the certificates of deduction and payment filed by the dealer. It is evident that sand and gravel has been used by the contractors after purchasing it themselves. The respondent-dealer has obtained registration for manufacture and sale of tiles. He had prayed to convert the temporary registration to permanent registration. Temporary registration is given only to those

dealers, who are manufacturers. The reason for the rate of cement tiles being less is that all the facilities had been provided by the Department. The rate of cement was also Rs. 48 per bag and the tiles were being manufactured in large quantity.

5. He refers to the survey, which was carried out and the partner apprising the officer that the contract was for supply of 60 lakh number of cement tiles for Rs. 1, 15,00,000/-, which has been received from the Executive Engineer and the material was to be supplied in two years. The average rate of the tile was Rs. 1.87 per tile in regard to 55 lakh tiles of a certain size and Rs. 1.12 for the other lot. The Assessing Officer also takes note of the fact that the dealers themselves in the statement for the month of January, 1988 on the taxable sale of Rs. 17,49,393/- deposited admitted tax at the rate of Rs. 4.4 per cent. He further finds that it is also evident from this fact that the dealer has done sale against Form 3-D, due to which the dealer has admitted tax liability at the concessional rate of 4.4%. Thereafter, the Assessing Officer finds that from the intimation received from the Executive Engineers of the two Divisions at Haridwar available on file, the dealer has been given Rs. 18,98,008/- and a net payment of Rs. 5,72,254/- during the year in consideration by the department. For the year 1988-89, the dealer was given a gross payment of Rs. 10,62,078/- and a net payment of Rs. 1,97,410/-. Thus, the total amount of Rs. 29,60,086/- for the years 1987-88 and 1988-89 was received. It is also stated in the statement, which is available on the file that payment of the last bill is still outstanding. Thus, it is found that it is but natural that for the supplies made in the year 1987-88, the payment has been received during the year 1988-89 and this shall also be deemed as sale for the year 1987-88. No accounts were presented for scrutiny. On the basis of the same, the sale of the cement tiles was determined as Rs. 40,00,000/-, which was also treated as taxable turnover and the amount of Rs. 5,28,000/- was demanded. The First Appellate Authority has dismissed the Appeal.

6. In the further Appeal, the Tribunal has found that the matter is to be governed by the decision in the Assessment Year 1986-87. The Tribunal has entered the following findings *inter alia* :

> "We heard both the parties and perused the record. There is no dispute on this point that payment of Rs. 8,72,617/- in the Year 86-87 and of Rs. 18,98,008/- in the Year 87-88 has been made to the Dealer by the Contractee Superintending Engineer, East Ganga Canal Construction Division-3, Haridwar in respect of the work performed, under agreement no. 2 / East Ganga Canal Construction Division / Section -2/S.E./85-86. With regard to the payment received for the Year 86-87, vide order dated 22-2-1996 passed U/s 10-B by the learned Deputy Commissioner (Executive), Trade Tax, Muzaffarnagar tax has been assessed on the sale of self-manufactured comprest cement tiles, by holding the work of manufacture and supply of comprest cement tiles as executed by the Dealer in compliance of agreement no. 2 / East Ganga Canal Construction Division / Section -2 / S.E. / 85-86 made with M/s Superintending Engineer, East Ganga Canal Construction Division -3, Haridwar; and on imported empty cement bags against which the Dealer preferred Second Appeal No. 35 of 2006 (year 1986-87) before the Trade Tax Tribunal, Dehradun Bench and in the judgment / order dated 22-10-97 passed by the Division Bench of Trade Tax Tribunal, Dehradun after detailed discussion and keeping in view the terms of referred agreement holding the payment received by the Dealer as being the payment received against job-work, it was decided that no sale has been made and accordingly the Dealer has been exempted from tax for the Year 86-87. The Hon'ble Allahabad High Court vide its judgment / order dated 4-9-1998 delivered in Revision No. 316 of 1998, confirming the aforesaid order passed by the Trade Tax Tribunal, has dismissed the Revision Petition of the Department. Though the referred agreement no. 2 / East Ganga Canal Construction Division / Section – 2 / S.E. / 85-86 has not been produced before us either by the department or the Dealer, yet keeping in view the terms of agreement mentioned in the order dated 22-10-97 passed by the Division Bench of Trade Tax Tribunal, Dehradun in Second Appeal No. 35 / 96 (Year 1986-87), the payment received by the Dealer against this judgment has been assessed to be related with the job work, against which no fact is available in the assessment order or Appellate order and neither the learned State representative has produced any such fact before us whereby the mentioned agreement no. 2 / East Ganga Canal Construction Division / section -2/ S.E. / 85-86 can be proved to be related with the work contract or supply (sale). As per assessment order there is no mention of receipt of payment of Rs. 18,98,008/- to the Dealer against referred agreement no. 2/East Ganga Canal Construction Division /

Section -2 / S.E. /85-86, from the Contractee Superintending Engineer, East Ganga Canal Construction Division-3, Haridwar. Except this, there is no mention of any other adverse fact in the assessment order or Appellate order. As such, the learned Appellate Officer has committed mistake by supporting the taxable sale of Rs. 40,00,000/- as assessed for the relevant year by the Assessing Officer, which can not be confirmed. Therefore, after considering all the facts on account of payment of Rs. 18,98,008/- received to the Dealer against agreement no. 2 / East Ganga Canal Construction Division / Section -2 / S.E. /85-86, having come to light as being received as labour charges under job work, it can not be held to be amount for sale. Accordingly, on this amount no tax liability accrues to the Dealer.

ORDER

The Appeal is allowed. The Appellate order is set aside. Modifying the order passed by the Assessing Authority the imposed tax is set aside and the Dealer is declared exempted from tax. The amount got deposited by the Dealer along with returns, if not realised from the Contractee Department, be refunded to the Dealer as per Rules."

7. It is also relevant to notice the discussion in regard to the judgments of the Hon'ble Apex Court, which we have referred to and which have been relied on by the Assessing Officer and the discussion, as found, is as follows:

"Therefore, as per the ruling given by the Hon'ble Apex Court in the case of M/s Aysher Farma Machinery Ltd. vs. Commissioner, Sales Tax 1999 NTN-242 the judgment of Hon'ble Trade Tax Tribunal in the matter of the Dealer relating to the year 86-87 is also applicable for the year 87-88. It was stated that with regard to the payment received for the Year 88-89 the Dealer has been declared exempted from tax vide assessment order dated 15-3-1993. In the assessment order, the Assessing Authority has given reference of the judgments delivered by the Hon'ble Apex Court in the cases of M/s Chandrabhan Goswami vs. State of Orissa (1963) 14 STC 866 and M/s Sabarmati Reta Udyog Sahkari Mandali Ltd. vs. Gujarat State (1976) STI-119, whereas the facts of the cases related with these judgments / orders are different from those of his case. As per the facts of the case of M/s Sabarmati Reta Udyog Sahkari Mandali Ltd. Vs. Gujarat State, as per the provisions of Clause 22 and Clause 3 of the agreement contract was executed between the Department and the Contractor for the supply of goods, the responsibility of making arrangement the entire raw

> material such as water, coal, labour etc. was of Contractor, whereas in his case the arrangement of entire raw material, electricity, water and the arrangement of site has been made by the Department and only the labour work has been performed by the Dealer, which comes under the category of job-work. The Dealer has neither charged any tax from the Department nor any tax has been paid by the Department to the Dealer, which has been verified by the Assessing Officer at the time of hearing of the case from the concerned Department. Therefore, prayer to provide justice at the stage of Appeal to the Dealer was made."

8. Mr. Mohit Maulekhi, learned Brief Holder would submit that neither agreement, nor Form 3-D was produced, and he would rely on the judgments of the Hon'ble Apex Court, which were relied on by the Assessing Officer.

9. Per contra, Mr. S.K. Posti, learned counsel for the respondent-assessee would support the order of the Tribunal and submit that this is a case of a 'job-work'. He would reiterate that the entire materials were supplied by the Department, which include even land and electricity, and he only supplied the labour and there is no sale of chattel. As far as the amount, which is shown as paid as admitted tax and that too at the concessional rate of 4.4% and the production of Form-3-D is concerned, he would submit that under notion that this is taxable and this is a case, where, as found by the Tribunal, having regard to the terms of the contract, the entire material was supplied by the contractee Department and it is only the labour, which is to be supplied by the respondent, the Tribunal has rightly found that the contract is one for supply of labour and not for chattels.

10. It is first of all necessary to notice the nature of the transaction. The contractee Departments are the Government Departments. The respondent assessee has supplied the tiles. The question, which is noted in the decision of the Hon'ble Apex Court, is whether what is involved is only the supply of labour, and therefore, it is a job work or whether it is a contract of sale of goods, the tax is leviable under the U.P. Trade Tax Act, 1948 (**hereinafter referred to**

as the Act) on the sale of goods. At once, necessary it is to notice Section 3-G of the Act. Form 3-D is contemplated under the provisions of Section 3-G. Sub-Section (1) of Section 3-G reads as follows:

> "(1) Notwithstanding anything contained in Section 3-A or Section 3-D or Section 3-F, and subject to the provisions of sub-section (2), and such conditions and restrictions, if any, as may be specified by the State Government by notification, tax on the turnover of sales of goods to a department of the Central Government or of a State Government or to a Corporation or Undertaking, established or constituted by or under a Central Act or an Uttar Pradesh Act, or to a Government company as defined in Section 617 of the Companies Act, 1956 (not being a Nagar Nigam, Nagar Palika Parishad, Zila Panchayat, Nagar Panchayat, Cantonment Board, a University or an educational institution or an institution managed for the time being by an authorized controller) shall, if the dealer furnishes to the assessing authority a certificate obtained from such department or declaration obtained from such Corporation, Undertaking or Company in such form and manner and within such period as may be prescribed, be levied and paid at the rate for the time being specified in sub-section (1) of Section 8 of the Central Sales Tax Act, 1956, or at such rate as the State Government may, by notification, specify in relation to any sales, unless the goods are taxable under any other Section of this Act at a rate lower than the said rate."

11. It is, thereafter, under Rule 12-C that Form 3-D has been framed. In Form 3-D, there is a declaration in regard to the goods sold to any Company / Corporation or Undertaking referred to under Section 3-G. The form ends by a certification to the effect that the goods are meant for our own requirement and are not meant for re-sale or for use in the manufacture or packing of any goods, other than electrical energy, for sale. Therefore, it may not be correct on the part of the revisionist to contend that non-production of Form 3-D by the assessee is fatal to his setting up the case of job work.

12. Coming to the issue as to whether a contract is to be treated as the contract of sale of goods or the contract of work, the

issue is no longer *res integra* and is covered by a catena of judgments of the Hon'ble Apex Court. Suffice it for us to refer to two of them. One of the early decisions on this point is the decision in the case of **M/s Chandra Bhan Gosain vs. State of Orissa** reported in **1963 -14 STC 866**. In fact, the Assessing Officer and the Appellate Authority have relied upon it, whereas the Tribunal has distinguished the said judgment. It is, therefore, necessary to notice the facts and also the law, which has been laid down in the said decision. The facts were that the appellants therein had entered into a contract with the Company for manufacture and supply of bricks. Large quantities of bricks were manufactured and supplied under the contract and the State assessed the appellant to sales tax. The contention of the appellant was that the contract was only for labour and for work done and material found, and that there was no sale of any goods. The Court rejected the contention; firstly, that the bricks were made out of earth belonging to the Company and, therefore, the bricks had along been its property and therefore, there could be no transfer of the property in them to it. The Court found that it may be presumed that it was in quoting the rate for the bricks, the appellant would take into account the free supply of earth for making the bricks. What was supplied by the Company was not the earth, which it got from it, but bricks, which were something entirely different found the Hon'ble Apex Court. The Court also took note of the clause in the contract that the bricks would remain at the appellant's risk till delivery to the Company. The Court reasoned that the bricks could not remain at the appellant's risk, unless they were his property. There was another clause, which prevented the appellant from selling the bricks to other parties, without the permission of the Company. The Court construed this to mean that the property and the bricks belonged to him, as otherwise, this clause would not have been there. The tender condition provided that he would supply the material described in the memorandum. The memorandum described the material as bricks and also the quantity to be delivered and the rates were mentioned. This showed, according to the Hon'ble Apex Court,

that the contract was for sale of goods. The Court distinguished the judgment in the case of **P.A. Raju Chettiar vs. State of Madras** reported in **6 STC 131**. The fact that the word 'sale' was not used did not matter, found the Hon'ble Apex Court. The Court, *inter alia*, held as follows:

> "7. The other argument of learned counsel for the appellant was that even if the earth of which the bricks had to be made be taken to have been transferred under the contract to the appellant, this was not a contract for sale of goods but one of work done and materials found. A contract of this kind is illustrated by the case of Clay v. Yates. There the contract was to print a book, the printer to find the materials including the paper. Robinson v. Graves was also referred to. There a person had commissioned an artist to paint the portrait of a lady and it was held that the contract was not for sale of goods though the artist had to supply the paint and canvas and had to deliver the completed picture. In these cases in arriving at the view that the contract was not for sale of goods the test that was applied is, what was the essence of the contract? Was it the intention of the parties in making the contract that a chattel should be produced and transferred as a chattel for a consideration? This test has now been accepted as of general application to decide whether a contract was for sale of goods or for labour supplied and materials found: see Benjamin on Sales (8th ed.) p. 161 and Halsbury's Laws of England (3rd Edn.) Vol. 34, p. 6.
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> 8. It is true that the test will often be found to be difficult of application. But no such difficulty arises in the present case. Here the intention of the parties in making the contract clearly was that the Company would obtain delivery of the bricks to be made by the appellant; it was a contract for the transfer of chattels qua chattels. The essence of the contract was the delivery of the bricks, though no doubt they had to be manufactured to a certain specification. It would be absurd to suggest that the essence of the contract was the work of manufacture and the delivery of the bricks was merely ancilliary to the work of manufacture, in the same way as the delivery of the paint and the canvas were held to be ancillary to the contract to paint the portrait in Robinson v. Graves.
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> 9. The fact that under the contract the bricks had to be manufactured according to certain specifications, and, therefore, the appellant had to bestow a certain amount of

> skill and labour in the manufacture of the bricks, does not affect the question. That was not the essence of the contract. The object of the contract nonetheless remained the delivery of bricks. It has never been doubted that "the claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work or labour bestowed by him in the fabrication of them": see Grafton v. Armitage and J. Marcel (Furriers) Ltd. v. Tapper. The present case, therefore, must a fortiori be one of sale of goods."

13. Now we may come to the later decision of the Hon'ble Apex Court in the case of **Commissioner Sales Tax vs. M/s Sabarmati Udyog Sahkari Mandali** reported in (**1976) 3 SCC 592.** Therein also, a contract was entered with the Public Works Department by the assessee for manufacture and supply of kiln-burnt bricks for the construction of the project. The Hon'ble Apex Court referred to the decision in **M/s Chandra Bhan Gosain vs. State of Orissa** reported in **1963 -14 STC 866** and further, several clauses in the contract were referred. It is necessary to refer to Clause 3 of the General Condition, which reads as follows:

> "Clause 3: All the necessary arrangements of raw materials, equipments, water, coal, labour, etc. required for supply and manufacture of bricks shall have to be made by the contractor at his own cost. The Government shall give only land for excavating soil for manufacture of bricks to the contractors free of rent from the land reserved by the Government for this purpose. The land shall have to be handed over back to the Government after the manufacturing of the brick work is completed."

14. Thereafter, the discussions read as follows:

> "6. It is well-settled that whether a particular transaction is contract of sale or a works contract depends upon the true construction of all the terms and conditions of the document, when there is one. The question will depend upon the intention of the parties executing the contract as we have observed in our judgment in Civil Appeal Nos. 1492 and 1493 of 1971, which we have just delivered there is no standard formula

by which one can distinguish a contract of sale from a contract for work and labour. The question is not always easy and has for all time vexed jurists all over. The distinction between a contract of sale of goods and a contract for work and labour is often a fine one. A contract of sale is a contract, whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. (Halsbury's Laws of England, Third Edition, Volume 34, page 6).

10. Mr. V. S. Desai brings to our- notice the common as well as the distinguishing features of this case and of Chandra Bhan Gosain's case (supra). According to him the common features are the following:-

11. The land was given free for manufacture of bricks in both the cases. The materials shall remain at the contractor`s risk till the date of final delivery. In Chandra Bhan Gosain`s case (supra) the contractor could not sell the bricks to third parties without previous permission of the company. Here also the contractor has no right to sell the bricks etc. but if he does sell he will have to pay 10 percent of the value of the materials at the tender rates. Both the Clauses are, therefore, permissive Clauses and are substantially the same. In both the contracts the contracting parties have used the words such as sell, purchase, deliver or rate of supply etc. in the contract.

13. From the above extract, it is clear that the decision in Chandra Bhan Gosain's case (supra) will govern the present case where terms and conditions are almost identical so far as relating to the relevant subject-matter.

14. Mr. Desai, however, took pains to point out certain distinguishing features of the present case such as maintenance of qualified Executive Engineer for supervision of work subject to removal at the instance of the Government; restriction on employment of children under 12 years; labour welfare provisions regarding wages; workmen's compensation, etc.; provisions in relation to prevention of cruelty to animals; non-payment of royalty for excavating earth; use of tube-wells standing on the Government site; manner of execution of the work regarding moulding and drying and provision against subletting which shall constitute a breach of the contract resulting in forfeiture of security deposit."

15. The Court, thereafter, took the view that the terms do not appear to impinge on the character of the contract as one for sale of the

bricks manufactured. The Government in its over all interest and anxiety for general welfare could insist on compliance with certain beneficial legal measures. They do not negate the concept of contract of sale.

16. As we have noted in our order earlier, the Tribunal has rendered certain findings of fact. The vital fact, which is found, is that all materials in this case were supplied by the contractee to the respondent assessee and what is supplied by the assessee was actually the labour component. On this basis, the Tribunal has distinguished the judgment in the case of **Commissioner Sales Tax vs. M/s Sabarmati Udyog Sahkari Mandali** reported in **1976 STI SC 119** and also the judgment in the case of **M/s Chandra Bhan Gosain vs. State of Orissa** reported in **1963 -14 STC 866.**

17. It is clear from the perusal of the clauses considered elaborately in the case of **Commissioner Sales Tax vs. M/s Sabarmati Udyog Sahkari Mandali** reported in (**1976) 3 SCC 592,** that that was the case, where the raw materials had to be purchased by the assessee and using the raw materials, he had to manufacture the bricks and the contract contemplated the sale of bricks as 'chattels' The distinguishing feature in this case, as found by the Tribunal, is that the entire raw materials were supplied by the Department. The materials were made use of by the assessee, who has supplied the labour and he made the tiles, which were supplied. It is significant to note that in the revision filed, there is no challenge to the findings given by the Tribunal that the entire raw materials, including the land and electricity were supplied by the contractee to the respondent assessee. Therefore, we have no occasion to go into the validity of the findings by the Tribunal, which is after all the final fact-finding authority that the raw materials, besides electricity, have all been supplied by the contractee Department to the respondent assessee.

18. Secondly, we must also notice another significant feature. There is a definite case for the respondent assessee that the tiles, which

are subject matter of the controversy, have been supplied under a contract, which was executed in the year 1986. The respondent assessee was assessed to tax in respect of the tiles, which were supplied apparently under the same contract in the year 1986-87, but the said assessment was interfered with by the order passed by the Tribunal. The Tribunal apparently has proceeded to hold that the transaction is in the nature of a job work. This order of the Tribunal was in fact challenged by the Department before the jurisdictional High Court. The jurisdictional High Court agreed with the Tribunal's view. While it may be true that it related to another assessment year, and it may not be fully correct to say that the principle of *res judicata* as such applies as every assessment year is a separate year when the vital fact, which is relevant for the subsequent year arises for consideration unless there is any change in the circumstances, which is brought to our notice, we have to give due importance to the findings by the Authorities in the earlier year. In this case, the contract was of the year 1986-87. It is in regard to the said assessment year, that finding has been rendered, which has become final that what is involved is only a job work and not a contract of sale of goods. We do not see, why the said principle should not hold good in respect of the tiles, which have been supplied in terms of the said contract for the year 1987-1988. It is true no doubt that the contract as such has not been made available, but in the light of the fact that the Tribunal has rendered a finding at any rate that all the materials, including land and electricity have been supplied by the contractee Department, we are of the view that what is involved is a job work. Therefore, we would answer the substantial question of law, which has been raised, against the revisionist. The revision will stand dismissed without any order as to costs.

(Sharad Kumar Sharma, J.) **(K.M. Joseph, C.J.)**

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