

**IN THE COURT OF COMMISSIONER
DEPARTMENT OF TRADE AND TAXES
GOVERNMENT OF N.C.T. OF DELHI
VYAPAR BHAVAN, NEW DELHI**

No: 246/CDVAT/2009/14

Dated: 23.12.2009

**M/s Doshion Veolia Water Solutions Pvt. Ltd.
C/o Mr. Sujit Ghosh
BMR Associates
The Great Eastern Centre,
1st Floor, Nehru Place
Delhi-110019**

ORDER

Present for the Applicant : Sh. Sujit Ghosh, Advocate
Present for the Department : Shri T.C. Sharma, DR.

The above named applicant filed an application dated 1.07.2009 under section 84 of Delhi Value Added Tax Act, 2004 for determination of the under mentioned questions:

Questions raised for determination

The following questions have been raised by the Petitioner for determination u/s 84:-

- a) In respect of the above mentioned sub-contract (works contract) awarded by L&T to DVWS for setting up of a Water Treatment Plant and Sewage Treatment Plant, whether the amount paid by L&T to DVWS towards the value of cost centre pertaining to execution of civil construction work which has been further sub-contracted by DVWS to Ramkey (on which Ramkey has discharged VAT on such subcontracted value), would be eligible to be excluded from the gross turnover received by DVWS from L&T, for the purpose of determining the taxable quantum of DVWS?
- b) Whether the following sales made by DVWS to L&T under the subcontract viz.,
 - i) Plant and machinery manufactured by DVWS at its factory in Gujarat and dispatched to the project site in Delhi, for permanent incorporation into the project, post approval by L&T/DIAL at such manufacturing facility.
 - ii) Plant and machinery manufactured by vendors of DVWS at factories located outside of Delhi and dispatched to the project site in Delhi, or permanent incorporation into the project, post approval by L&T/DIAL at such manufacturing facility would not be liable to tax under section 7 of the DVAT Act?
2. The application in question has been preferred in the prescribed format DVAT-42 and the requisite fee of Rs. 1000/- paid vide Demand Draft Nos. 270790 & 270291 both dated 3-06-09.
3. **Background** – The appellant is a private limited company engaged in executing EPC contracts for water and waste water management facility. The applicant proposes to undertake/has undertaken for setting up water treatment plant and sewage treatment plant at IGI Airport. The applicant is a registered dealer of the Department. As per facts given in the application, Airport Authority of India (AAI) has awarded a contract in favour of Delhi International Airport Pvt. Ltd. (DIAL) granting them exclusive right and authority for the operation and maintenance etc. of IGI, Airport, Delhi. Based on the contract awarded by AAI to DIAL, for its implementation, DIAL has appointed Larsen & Toubro (L&T) as the principal contractor on “turn-key basis” to execute the contract between AAI & DIAL. The contract between DIAL & L&T also has an enabling provision whereby L&T can sub-contract any part of the work to any sub-contractor. The principal terms & conditions of the sub-contract that L&T sub-contracts are also given in the contract between DIAL & L&T. The applicant has also given various sub-clauses of the contract between L&T and DIAL, which are of routine nature for such contracts. L&T has given a sub-contract to the Petitioner on “turn-key basis” for setting up water treatment plant and sewage treatment plant at IGI Airport, Delhi. The applicant has given various clauses of this sub-contract between the two parties:

The total value of the sub-contract under reference is Rs. 169,72,50,000/-The applicant has also given bifurcation of this contract into various cost centres mentioned in para 3.4 of the application. Basically, six cost centres for the execution of this subcontract relates to various activities that are required to be completed to set up water treatment plant and sewage treatment plant.

4. **Award of sub-contracts by the Petitioner**

In para 4 of the application, it has been stated that to execute the subcontract awarded to the petitioner by L&T, the petitioner has further sub-contracted the work to another co. called Ramkey Infrastructure Ltd. The main clauses for this sub-contract as sought out in the application are given below:-

b) DVWS should manufacture certain plant and machinery necessary for the project, in its factory in Gujarat and supply the same to L&T. The appropriation of these goods to the contract takes place at the manufacturing location in Gujarat, once L&T/DIAL accords approval to these goods post carrying out necessary testing.

c) DVWS would purchase items from Domestic Vendors (supplying from outside Delhi) i.e. Sub vendors and ship the same to L&T. The appropriation of these goods to the contract takes place at the vendors manufacturing location outside of Delhi, once L&T/DIAL accords approval to these goods post carrying out necessary testing at such vendors manufacturing location.

In case of supply of plant and materials by DVWS for the project, it is pertinent to mention that certain inter-State supplies have already been carried out for the present project. The Applicant annexes herewith the details of inter-State and other supplies of goods to the project. Representative copies of invoices evidencing inter state supplies by DVWS to the contract is annexed as Annexure-I.

d) DVWS would import goods from foreign vendors and sell the same to L&T via High Seas Sales under Section 5 of the CST Act.

e) DVWS would purchase certain goods from Domestic Vendors (from within Delhi) and supply the same to L&T.

Ramkey is also a registered under Delhi DVAT Act and is following composition scheme u/s 16 of Delhi Value Added Tax Act paying VAT @ 3% on the entire turnover of civil works sub-contract by the Petitioner to them effective 1st April, 2009.

5. Both the questions, as per the Petitioner, fall u/s 84(4)(c) & 84(4)(f) of Delhi Value Added Tax Act.

I have heard the Counsel for the Petitioner at length. He has emphasized his arguments mentioned in the Petition and has taken me through the judgments and the provisions of the Act. I have also heard the DR for Revenue at length. Both the Counsels have made vehement pleas in their favour and have quoted legal provisions. I have given my utmost consideration to the facts of the case and to the judgments quoted.

6. **Understanding the questions raised by the Petitioner**

6.1 Question Number (1) relates to a proposition wherein the petitioner desires to deduct the entire turnover billed by Ramkey to the petitioner from his billing to the principal contractor, L&T. The applicant has quoted ruling of Hon'ble Supreme Court in the case of State of Andhra Pradesh vs. L&T along with various issues decided by the Supreme Court in that judgment. The Petitioner has tried to deduce a legal ratio from the judgment of the Supreme Court quoted above to the fact that the sub-contract done by Ramkey for the Petitioner and, in turn, to L&T will result in transfer of property in goods directly to DIAL i.e. goods purchased by Ramkey as a sub-contractor of the Petitioner and used in the execution of the works contract will directly be transferred to DIAL. Based on the above understanding of judgment of the Supreme Court, the petitioner has desired that the deductions claimed by him in Column C(2) of page 21 of the application be allowed to be adjusted. In other words, the petitioner wants to deduct the entire value of civil constructions paid by L&T to the petitioner to arrive at taxable quantum u/s 5 of Delhi Value Added Tax Act. Similarly, the petitioner also wants to deduct the entire sale value of the goods manufactured by the petitioner in Gujarat and supplied to L&T claiming these to be inter-State sale. The petitioner has quoted the Supreme Court judgments in the matter of State of Andhra Pradesh vs. NTPC in support of this contention. The petitioner has further quoted the Supreme Court judgment in the matter of ANG Projects and Technologies Ltd. vs. State of Karnataka. Based on theory of appropriation of goods for works contracts, the petitioner wants to deduct the goods supplied by DVWS to L&T from its factory in Gujarat.

6.2 Quoting various provisions of Central Sales Tax Act and giving proposed factual matrix of movements of goods, the petitioner has attempted to make out a case that the amount received by DVWS from L&T towards supply of bought out items purchase by DVWS from vendors outside Delhi and shipped directly to site from such vendors premises, post appropriation of the goods to the contract (effected via grant of approval by L&T /DIAL on completion of testing during manufacture), being interstate sales would not be liable to VAT under the DVAT Act by virtue of Section 7(a) of the DVAT Act.

7. **Analysis of the judgement of State of Andhra Pradesh vs. L&T**

7.1 It is prima facie observed that the judgment of L&T case relied upon by the applicant has been pronounced in respect of specific provisions of Andhra Pradesh VAT Act and is not mutatis mutandis applicable in the present

case under the Delhi VAT Act, and is distinguishable. The relevant paras of the said judgment from page 12 to 14 of VST 1 have been reproduced below: “In this case we are concerned with Andhra Pradesh Value Added Tax Act,

2005. Section 4 is the charging section. It comes in Chapter III which deals with ‘incidence, levy and calculation of tax’. In this case, we are concerned with the taxability of works contract. That subject is dealt with by Section 4(7) of the said 2005 Act. In our view, Section 4(7) is a Code by itself. It begins with a non-obstinate clause. It, inter alia, states that every dealer executing works contract shall pay tax on the value of goods at the time of incorporation of such goods in the works executed at the rates applicable to the goods under the Act. The point to be noted is that Section 4(7)(a) of the 2005 Act indicates 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 value of the goods which constitutes the measure for the levy of the tax is the value of the goods at the time of the incorporation of the goods in the works. What is stated hereinabove also finds place in Rule 17(1)(a) of the APVAT Rules 2005, quoted hereinabove. It is important to note that each of the sub-contractors of L&T is registered dealer. None of them are unregistered. Under Section 4(7)(a) read with Rule 17(1)(c), quoted above, where VAT dealer awards any part of the contract to a sub-contractor, such sub-contractor shall issue a tax invoice to the contractor for the value of the goods at the time of incorporation in such sub-contract. The tax charged in the tax invoice issued by the sub-contractor shall be accounted by him in his returns. Therefore, the scheme indicates that there is a “deemed sale” by the dealer executing the work, i.e., the sub-contractor. It is only the subcontractor who effects transfer of property in goods as no goods vests in the respondent company (contractor) so as to be the subject-matter of a retransfer. By virtue of Article 366(29A)(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 subcontractor(s), L&T ceases to execute the works contract in the sense contemplated by Article 366(29A)(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.

The question which is raised before us is : whether the turnover of the subcontractors (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 the case of Builders’ Association of India (supra) as under:

“Ordinarily unless there is a contract to the contrary in the case of 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) As stated above, according to the Department, there are two deemed sales, one from the main contractor to contractee and the other from subcontractor(s) to the main contractor, in the event of the contractee not having any privity of contract with the sub-contractor(s).

If one keeps in mind the above quoted observation of this Court in the case of Builders’ Association of India (supra) 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 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 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(29A)(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.”

7.2 Section 4(7): Notwithstanding anything contained in the Act; -

(a) Every dealer executing works contracts shall pay tax on the value of goods at the time of incorporation of such goods in the works executed at the rates applicable to the goods under the Act:

8. Distinguishing the L&T judgment

8.1 The Delhi VAT Act does not have a provision similar to section 4(7) of the Andhra Pradesh Act where the taxable event in the case of a works contract is incorporation of goods. On the contrary, in accordance with rule 3(1) of the Delhi VAT Rules read with section 5(2) of the Act:

“In case of turnover arising from the execution of the works contract, the amount representing the taxable turnover **shall be the value at the time of transfer of property in goods** (whether as goods or in some other form) involved in the execution of work contract.....”

8.2 Further, the Delhi VAT Act has been drafted with a different scheme and does not have any provision to allow exemption to the contractor in respect of the turnover of the sub-contractor. Rule 3(2) read with section 5(2) of the Delhi VAT Act, in compliance with the verdict of the Supreme Court in the Gannon Dunkerley case, allows exemption towards labour, services and other like charges. Rule 3(2) reads as under:

Rule 3(2): For the purpose of sub-rule (1), the charges towards labour, services and other like charges shall include-

- (i) labour charges for execution of works;
- (ii) charges for planning and architects fees;
- (ii) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
- (iii) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract;
- (iv) cost of establishment of the contractor including cost of marketing, finance expenses and securities deposits to the extent it is relatable to supply of labour and services;
- (v) other similar expenses relatable to supply of labour and services;
- (vi) profits earned by the contractor to the extent it is relatable to supply of labour and services subject to furnishing of a profit and loss account of the works sites.

8.3 Rule 3(2) confines only the labour, services and like charges and cannot be extended to the material portion. The said judgment disallowed the exemption even towards “transportation charges for transport of goods to the place of works” since the same forms part of the sale price. Therefore, contention of the applicant to allow the exemption for material used by the sub-contractor to the main contractor is against the spirit and provisions of the Delhi VAT Act.

9. It is reiterated that the Delhi VAT Act eliminates the possibility of double taxation as doubted in the said L&T judgment through input tax credit mechanism. Moreover, the Hon’ble Supreme Court has not ruled out the possibility of double taxation, i.e. if the sub-contractor/contractor does not provide the tax invoice and other details required for the purpose of claiming exemption, the same turnover can be taxed in the hands of the contractor as well as sub-contractor.

9.1 Moreover, the single taxable event theory in case of civil works contract is applicable only in those cases where, as held by the Supreme Court in the case of Gannon Dunkerley, the property in the goods is transferred by the sub-contractor at the time of incorporation of goods. **If, by virtue of contrary terms of the contract, the property in the goods is transferred at some other time, there would be two taxable events since the property in the goods is not transferred by the principle of accretion. And, this is a question of facts and can be decided while perusing various terms of the contract.** While looking at the clause no. 43.1.1 of the contract, it is patently clear that property in the goods and equipments in the present case is not transferred at the time of incorporation; but is transferred at the earliest of the following :

“Equipment supplied or to be supplied pursuant to and in compliance with the terms of the Contract shall become the property of the Employer at whichever is the earliest of the following times:

- (a) when any sum is included in a Certificate of Payment in respect thereof; or
- (b) when any item is delivered to the Project Site pursuant to the Contract; or
- (c) when a high seas purchase contract is executed by the Employer

From the above, it clearly follows that in case of domestic supplies, the transfer of property to the project would take place as soon as the item is delivered to the project site.”

In para 34.3.3 the term “equipment” has been defined to mean “any apparatus, equipment, materials, systems, plant, machinery, vehicles and all other things of any kind, intended to form or forming part of the Permanent Works.”

9.3 Therefore, in the present case, since the property in the goods is not transferred at the time of incorporation of goods, L&T judgment by the Supreme Court is not otherwise applicable.

10. Further, if the sub-contractor has opted for the composition scheme under the Delhi VAT Act, as in the present case, he cannot charge and collect tax and issue tax invoice by virtue of this scheme, and therefore the exemption is not available to the main contractor for different reasons also. The Supreme Court in the L&T case has allowed the exemption to the main contractor only in those cases where the subcontractor has paid due taxes under the Act. The various composition schemes under the Delhi VAT Act are specific purpose optional schemes available to the dealer, allowing him various facilities under the Act in respect of maintenance of accounts and making of assessment, with the condition that he will neither claim input tax credit nor issue tax invoice and further restricting the main-contractor/contractee to claim his input tax credit. If instead of allowing the, input tax credit, whole turnover of the sub-contractor were allowed to be deducted from the turnover of the main contractor, the basic purpose of the scheme would be defeated. In accordance with section 3(3) of the Delhi VAT Act, "The amount of tax payable under this Act by a dealer, is the dealer's net tax for the tax period calculated under section 11 of this Act." As per section 16(5)(b) of the Act, "A dealer who elects to pay tax under this section shall not compute his net tax under section 11 of this Act." Therefore, section 16 of the Delhi VAT Act, which commences with non-obstinate clause, is an overriding section and is a self contained code. If the sub-contractor has not paid any tax under the charging section, question of issuing tax invoice would not arise, as observed by the Supreme Court in the L&T case.

11. Ruling in respect of question No. 1(a)

11.1 Therefore, in the present case based upon the facts, the turnover of subcontractor cannot be allowed as exemption from the turnover of the main contractor due to following independent and separate reasons:

(a) The provisions in the Andhra Pradesh VAT Act are materially different from those in Delhi VAT Act, and therefore, the verdict of the Supreme Court in L&T case is distinguished;

(b) In the case under determination, the property in the goods is not transferred at the time of incorporation, based upon the principle of accretion.

(c) The sub-contractor (Ramkey) has opted for the composition scheme, hence not liable to pay tax u/s 3 and not eligible to issue tax invoice, which may entitled to the main-contractor to claim exemption for turnover of the subcontractor;

12. Ruling in respect of Q.1(b)(i) & (ii)

12.1 It is mixed question of fact and law which can be answered after perusing the terms of contract, type of goods involved in execution of contract and facts of the transactions. However, in the instant case it appears that the transaction pertains to standard goods (pipes, valves & meter), wherein property in the goods is not transferred at the time of appropriation and hence the Supreme Court judgement in NTPC & A&G Projects does not apply. Further, the property in the present case is transferred to the employer at the time of delivery of goods in Delhi and not at any other time i.e. appropriation.

12.2 The taxable event in the execution of works contract takes place when the goods are incorporated in the works. If the contractor procures goods from suppliers located in other State for incorporation in the works contract, whether such purchase or sale takes place in the course of inter-State trade or within the State is again a mixed question of fact and law which can be answered after perusing the terms of contract, facts of the transactions and type of goods involved in execution of WCT at the stage of assessment.

12.3 When the contractor procures goods from suppliers situated in other States for use in works contract, it involves two sale : (1) Sale by the supplier to the contractor (a normal sale); and (2) Sale by the contractor to the contractee in the form of deemed sale. In this type of contracts, there can be multiple set of answers, such as:

a) Local purchase by the contractor, then stock transfer by the contractor to Delhi, and then finally local deemed sale in Delhi;

b) Central Purchase u/s 3(a) by the contractor in Ahmedabad / Delhi and then central sale u/s 3(a) to contractee in Delhi;

c) Central Purchase u/s 3(a) by the contractor in Delhi, and then local sale to contractee in Delhi;

12.4 Therefore, the precedents quoted by the Petitioner need to be understood in the light of the facts of those case and no more should be read into it than what it actually says. The NTPC case dealt with sale of electricity between the two states and not transactions of work contract involving turnkey jobs and multiple operations within India and abroad. The A&G judgement involved the key question of interpretation of Section 9(1) proviso.

12.5 Hon'ble Supreme Court in Commissioner of Income Tax v. M/s Sun Engineering Works Pvt. Ltd., AIR 1993 SC 43 held that It is neither desirable nor permissible to pick out a word or a sentence from the judgement of the Hon'ble Supreme Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by the Hon'ble Supreme Court. The judgement must be read as a whole and the observations from the judgement have to be considered in the light of the questions which were before the Court. A decision of the Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of the Supreme Court and not to pick out words or sentences from the judgement divorced from the context of the questions under consideration by the Court, to support their reasoning.

12.6 Hence, question no. 1(b)(i) & (ii) are mixed questions of fact and law and can be answered at the Stage of assessment only. Moreover, whether a transaction falls within the scope of section 3(a) of the CST Act or section 3(b) of that Act, is not a type of question which can be answered u/s 84 of the DVAT Act.

Both the questions are accordingly answered.
