A M/S. GOA CARBON LTD.

v.

COMMISSIONER OF TRADE TAX

(Civil Appeal No. 1660 of 2008)

FEBRUARY 28, 2008

B

[S.H. KAPADIA AND B. SUDERSHAN REDDY, JJ.]

Uttar Pradesh Trade Tax Act, 1948: s.3F – Transaction of transfer of right to use – Supply of plant and machinery on C *lease – Receipt of lease rent – Taxability of – Held, on facts, taxable in terms of s.3-F as it was local sale.*

Assessee was engaged in the business of leasing and financing plants and machinery. While examining the case for the assessment year 1994-95, 1995-96 and 1996- D **97, the Department noticed that assessee supplied plant and machinery to KE Ltd, U.P. on lease and in return received lease rent. The assessing officer issued show cause notice under s.3F of U.P. Trade Tax Act, 1948 and thereafter when assessee did not reply passed the** E **assessment orders imposing tax on lease rent received by the assessee, which was confirmed by the Deputy Commissioner (appeal). On appeal, Tribunal remanded the matter to Assessing Officer. On remand, the Assessing Officer observed that in the lease agreement, there was a** F **warranty clause which indicated that KE Ltd. had selected the equipment which were leased out to it prior to its purchase by the assessee. In view of these clauses in the lease, the assessee was called upon to produce agreement/agreement pursuant to which equipment** G **stood purchased. Assessee failed to produce such agreement. The Assessing Officer also noticed an invoice under which the assessee had purchased machinery in which there was reference to the purchase order which indicated that the equipment was purchased from Punjab**

H

under an arrangement prior to lease agreement executed at Mumbai. Assessing Officer found that this was an after thought to earmark the transaction as an outside sale. This finding was upheld by Deputy Commissioner (appeal). It was held that movement of equipment cannot be said to have taken place from ex U.P. place to U.P. in pursuance of lease. It was also held that the letter of intent dated 29.10.1991 was not part of the lease. The concurrent findings were affirmed by the Tribunal. High Court also dismissed the revisions. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. In cases falling under s.3F of the U.P. Trade Tax Act, 1948 the subject-matter of taxation is transfer of right to use goods and, therefore, it is unnecessary to deal with the question of delivery of possession which is related to situs. Therefore, in this case the place where the right to use is transferred is relevant and not place of delivery which may be relevant in case of oral contracts to determine the situs. In cases under s.3F, the subject-matter of taxation is transfer of right to use and, therefore, place where such right is transferred assumes importance. Hence, the place at which the contract is executed is relevant. [Para 9] [607-D, E, F]

2. According to assessee, the Letter of Intent was the contract which existed on 29.10.91. However, the said Letter does not indicate the place, namely, Mumbai. This Letter of Intent was produced for the first time after 12 years by the assessee. No explanation has been given for not producing the said letter earlier, particularly, when the Department had repeatedly called upon the assessee to produce any agreement/arrangement prior to the lease and pursuant to which the Purchase Orders dated 28.11.91 were placed by the assessee. Moreover, in the invoice dated 26.2.92, KE Ltd. is described as lessee. On that date there was no lease. The lease has been executed

only on 24.3.92. Taking into account the aforesaid circumstances, the Letter of Intent produced after 12 years cannot be relied upon in support of the assessee's case that there was a prior agreement/arrangement even before 24.3.92 pursuant to which the equipment stood purchased. From the above circumstances it is clear that the Letter of Intent is executed not for commercial purposes but to evade the tax and consequently it cannot be said that the impugned transaction was an outside sale. The entire arrangement was got up in order to project the impugned transaction as an outside sale so that the said transaction does not come within the ambit of s.3F of the 1948 Act. [Para 10–11] [607-G, H; 608-A-D; 609-A]

20th Century Finance Corpn. Ltd. and Anr. v. State of Maharashtra **(2000) 6 SCC 12 – distinguished.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1660 of 2008.

From the common Judgment and Order dated 19/10/2006 of the High Court of Judicature at Allahabad in TTR Nos. 691, 692 and 693/2006.

Dinesh Dwivedi, Kavin Gulati, Rashmi Singh, Avinash Pandey, Pratik Dwivedi and T. Mahipal for the Appellant.

Krishnan Venugopal, S.K. Dwivedi, Ravinder Kumar and Gunnam Venkateswara Rao for the Respondent.

The Judgment of the Court was delivered by

KAPADIA, J. Leave granted.

2. This civil appeal filed by the assessee is directed against the judgment and order dated 19.10.06 passed by the High Court of Judicature at Allahabad in three Trade Tax Revision Nos.691, 692 and 693 of 2006 by which it has been held that the transaction of transfer of the right to use was a local sale under Section 3F of the U.P. Trade Tax Act, 1948 (for short, "1948 Act").

3. Assessee is a company incorporated under Companies Act, 1956 having its registered office at Panjim, Goa. It is engaged in the business of leasing and financing plants and machinery.

4. In this civil appeal we are concerned with the assessment years 1994-95, 1995-1996 and 1996-97.

5. While examining the case for the assessment years in question pertaining to M/s. Kesar Enterprises Limited Baheri, U.P., the Department noticed that the assessee herein supplied plants and machinery to M/s. Kesar Enterprises Limited on lease and that the assessee was in receipt of lease rent for the machinery supplied by it to M/s. Kesar Enterprises Limited Baheri, U.P. Therefore, the Assessing Authority issued notices under Section 3F of the 1948 Act to show cause as to why tax should not be levied on the lease rent received by the assessee herein. None appeared on behalf of the assessee and, therefore, A.O. passed ex-parte assessment orders dated 31.3.98 and 27.3.99 imposing tax on the lease rent received by the assessee. The said assessment orders were confirmed by the Deputy Commissioner (A).

6. Aggrieved by the orders passed by the Deputy Commissioner (A), the assessee preferred second appeal under Section 10 of the 1948 Act before the Tribunal, Bareilly. Vide order dated 28.1.04 the Tax Tribunal remanded the cases to the A.O. for fresh disposal. The Tribunal directed the A.O. to consider the cases *de novo* in the light of the judgment of this Court in the case of **20th Century Finance Corpn. Ltd. and Anr. v. State of Maharashtra – (2000) 6 SCC 12**.

7. On remand, the A.O. held that in the lease agreement dated 24.3.92 there was a warranty clause which indicated that M/s. Kesar Enterprises Limited had selected the equipments which were leased out to it prior to its purchase by the assessee. A.O. came to the conclusion that the equipment was purchased prior to the execution of the lease dated 24.3.92. According to A.O., in view of the said clause in the said lease the assessee

A was called upon to produce the agreement/arrangement either oral or written pursuant to which the equipment stood purchased by the assessee. According to A.O., despite opportunity the assessee failed to produce such agreement/arrangement. Further, the A.O. also relied upon an invoice dated 26.2.92 under B which the assessee had purchased boilers and turbines from Punjab Chemicals and Pharmaceuticals Ltd., Dist. Patiala, Punjab, in which there was reference to the Purchase Order dated 28.11.91 which indicated that the equipment was purchased under an agreement/arrangement prior to lease C agreement dated 24.3.92 which lease has shown to have been executed at Mumbai as an afterthought and in order to earmark the transaction as an outside sale. This finding of the A.O. was confirmed once again by the Deputy Commissioner (A). It was held that since the equipment was purchased on 26.2.92 (as D indicated by the invoice at page No.36 of the S.L.P. Paper Book), the movement of the said equipment cannot be said to have taken place from ex-U.P. place to Baheri in U.P. in pursuance of the lease dated 24.3.92. It was further held that the Letter of Intent dated 29.10.91 was not a part of the lease. Consequently, the appeal filed by the assessee stood E dismissed. The concurrent findings, above-mentioned, were affirmed by the Tribunal vide its order dated 6.5.06. The Tribunal further held that there was no merit in the argument of the assessee that lease agreement was executed pursuant to Letter of Intent dated 29.10.91, particularly, when there was no F indication to that effect in the lease. According to the Tribunal, had the lease been executed in continuation of the Letter of Intent, there would have been reference to such letter in the lease and in the absence of such reference it cannot be said that the lease stood executed pursuant to the Letter of Intent. G Consequently, the appeal filed by the assessee before the Tribunal stood dismissed. The Tax Revisions, filed by the assessee before the High Court, have also been dismissed, hence this civil appeal.

8. In the case of **20th Century Finance Corpn. Ltd.**

H

(supra) the Constitution Bench of this Court by majority held that delivery of goods may be one of the elements of transfer of right to use, but the same would not be the condition precedent for a contract of transfer of right to use goods. That, where a party has entered into a formal contract and the goods are available for delivery, irrespective of the place where they are located, the *situs* of such sale would be where the property in goods passes, namely, where the contract is entered into [**See**: para 25]. It has been further held that Article 366(29-A)(d) shows that levy of tax is not on use of goods but on the transfer of the right to use goods. That, right to use arises only on the transfer of such a right under the contract and unless there is transfer of such right, the right to use does not arise. Therefore, it is the transfer which is *sine qua non* for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee [See: para 27].

9. On reading the above judgment it is clear that, in cases falling under Section 3F of the 1948 Act, the subject-matter of taxation is transfer of right to use goods and, therefore, it is unnecessary to deal with the question of delivery of possession which is related to *situs*. Therefore, in this case the place where the right to use is transferred is relevant and not place of delivery which may be relevant in case of oral contracts to determine the *situs*. In cases under Section 3F, the subject-matter of taxation is transfer of right to use and, *therefore, place where such right is transferred assumes importance.* Hence, we are required to look to the place at which the contract is executed. In case of oral contracts with which we are not concerned the *situs* of the transfer may be where goods are delivered.

10. According to assessee, the Letter of Intent was the contract which existed on 29.10.91. However, the said Letter does not indicate the place, namely, Mumbai. It is important to note that this Letter of Intent was produced for the first time after 12 years by the assessee. No explanation has been given for

not producing the said letter earlier, particularly, when the Department had repeatedly called upon the assessee to produce any agreement/arrangement prior to the lease and pursuant to which the Purchase Orders dated 28.11.91 were placed by the assessee with the Punjab Chemicals and Pharmaceuticals Ltd. Moreover, in the invoice dated 26.2.92, M/s. Kesar Enterprises Limited Baheri is described as lessee. On that date there was no lease. The lease has been executed only on 24.3.92. Taking into account the aforesaid circumstances, we are of the view that the Letter of Intent produced after 12 years cannot be relied upon in support of the assessee's case that there was a prior agreement/arrangement even before 24.3.92 pursuant to which the equipment stood purchased. From the above circumstances it is clear that the Letter of Intent is executed not for commercial purposes but to evade the tax and consequently it cannot be said that the impugned transaction was an outside sale. In the case of **20th Century Finance Corpn. Ltd. (supra),** the assessee carried on business of leasing of diverse equipment. In that case, assessee had entered into Master Lease Agreements with the lessee which provided that orders for individual equipment will be placed at the instance of the lessee by the appellants and that the equipment to be leased will be despatched by the supplier to the locations specified in the lease. Therefore, in that case it was established that the appellants had placed their purchase orders to the suppliers pursuant to the Master Lease Agreement whereas in the present case there is nothing to indicate that there existed an agreement/arrangement pursuant to which the Purchase Orders were placed on 28.11.91. Therefore, on the facts of the present case, we hold that the judgment of this Court in the case of **20th Century Finance Corpn. Ltd. (supra)** has no application to the present case. In fact, the record indicates that the Letter of Intent surfaced after 12 years at the instance of the assessee in order to align this case with the facts in the case of **20th Century Finance Corpn. Ltd. (supra)**.

11. For the aforestated reasons, we are in agreement with the view expressed by the Tribunal that the entire arrangement was got up in order to project the impugned transaction as an outside sale so that the said transaction does not come within the ambit of Section 3F of the 1948 Act. The High Court has given reasons with which we do not agree in entirety though we agree with the operative part of its judgment dismissing the appeal of the assessee. A B

12. For the aforestated reasons, in the facts of the present case, we do not wish to interfere with the finding of fact recorded by the Tribunal in the present case. Accordingly, the civil appeal is dismissed with no order as to costs. C

D.G. Appeal dismissed.