

**Before the Central Sales Tax Appellate Authority
New Delhi**

PRESENT

Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson

Thursday, 29th November, 2018

Appeal No(s)- CST / 82 / 2016

Name & address of the Parties (Appellant(s) / Respondent (s)) : State of Telangana
versus
M/s Hindustan Aeronautic Ltd.

Present for the appellant(s) : Mr. B. Adinarayana Rao, Sr. Advocate
Mr. P.Venkat Reddy, Advocate
Mr. Prashant Tyagi, Advocate

ePresent for the respondent(s) : Dr. M.V.K. Moorthy, Sr. Advocate
Mr. Hetendranath Rath, Advocate

ORDER

The State of Telangana has challenged in this appeal order dated 19.02.2016 passed by the Telangana VAT Appellate Tribunal, Hyderabad ("**VAT Tribunal**" for short). By the said order, the VAT Tribunal has set aside the order of the Assistant Commissioner (CT), LTU Hyderabad (R) Division, Hyderabad (the Assessing Authority) dated 06.04.2015 whereby the Assessing Authority has disallowed exemption on the turnover of Rs.568,80,70,690/- representing inter division transfer as not being covered by Form 'F'

declarations out of total turnover of Rs. 605,80,61,345/- under that head. For the balance of Rs. 36,99,90,655/- the Assessing Authority found that the turnover was supported by Form 'F' declarations and the Assessing Authority allowed the exemption.

Brief facts need to be stated. Respondent, M/s Hindustan Aeronautics Limited ("the assessee" for convenience) is a Public Sector Undertaking of Government of India. It is dealing in manufacture and sale of electronic equipment to Indian Air Force, Ministry of Defence. For the Assessment year 2011-12, the turnover of the assessee as disclosed by the assessee was as under:

Gross Turn Over (GTO)	:	Rs. 950,61,61,940-00
Excess Turn Over (ETO)	:	Rs. 836,92,30,210-00
Net Turn Over (NTO)	:	Rs. 113,69,31,730-00

The balance sheet of the assessee along with sale statements for the year 2011-12 was verified and the turnover arrived at was as under:-

Gross Turnover

1.	Inter-state sales of Electronic Equipment against Form 'C' taxable @ 2%	:	Rs. 38,01,85,000-00
2.	Inter-state sales of Electronic Equipment taxable @ 14.5%	:	Rs. 75,67,46,730-00

3.	Export Sales	:	Rs. 66,86,48,127-00
4.	Repairs and Overhauling charges	:	Rs. 81,72,96,167-00
5.	Air Craft fitments / IDTO Sales	:	Rs. 605,80,61,345.00
6.	Labour Charges collected	:	Rs. 2,60,19,900-00
7.	Deferred Revenue Expenditure	:	Rs. 42,22,62,290-00
8.	Exchange rate variation	:	Rs. 24,46,79,669-00
9.	NPOH / Interest on Deferred credit	:	Rs. 1,49,30,738-00
	Total	:	Rs.938,88,29,966-00

On the above gross turnover, the assessee claimed exemption on certain transactions. The assessee's claim for exemption was allowed in respect of repairs and overhauling charges, export sales, NPOH / interest on deferred credit, deferred revenue expenditure, labour charges collected and exchange rate variation. So far as aircraft fitments / IDTO sales are concerned the assessee stated that the turnover of Rs.605,80,61,345.00 arising out of this transaction represented supply of electronic equipment to other sister division of the assessee for fitment in aircrafts delivered to

customers and supply of electronic equipment to other sister concern of the assessee for their own consumption against Form 'F' declarations. The assessee, however, failed to file Form 'F' declarations in respect of all the transactions. Hence exemption was only allowed on the turnover of Rs. 36,99,90,655/- in respect of which Form 'F' declarations were filed. The remaining turnover of Rs. 568,80,70,690/- was not covered by 'Form 'F' declarations. Hence the claim of exemption in respect thereof was not allowed. The assessee's appeal to the VAT Tribunal was confined to the rejection of its claim of exemption on the alleged stock transfer of Rs. 568,80,70,690/- for want of production of Form 'F' declarations. It is, therefore, not necessary to go into other aspects of the matter. The VAT Tribunal by the impugned order set aside the order of the Assessing Authority dated 06.04.2015. Being aggrieved by the said reversal the State of Telangana has filed the present appeal.

Before proceeding further, it is necessary to state the gist of the impugned order of the VAT Tribunal. The VAT Tribunal has observed that the agreement between the assessee and the Government of India was the subject matter of earlier round of disputes. The Maharashtra Sales Tax Tribunal vide order dated 11.10.2012 in Appeal Nos. 30 of 2005 and 165 of 2008, after going through the important clauses of the agreement, held that the supply of spare parts by the assessee was as an agent on behalf of the Government of India to Indian Air Force for manufacturing aircrafts and therefore it does not amount to sale.

Hence both the lower authorities have committed an error in working out tax on the concerned two turnovers. The VAT Tribunal has also referred to judgment dated 31.12.2008 in TA No. 86 of 2007 of the Sales Tax Appellate Tribunal Andhra Pradesh where the same question arose. The VAT Tribunal has observed that in that case after referring to ***M/s Hindustan Aeronautics Limited versus State of Karnataka***¹, it is observed that the material, spare parts or any other goods used by the assessee were the property of the Government of India before being used in the works contract and remain so even after the completion of the works contract because the assessee and the Indian Air Force are two arms of the Government of India and hence there was no transfer of property in goods during the execution of the works contract. In the light of this decision, the VAT Tribunal has held in the impugned order that in this case also the assessee is an agent of the Government of India. The assessee is entrusted with the job of manufacturing the aircrafts for Indian Air Force. The funds are provided by the Government of India and the assessee's commission for the services rendered by it is only 10%. The units manufactured at Hyderabad, were transferred to assessee's Nasik division for fitting them into aircraft and from Nasik Division the aircrafts were delivered to the Defence. The VAT Tribunal has observed that the absolute ownership of the goods vests in Government of India and hence there cannot be any inter-state sale. It is a mere stock-transfer. The VAT Tribunal has further observed that

¹ (1984) 55 STC 314

Form 'F' declaration is not necessary because there is no sale. Taking this view of the matter, the VAT Tribunal has set aside the order of the Assessing Authority.

The main contention of Ld. Counsel for the appellant is that Section 6A(1) of the Central Sales Tax Act, 1956 ("**CST Act**" for short) casts statutory obligation on the assessee to file Form 'F' declarations to discharge the burden of proof that the movement of goods from one State to another was not by reason of sale but was occasioned by reason of stock-transfer of goods. Counsel contended that the assessee has failed to file Form 'F' declarations and therefore the appeal must be allowed. In support of his submissions, Counsel has relied on **Ashok Leyland Ltd. versus State of T.N. and Another**². ("Ashok Leyland II" for short).

Counsel for the assessee has, however, strongly supported the impugned order and has reiterated the reasoning of the VAT Tribunal. It is submitted that the assessee is only an agent of the Ministry of Defence; the aircrafts manufactured by the assessee are absolute property of the Ministry of Defence and that the assessee was given the licence to manufacture the aircrafts. It is pointed out that the assessee was only to use raw material and other component parts in the production of the aircrafts according to the specification of the Government of India. The assessee was to render accounts for the use of the raw

² (2004) 3 SCC 1.

material and had to finally hand over the finished products to the Ministry of Defence. It is further submitted that for each project entrusted to the assessee by the Ministry, the required funds were to be released in a phased manner and on receipt of the said funds, the assessee had to follow certain accounting procedure as per the Companies Act. The assessee had to issue memo / invoice in connection with the handing over of the finished products. The assessee had to render account so as to ensure that the funds provided by the Ministry of Defence are properly utilized. Counsel stressed that the Government of India is the owner of the goods i.e. raw material and spare parts. The assessee merely delivered the aircrafts manufactured by it by using the said raw material or spare parts to the Government of India. Counsel submitted that it is elementary that there cannot be a sale by owner to itself and therefore no transfer of goods by way of sale is involved in this case. It is contended that there is no commercial activity involved in the production of the aircrafts. The aircrafts are manufactured in terms of the licence obtained from the Government of India. The stock transfer was effected by the assessee to its division in Nasik and then the aircrafts in the form of finished goods were handed over by the Nasik Division to the Indian Air Force. Such transaction does not involve any transfer of property and therefore it does not warrant production of Form 'F' declarations. It is submitted that in the circumstances, there is no merit in the appeal and the appeal deserves to be dismissed. Counsel pointed out that in any case though Form 'F' declarations are not necessary, the assessee did try to obtain

them, but was denied Form 'F' declarations for no fault on its part. In this connection, Counsel drew my attention to letter dated 16.09.2014 sent by the assessee's Chief Manager Fin (AOD) to the AGM- Finance, HAL – Hyderabad Division, Hyderabad in which it is stated that Nasik Division had tried to obtain Form 'F' declarations several times but the Sales Tax Department rejected the request on the ground that VAT Returns did not reflect the value of any inter-state transfer received. Counsel relying on the judgment of the Supreme Court in **Ambica Steels Ltd. v. State of UP and Others**³ contended that in case this Tribunal comes to a conclusion that Form 'F' declarations are a must, it may remand the matter to the assessing officer to examine the concerned transactions between the parties to find out whether there is inter-state sale or not, because Form 'F' declarations are denied for no fault of the assessee.

Against the backdrop of above facts and submissions, it is necessary to first refer to the judgment of the Supreme Court in **Hindustan Aeronautics Ltd. versus The State of Orissa**⁴. In that case, the respondent herein was entrusted by the Government of India with the manufacture of MIG engines for which the Government of India had obtained a licence from the U.S.S.R.. Under the entrustment the responsibility for the proper implementation of the agreement was exclusively of the respondent. All payments falling due under the agreement to the Government of USSR had to be made by the respondent on behalf of the

³ [2009] 24 VST 356 (SC)

⁴ [1984]55 STC 327

Government of India. The materials imported by the respondent for the manufacture as well as goods, stocks and stores were the property of the Air Force and items manufactured by the respondent were to be supplied only to the Air Force or as authorized by the Government. Some of the engines manufactured by the respondent in its division in Orissa were sent to its Nasik Division where the MIG aircraft was finally assembled for delivery to the Government of India. After the engines were dispatched to the Nasik Division, the respondent drew bills and raised debits against the Government of India. The bills indicated a break-up of the material cost and sundry direct charges and further profit at a percentage. In respect of the payments so received the Sales Tax authorities levied Central Sales Tax on the ground that the transactions were inter-state sales. The Sales Tax authorities held that entrustment to the respondent of the manufacture of MIG engines amounted to contract of sale and Central Sales tax was attracted when engines were delivered to the Nasik Division and invoices were raised and payment received from the Government of India. The respondent claimed that the transaction was works contract but the Tribunal rejected its contention. The respondent appealed to the Supreme Court.

The Supreme Court went through the relevant agreement between the Government of India and the Government of USSR and the crucial correspondence between the respondent and the Government of India. The Supreme Court came to the conclusion that the entire transaction was entrusted to the respondent in terms of the agreement between

the Government of India and the Government of USSR for the manufacture on behalf of Government of India of MIG engines for which licence had been granted by the Government of USSR to the Government of India. The Supreme Court referred to the letter dated 22.09.1970 addressed by the Government of India to the respondent which indicated that under the entrustment the responsibility for the proper implementation of the agreement would be exclusively that of the respondent except that the Government may from time to time advise the respondent about the programme of manufacture of the equipments. The Supreme Court observed that the property in the air-crafts, in the equipments and material had always been with the Government. The materials imported under the licence or procured indigenously for the manufacture were always and had always remained property of the Government. The respondent had no property in any part thereof and had no right to dispose off or disposal over these material and spares. The respondent had no right to supply the manufactured equipments to anyone except to the Indian Air-Force or as authorized by the Government of India. The material observations of the Supreme Court are as under:-

“There cannot be any question, in our opinion, of any sales tax in respect of aero engines transferred to the Nasik Division of H.A.L. for installing the same in aircrafts. It was the transfer of the aircrafts to the Nasik Division for the purpose of completion of the job and the making of the invoices was a matter of accounting and carrying out the job of entrustment. As had been emphasized by this Court, that the primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing

or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of materials used by him may have been his property. In the case of a contract for sale, the thing produced as whole has individual existence as the sole property of the party who produced it some time before delivery and the property therein passes only under the contract relating thereto to the other party for price. This cannot be said to be in respect of any of the items involved in these transactions. These transactions were carried out in implementation of the entrustment job for the manufacture by H.A.L. and all payments and actions taken in this behalf were on behalf of the Government of India.”

It may be noted here that while coming to the above conclusion, the Supreme Court also referred to its earlier decision rendered in similar facts situation in the respondent's own case in ***Hindustan Aeronautics Ltd. v. State of Karnataka (supra)***.

There is no dispute before me about the fact that the salient features of the case before the Supreme Court in the above referred cases and the present case are similar. It is pertinent to note that in this transaction only 10% is given as commission for the services rendered by the respondent. In fact the letter dated 24.08.2007 addressed to the respondent by the Indian Air-Force on which reliance is placed by the respondent is similar to the letter which had been reproduced by the Supreme Court in ***Hindustan Aeronautics Ltd. v. State of Orissa (Supra)***. The relevant portion of the letter dated 24.08.2007 is as follows:-

“I am directed to say that the material imported / procured by HAL Avionics Division Hyderabad for the manufacture, overhaul of aircraft accessories, other equipment and also the other material, goods, stocks, work in progress etc. are the property of Govt and the items manufactured / overhauled out of the categories of material stated above are to be supplied only to India Air Force and

other defence services or as authorized by Government of India. The material at all the times belong to the Government of India.”

In the impugned order the VAT Tribunal has referred to earlier judgments of Maharashtra Sales Tax Tribunal and the Sales Tax Appellate Tribunal Andhra Pradesh. In those judgments the Tribunals have come to the conclusion that there was no sale by the respondent to the Government of India attracting Central Sales Tax. Pertinently in TA No. 86 of 2007, the Sales Tax Appellate Tribunal, Andhra Pradesh has referred to the above mentioned judgments of the Supreme Court. I am informed that those judgments of the Tribunals have become final as no appeals have been preferred therefrom. However, I will have to take note of the fact that the Supreme Court has delivered judgement in **Ashok Leyland II**. In this judgment, the Supreme Court has discussed Section 6A and reconsidered its earlier view. The present case will have to be viewed in the light of **Ashok Leyland II**. I must therefore refer to **Ashok Leyland II**.

Before I discuss **Ashok Leyland II** it is necessary to note the legislative history of Section 6A. Section 6A was inserted in the CST Act by Act 61 of 1972 with effect from 01.04.1973. Act 20 of 2002 dated 11.05.2002 further amended Section 6A to state that if the dealer fails to furnish Form 'F' declaration then the movement of goods from one State to another shall be deemed for all purposes to have been occasioned as a result of sale. By

Act 14 of 2010 dated 08.05.2010, Section 6A(2) was amended and Section 6A(3) was inserted. The amended Section 6A reads thus-

6A Burden of proof, etc., in case of transfer of goods claimed otherwise than by way of sale.

(1) Where any dealer claims that he is not liable to pay tax under this Act, in respect of any goods, on the ground that the movement of such goods from one State to another was occasioned by reason of transfer of such goods by him to any other place of his business or to his agent or principal, as the case may be, and not by reason of sale, the burden of proving that the movement of those goods was so occasioned shall be on that dealer and for this purpose he may furnish to the assessing authority, within the prescribed time or within such further time as that authority may, for sufficient cause, permit, a declaration, duly filled and signed by the principal officer of the other place of business, or his agent or principal, as the case may be, containing the prescribed particulars in the prescribed form obtained from the prescribed authority, along with the evidence of despatch of such goods [and if the dealer fails to furnish such declaration, then, the movement of such goods shall be deemed for all purposes of this Act to have been occasioned as a result of sale].

(2) If the assessing authority is satisfied after making such inquiry as he may deem necessary that the particulars contained in the declaration furnished by a dealer under sub-section (1) [are true and that no inter-State sale has been effected, he may, at the time of, or at any time before, the assessment of the tax payable by the dealer under this Act, make an order to that effect and thereupon the movement of goods to which the declaration relates shall, subject to the provisions of sub-section (3)] be deemed for the purpose of this Act to have been occasioned otherwise than as a result of sale. Explanation. —In this section, “assessing authority”, in relation to a dealer, means the authority for the time being competent to assess the tax payable by the dealer under this Act.]

(3) Nothing contained in sub-section (2) shall preclude reassessment by the assessing authority on the ground of discovery of new facts or revision by a higher authority on the ground that the findings of the assessing authority are contrary to law, and such reassessment or revision may be done in accordance with the provisions of general sales tax law of the State.]

In ***Ashok Leyland v. Union of India***⁵ (***Ashok Leyland I***), the Supreme Court considered the provisions of the CST Act and *inter alia* held that Section 6A does not create a conclusive presumption; that it is not possible to accept that an order under section 6A(2) has an independent existence and that it is permissible to reopen an assessment accepting Form F as true. In its order dated 17.03.1998 passed in Civil Appeal No. 14406-08 of 1997 the Supreme Court expressed that its decision in ***Ashok Leyland I*** may have to be applied with suitable modifications. Pursuant to this order a bench of three learned judges of the Supreme Court reconsidered its view in ***Ashok Leyland I*** and delivered its judgment in ***Ashok Leyland II***.

In ***Ashok Leyland II***, the Supreme Court held that Section 6A provides for exception as regards the burden of proof in the event a claim is made that transfer of goods had taken place otherwise than by way of sale. In such a case the initial burden of proof would be on the dealer to show that the movement of goods had occasioned not by reason of any transaction involving sale of goods but by reason of transfer of such goods to any other place of his business or to his agent or the principle as the case may be. The dealer / assessee may file Form 'F' declarations. On such a declaration being filed an enquiry is to be made by the Assessing Authority for the purpose of passing an order on arriving at a satisfaction that movement of goods has occasioned otherwise than as a result of sale. Whenever such an

⁵ (1997) 9 SCC 10

order is passed, a legal fiction is created, which has to be given its full effect. The Supreme Court made it clear that the order of an authority under Section 6A is conclusive for all practical purposes. The Supreme Court further observed that whereas prior to the amendment in sub-section(1) of section 6A the dealer had an option of filing a Form F declaration, after the amendment he does not have such an option. In terms of the amended provisions, if the dealer fails and / or neglects to file such a declaration the transaction would be deemed to be an inter-state sale. The Supreme Court further made it clear that the finding that the movement of goods from one State to another is not an inter-state sale, but is a transfer of stock is made by a statutory authority who has the jurisdiction to do so and there is no provision for appeal. The order made by such authority is conclusive in that it cannot be reopened on the basis that there had been a mere error of judgment. It can only be reopened on a small set of grounds such as fraud, misrepresentation, collusion etc. The Supreme Court added that when an order passed in terms of sub-section(2) of section 6A is found to be illegal or *void ab initio* or otherwise voidable, the assessing authority derives jurisdiction to direct reopening of the proceedings and not otherwise.

From the above authoritative judgment of the Supreme Court it is clear that filing of Form 'F' declaration is now mandatory. Whereas prior to amendment the dealer had an option of filing Form 'F' declaration, he has no such option now. Under section 6A as it stands today if the dealer fails to file Form 'F' declaration the transaction would be deemed to

be an inter-state sale. The deeming provision creates a legal fiction which must be given its full effect. For the purpose of discharging the initial burden of proof which rests on the dealer to prove that there is no inter-state sale he must produce Form 'F' declaration. The order passed by the authority under section 6A on the basis of Form 'F' declaration that there is no inter-state sale is conclusive for all practical purposes and can be reopened only on the limited grounds of fraud, misrepresentation or collusion etc. Thus filing of Form 'F' declaration strengthens the case of the dealer. If found true a conclusive presumption that there is no inter-state sale is created in his favour. In the instant case, it is pertinent to note that the respondent did file Form 'F' declaration in respect of turnover of Rs. 36,99,90,655/- and the Assessing Authority allowed the exemption in respect thereof. So far as the rest of the turnover is concerned, exemption was not allowed because Form 'F' declarations were not filed. In **Ambica Steels** the Supreme Court has held that if the assessee is not in a position to obtain Form 'F' declaration for no fault of his, it would be open to the assessing officer to complete reassessment proceedings on its own merits after examining the transaction between the parties. In this case letter dated 16.09.2014 sent by the assessee's Chief Manager Fin (AOD) to the AGM-Finance, HAL, Hyderabad Division indicates that the Assessee's Nasik Division had tried to obtain Form 'F' declaration several times but the Sales Tax Department rejected the request on the ground that VAT Returns did not reflect the value of any inter-state transfer received. In the circumstances in the facts of this case

and in the interest of justice, I am of the view that the course adopted by the Supreme Court in **Ambica Steels** deserves to be followed here. Hence the following order-

The appeal is partly allowed. The impugned order, to the extent it disallows exemption on transactions covering Rs.568,80,70,690/- is set aside. The matter is remanded to the Assessing Authority with the direction to complete the assessment independently and in accordance with law after examining the transactions covering turnover of Rs. 568,80,70,690/- on which exemption was disallowed. The Assessing Authority shall keep in mind the relevant judgments, particularly judgments of the Supreme Court referred to in this order and the assessment shall be completed independently in the light of those judgments. The entire exercise be completed within a period of 4 months from the date of receipt of this order.

Sd/-
(Justice Ranjana P. Desai)
Chairperson