

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR
CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. C. Lalappan.
Joint Commissioner (Audit & Inspection),
Office of the Commissioner of Commercial Taxes,
Thiruvananthapuram.

2. T.K. Ziavudeen
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes,
Thiruvananthapuram.

3. V.J. Gopakumar.
Deputy Commissioner (General),
Office of the Commissioner of Commercial Taxes,
Thiruvananthapuram.

Sub : KVAT Act, 2003 – Clarification U/s 94 – Supplying and fixing of auditorium chairs to the theatres belonging to M/s. KSFDC and tax liability – Orders issued.

Read : Application from M/s. Innovative Seatings (P) Ltd., Vadodara dtd. 15/12/2014.

ORDER No.C3/38881/14/CT DATED 30/4/2015.

1. M/s. Innovative Seatings (P) Ltd., Vadodara has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003 seeking clarification on the tax liability on supply and fixing of auditorium chairs to the theatres belonging to M/s. KSFDC.

2. The applicant is a dealer situated in the State of Gujarat bearing TIN 24191201857 under Gujarat Value Added Tax Act and CST No.24691201857 under the CST Act, 1956.

3. The applicant contend that M/s. Kerala State Film Development Corporation Ltd., Thiruvananthapuram (KSFDC), had invited sealed tenders for supply and fixing of auditorium chairs in the theatres belonging to them at Thiruvananthapuram, Kozhikode and Alappuzha and the applicant placed their tender on 14/8/2012 which was accepted. After discussions and negotiations, the work was awarded to the applicant as per agreement executed between them and KSFDC. As a result of this contract, the applicant sold and supplied

auditorium chairs from their business place at Vadodara to Kerala for execution of the works contract, raising sale bills favouring KSFDc, paying CST at the higher rate in Gujarat, and fixed the chairs in the theatres at Thiruvananthapuram, Kozhikode and Alappuzha. In the agreement of works contract, a general provision for TDS was included as clause 5(f) as under:-

“Sales Tax on works (Work Contract) shall be deducted at 3% of the gross payment at present for contractors having KGST registration. For those contractors without KGST registration, the deduction for work contract tax shall be as per KGST registration.

Any tax omitted to be deducted in any part bill shall be deducted in the subsequent bills / final bill”.

At the time of payment of the contract amount, the applicant had represented before the awarders that they are only executing interstate works contract and are not liable to pay any sales tax in the State of Kerala and as such no TDS be effected. The awarders (KSFDc), had thereupon sent a letter dtd. 25/4/2014 to the Inspecting Assistant Commissioner (IB), Kottayam, intimating the claim of interstate transaction put forth by the applicant and therefore to advise as to at which rate TDS to be effected. The Inspecting Assistant Commissioner (IB), Kottayam vide his letter dtd. 3/6/2014, informed the awarders to deduct tax at source at the rate of 10% for the reasons that the contract related to future goods and appropriation of goods took place in Kerala and therefore the awardee was liable to effect TDS at the rate of 10%. The applicant had again on 18/7/2014 addressed the awarders to abstain from effecting any TDS on the interstate transaction as it would be violative of settled law declared by Hon'ble High Courts and Supreme Court. Despite all the efforts from the part of the applicants, the awarders had effected TDS at the rate of 10% and remitted the same to Commercial Tax Officer (Works Contract), Thiruvananthapuram.

4. The applicant would contend that the fact that there existed a privity of contract in between the applicant company in Gujarat who is a dealer in auditorium chairs, registered under the CST Act, 1956 and the awardee, KSFDc, Kerala and that the movement of goods from the State of Gujarat had occasioned as a result of this contract is not under dispute. There is no intermediary appearing in between the two parties, and the applicant had paid CST at the appropriate rate in the State of Gujarat which is also unassailable. The sale of goods from Gujarat and the movement of goods from Gujarat to Kerala are integral part of the same transaction and there is direct nexus between the sale and the movement of goods from one State to another, are all irrefutable facts. In other words, the movement is incident of and was necessitated by the

contract of sale (works contract) in between the applicant and KSFDC and thus inextricably linked with the sale of goods taken place at Gujarat. There is undoubtedly a conceivable link between the inter-state seller and the ultimate purchaser.

Thus all the three essential requirements necessary for an interstate sale, namely:-

- (i) there must be a sale,
- (ii) the goods must actually be moved from one State to another,
- (iii) the sale and movement of such goods must be part of the same transaction are all satisfied in this case.

5. The applicant would contend that the movement of goods from Gujarat to Kerala was occasioned by the sale of auditorium chairs by the applicant to KSFDC or by the purchase of KSFDC from the applicant whichever way one looked at it. The movement to Kerala was an incident of and was inextricably connected with the purchase / sale. The purchase and transport were part of one transaction and there was no break. The appropriation of goods had taken place at Gujarat when the goods were sent apart for transport to Kerala. It is immaterial that the accretion or addition of goods in the execution of works contract had taken place at the theatres owned by KSFDC in Kerala. So long as the movement of goods was an incident of the sale / purchase, it amounts to an interstate sale. It is also not necessary that the contract of sale had to expressly provide for the movement of goods. It is sufficient if the movement of goods was implicit in the sale. The applicant would contend that the situation is well settled and it was reiterated by the Apex Court in (1993) 90 STC 1 (SC) - Co-operative Sugars (Chittur) Ltd. Vs. State of Tamil Nadu.

6. The applicant would contend that the reasoning of the Inspecting Assistant Commissioner (IB), Kottayam that the appropriation of goods took place at Kerala and hence it is a local sale at Kerala is legally and factually incorrect. It is also incorrect to say that the contract for supply of auditorium chairs and its erection was a contract of sale for future or unascertained goods. On the contrary the agreement was for supply of specific goods as defined under Section 2(14) of the Sale of Goods Act, 1930, namely a particular number of auditorium chairs of identified quality and for its erection at specified places.

7. The applicant would contend that the Inspecting Assistant Commissioner (IB), Kottayam is of the view that appropriation of goods takes place only when the chairs are erected in the floor of the theatre and in such cases the sale can only be a local sale at Kerala. If this view is accepted, there

cannot exist a concept which can be termed as interstate works contract at any event. The chairs had started its movement from Gujarat under cover of invoices raised in favour of the KSFDC and crossed the check posts under that status. As per Section 23(2) of the Sale of Goods Act, the divestment of property in goods and the sale is concluded with reference to the seller when the goods are delivered to the carriers for transit to the purchaser's destination and therefore appropriation of goods had taken place at Gujarat.

8. The applicant would further contend that to quote "Benjamin on Sale" (Page 336 - Eighth edition), *"with respect to delivery to a carrier, in 1803, in the case of Dutton Vs. Solomon Son, it was treated as already settled law that where a seller deliver goods to a carrier by order of the purchaser, the appropriation is determined, the delivery to the carrier is a delivery to the buyer, and the property vests immediately. And where the intention finally to appropriate the goods is clear, and the carrier assents, it is immaterial by what documents the consignments is effected"*. Therefore the finding of the Inspecting Assistant Commissioner (IB), Kottayam that appropriation of goods had taken place only in Kerala is not correct.

9. The applicant would further contend that the law by the extended definition of Sale, what is being taxed is the materials in goods transferred in the execution of works contract and when those materials move from another State as a result of a prior contract of deemed sale, the authority to tax it, as per the Central enactment, rests solely on the State from which the movement occasions, and that aspect should have been taken care of by Kerala Commercial Tax authorities. The legislative history of the Central Law of the CST Act, 1956 throws light that it was legislated to avoid multiple taxation on a single transaction by two different States in the Union. If the view of the Inspecting Assistant Commissioner is endorsed, it would no doubt defeat the purpose of the central legislation in the case of all works contracts in which the parties to contracts are placed in two different States and the goods pursuant to the contract occasions movement from one State to another for use in execution of work in the other State. In the present case, the applicant has paid CST at Gujarat, as they have sold goods to Kerala under a prior contract and the goods have occasioned movement from the State of Gujarat. This act of the applicant in paying CST in Gujarat is justified as per Section 3, 4 and 6 of the CST Act, 1956. The authorities ought to have found that deemed sale makes no difference with that of other types of sales and once when the goods move from another State as a result of deemed sale, that also is an inter-state sale and the State which is competent to levy tax is the State from which the goods occasion the movement.

The law applicable was discussed by the Hon'ble Court of Gauhati in 82 STC 89 (Gauhati) in Projects and Services Centre Vs. State of Tripura wherein it was held that *the actual use of goods in works contract made in Tripura or the property in the materials passed in Tripura do not affect the nature of sale and the movement of the goods from other State to Tripura being occasioned by a contract for use in execution of the work, it is an interstate sale and the works contractor was not liable to any tax under the Tripura Act, as it is only an interstate works contract guided by Sec.3 of the CST Act, 1956.*

10. The applicant would further contend that Hon'ble Supreme Court while examining the vires of provision as to TDS in the Orissa Sales Tax Act has held in Steel Authority of India Ltd. Vs. State of Orissa & Others reported in 118 STC 297 (SC) that '*if no provision for deduction of value of transfer of goods interstate, outside State and in the course of import are provided when TDS is made compulsory, that would be ultra vires to constitution*'. In 7 KTR 156 (Ker), Hon'ble High Court of Kerala in R.K. Ubaidu Vs. State of Kerala has held that "*..... if the goods used in the execution of the said work contract are not exigible to tax under the Act..... certainly the awarders cannot deduct any amount by way of tax from the bill amount.*" It was further ordered that '*if the petitioner ha got a case that the second and third respondents had already deducted any amount by way of tax from the previous bills, it is for the petitioner to make a request to the assessing authority with copy to the awarder for refund of the said amount and the assessing authority will consider and pass appropriate orders therein expeditiously.*'"

11. The applicant would conclude that that the transaction under question is an interstate work contract and that they are not liable to pay any tax in the State of Kerala and therefore the awarders should not have deducted any TDS and that they are entitled to immediate refund of the amount corresponding to the TDS illegally deducted from him by the awarder and remitted to the Department.

12. The applicant has requested to clarify as to:-

- i. Whether the works contract entered into in between the applicant and KFSDC in the present case is an interstate works contract or not?
- ii. Whether the applicant is liable to any tax under Kerala Value Added Tax Act, 2003?
- iii. Whether the applicant is entitled to refund of the TDS effected from them and remitted to Government by the awarder (KFSDC)?
- iv. What is the procedure to be adopted by the applicant for refund of the TDS, if in case the levy is found to be illegal?

13. The authorized representative of the applicant was heard in the matter and the contentions raised were examined.

14. A perusal of the terms and conditions of the contract would show that the contractor (applicant) has to supply the chairs as per the given specification and fix them on the floor of the theatre with nuts and bolts. Samples shall be supplied by the contractor at his own cost and if any of the materials stored at the site by the contractor for the work are found not in conformity with the specifications or in quality, the same shall be removed from the site at contractor's cost. So it can be seen that ascertained goods as per the given specification moved from outside the State into the State of Kerala pursuant to a concluded contract. Only such goods are accepted. Hence, such supply will come within the scope of inter-state sale. If any local material is used in the installation part, it would be taxable at its transfer value. In the circumstances TDS need not be deducted in the above case.

The issues raised above are clarified accordingly.

C. Lalappan
Joint Commissioner (A&I)

T.K. Ziavudeen
Joint Commissioner (General)

V.J. Gopakumar
Deputy Commissioner (General)

To,

Sri. S. Suresh Babu,
Advocate, (Rtd.) Joint Commissioner (Taxes),
N.S.S. Taluk Union Building,
Anandavalleeswaram, Kollam.