

## Transactions being import/inter-State trade and goods being used only in works contract, would be exempt under Delhi VAT

**Summary – The Supreme Court of India in a recent case of ABB Ltd., (the Assessee) held that where goods of specific quality and description could be used only in impugned works contract and there was no possibility of such goods being diverted by assessee for any other purpose, impugned transactions being inter-State trade or import would be exempt from Delhi VAT**

### Facts

- The assessee was engaged, *inter alia*, in manufacture and sale of engineering goods, including power distribution system and SCADA system. It was a subsidiary of ABB Ltd., Zurich Switzerland which was a market leader in power and automation technologies having operational presence in over 100 countries.
- The Delhi Metro Railway Corporation Ltd. (DMRC) awarded a contract to the assessee under which the assessee had to provide transformers, switch gears, high voltage cables, SCADA system and also complete electrical solution, including control room for operation of metro trains on the concerned section.
- The Assessing Officer called upon the assessee to pay VAT on the deemed sales made by it to DMRC.
- The assessee denied its liability on the ground that it was exempted from payment of VAT in respect of sale effected in the course of import and also in respect of inter-State sale of goods, on account of provisions of sections 3(a) and 5(2) of the Central Sales Tax Act (CST Act).
- The Assessing Officer as well as the Appellate Authority returned a finding that there was no link between the contractee (DMRC) and the supplier of goods that were imported by the assessee and hence on account of lack of any privity of contract the requirements of section 3(a) were not satisfied in respect of movement of goods from outside Delhi to the required site of DMRC in Delhi. Similar finding was returned in respect of movement of the goods under import, *i.e.*, it could not be held to have been occasioned by the contract between the DMRC and the assessee. The Assessing Officer rejected the claim of the assessee and raised tax demand upon it.
- The lower authorities including the Tribunal upheld the order of the Assessing Officer.
- The High Court held that the lower authorities and the Tribunal had failed to consider relevant clauses and conditions of the contract which demonstrated and clarified that the importation of equipment was strictly as per requirement and specification set out by the DMRC in the contract and only to meet such requirement of supply the specified goods were imported and hence the event of import and supply was clearly occasioned by the contract awarded to the assessee by the DMRC. Further the High Court, after carefully considering the relevant provisions of the contract, specifications of goods, requirement of inspection of goods at more than one occasion and right of rejecting the goods even on testing after supply, accepted the contentions of the assessee that the transactions leading to import of goods as well as movement of goods from one State to another

were occasioned by the contract awarded by the DMRC to the assessee and, hence, the transactions were not covered by the VAT Act but the CST Act.

- On appeal to Supreme Court by revenue:

**Held**

***Sale in course of inter-State sale***

- So far as the issue in respect of sale in the course of inter-state trade is concerned, the Tribunal rejected the claim on the ground that there was no specific order for supply of such goods issued by DMRC nor there was specific instruction for inter-State movement of goods. The High Court found that in fact the terms of the contract envisaged inter-State movement of goods. Such movement of goods was within the knowledge of DMRC, because there was total ban on setting up/working of heavy industries in Delhi and the DMRC had approved 18 places within the country from where the equipments and goods had to be supplied. These included the premises and factories of the assessee also. On facts, therefore, it was rightly held by the High Court that the inter-State movement of goods was within the contemplation of the parties and it can be reasonably presumed that such movement was to fulfill the terms of the contract and, therefore, the transaction was covered by section 3(a).

***Sale in course of imports***

- A Constitution Bench of the Supreme Court had the occasion to consider in the case of *K.G. Khosla & Co. v. Dy. Commissioner of Commercial Taxes* AIR 1966 SC 1216 whether sales in that case were in the course of imports. The assessee in that case had a contract with the Director General of Supplies, New Delhi for supply of axle bodies manufactured by its principals in Belgium. Although goods were inspected in Belgium also but under the contract they could be rejected on further inspection in India. After supplying the goods the assessee claimed the sales to be in course of import. After losing up to High Court, the assessee succeeded before the Supreme Court.
- The Constitution Bench held that section 5(2) of the CST Act does not prescribe any condition that before the sale could be said to have occasioned import, it is necessary that the sale should precede the import. The sale is only required to be incidental to the contract. In other words, the movement of goods from another country to India should be in pursuance of the conditions of the contract. The incident was held to be import of goods within section 5(2) on the reasoning that the entire transaction was an integrated one by which a foreign seller through its Indian agent, namely, the assessee sold the goods to Indian purchaser, namely, the Director General of Civil Supplies.
- The main contention of the revenue is that the instant case is identical to that of the assessee in the case of *Binani Bros. (P.) Ltd. v. Union of India* [1974] 1 SCC 459.
- In the case of *Binani Bros. (P.) Ltd. (supra)* in para 13 the most peculiar and conspicuous aspect of *K.G. Khosla & Co. case (supra)* was noticed and highlighted that 'under the contract of sale the goods were liable to be rejected after a further inspection by the buyer in India.' In the same paragraph it

was further highlighted with the help of a quotation from *K.G. Khosla & Co. case (supra)* that movement of goods imported to India was in pursuance of the conditions of the contract between the assessee and the Director General of Supplies. There was no possibility of such goods being used by the assessee for any other purpose. In the next paragraph the peculiar facts of *Binani Bros. (P.) Ltd.'s case (supra)* were highlighted in the following words : '..... the sale by the petitioner to the DGS&D did not occasion the import. It was purchase made by the petitioner from the foreign sellers which occasioned the import of the goods'. In paragraph 16 it was further pointed out that there was no obligation on the DGS&D to procure import licences for the petitioner.

- There is no difficulty in holding that *Binani Bros.(P.) Ltd.'s case (supra)* did not differ with the earlier judgment of a Constitution Bench in the case of *K.G. Khosla & Co. (supra)*. A careful analysis of the facts in *Binani Bros. (P.) Ltd.'s case (supra)* leads to a conclusion that the case of West Bengal Sales Tax authorities in that matter that there were two sales involved in the transactions in question, one by the foreign seller to the assessee and the second by the assessee to the DGS&D, because there was no privity of contract between the DGS&D and the foreign sellers, was accepted mainly because the assessee was found entitled to supply the goods to any person, even other than DGS&D because there was no specification of the goods in such a way as to render it useable only by the DGS&D. This was coupled with the fact that the latter had imposed no obligation on the assessee to supply the goods only to itself. Further there were no obligations of testing and approving the goods during the course of manufacture or for that matter, even at a later stage with a right of rejection. Such a right of rejecting the specific goods in the instant case is identical to the similar right in respect of goods in *K.G. Khosla & Co. case (supra)*.
- Hence, the Bench is unable to accept the main contention of the revenue that the instant case is similar to that of *Binani Bros. (P.) Ltd.'s case (supra)*. To the contrary, the Bench agrees with the reasonings of the High Court for coming to the view that the instant case is fit to be governed by the ratio laid down in *K.G. Khosla & Co. case (supra)*.
- The aforesaid conclusion leading to concurrence with the views of the High Court is also based upon the salient facts, particularly the various conditions in the contract and other related covenants between the DMRC and the assessee which have been spelt out in paragraph 31 of the High Court judgment, enumerated and described as follows:
  - (1) Specifications were spelt out by the DMRC.
  - (2) Suppliers of the goods were approved by the DMRC.
  - (3) Pre-inspection of goods was mandated.
  - (4) The goods were custom made, for use by DMRC in its project.
  - (5) Excise duty and Customs duty exemptions were given, specifically to the goods, because of a perceived public interest, and its need by DMRC.
  - (6) In the Project Authority Certificate issued by DMRC, the name of the sub-contractors as well as the equipment/goods to be supplied by them were expressly stipulated.

- (7) DMRC issued a certificate certifying its approval of foreign suppliers located in Italy, Germany, Korea, etc. from whom the goods were to be procured.
- (8) Packed goods were especially marked as meant for DMRC's use in its project.
- The salient features flowing out as conditions in the contract and the entire conspectus of law on the issues as notice earlier leave one with no option but to hold that the movement of goods by way of imports or by way of inter-State trade in instant case was in pursuance of the conditions and/or as an incident of the contract between the assessee and DMRC. The goods were of specific quality and description for being used in the works contract awarded on turnkey basis to the assessee and there was no possibility of such goods being diverted by the assessee for any other purpose.
  - In view of the aforesaid, the judgment of the High Court deserved to be upheld.