

(6) Accordingly, I find no merit in the these petitions. These are dismissed. In the circumstances of the case, there will be no order as to costs.

S.C.K.

Before Hon'ble R. S. Mongia, Jawahar Lal Gupta & N. K. Sodhi, JJ.

M/S THOMSON PRESS (INDIA) LTD., MATHURA ROAD,
FARIDABAD AND ANOTHER,—Petitioners.

versus

THE STATE OF HARYANA AND ANOTHER,—Respondents.

Review Application No. 147 of 1993 in Civil Writ Petition No. 337 of
1992

26th July, 1995

Constitution of India, 1950—Arts. 226/227—Haryana General Sales Tax Act, 1975—Central Sales Tax Act, 1956—Does printing of lottery tickets amount to execution of a works contract—Is State competent to levy sales tax on transfer of property in goods involved in execution of works contracts where such order for printing has been placed by another State.

Held, that one of the tests is—Can the product be sold to any person in the market or has it to be supplied to the particular customer. If it cannot be sold in the market and has to be supplied to a particular customer, the transaction can normally be described as execution of a works contract. In such a case, the supply of material is just incidental. Similar appears to be the position in the present case. The petitioner could not have sold the lottery tickets in the market to any person. These had to be supplied to the customer. These involved not only expertise but also confidentiality. The supply of paper and ink in the circumstances of this case was only incidental. As a result, the amount charged by the petitioner for the printing of lottery tickets from different customers could not be included in the taxable turnover.

(Para 14)

Further held, that the question is answered in the affirmative and it is held that the printing of lottery tickets amounts to execution of a works contract.

(Para 16)

Further held, that when the petitioner prints lottery tickets, in pursuance to a contract with the State of Haryana, the provisions of the Haryana General Sales Tax Act in so far as these provide for the levy of sales tax on the inputs involved in the execution of a works contract, shall be applicable. However, when the petitioner

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prints the lottery tickets at the asking of a State other than Haryana, the position is different. The provisions of the Central Sales Tax Act have not been amended. The fiction of a deemed sale has not been introduced. As a result, the goods involved in the execution of the works contract cannot be said to have been fictionally sold. The question of levy of tax on the inputs under the State Act or the Central Act would not arise.

(Para 18)

Further held that :—

- (i) In the facts and circumstances of these cases, the printing of lottery tickets amounts to execution of a 'works contract'.
- (ii) The State of Haryana is not competent to levy sales tax on the transfer of property in goods involved in the execution of a 'works contract' in a case where the order for printing of lottery tickets has been placed by another State, and there is movement of the end product in the course of inter-state trade and commerce.
- (iii) Clause 29-A which was added in Article 366 by the 46th Amendment of the Constitution only embodies an enabling provision. It does not, however, *ipso facto* authorise the State Legislature to levy taxes on the sale or purchase of goods where such sale or purchase takes place in the course of inter state trade and commerce. The power in this behalf vests exclusively in the Parliament and unless the provisions of the Central Sales Tax Act, 1956 are amended, the fiction introduced under the State Act by the Haryana Legislature would not permit the levy of sales tax.
- (iv) Review Application No. 147 of 1993 filed by the petitioner is allowed. The order of assessment dated January 14, 1992 is set aside.
- (v) Review application No. 205 of 1993 filed by the State of Haryana is dismissed.
- (vi) Civil Writ Petitions Nos. 14757, 14758 of 1993 and 4502 of 1995 are allowed. The orders of assessment impugned in C.W.Ps. Nos. 14757 of 1993 and 4502 of 1995 are set aside.
- (vii) The cases are remitted to the assessing authority for a fresh decision in accordance with law and the conclusions recorded above.

(Para 20)

Randhir Chawla, Advocate with Ms. Renu Sehgal, Advocate and R. C. Dogra, Advocate and Deepak Kapoor, Advocate, *for the Petitioners.*

H. L. Sibal, A.G. Haryana, with Ms. Rita Kohli, Advocate and Ms. Vandana Malhotra, Advocate, *for the Respondents.*

JUDGMENT

Jawahar Lal Gupta, J.

(1) Does the printing of lottery tickets amount to the execution of a works contract? Is the State of Haryana competent to levy sales tax on "transfer of property in goods involved in the execution of a works contract" where the order for printing of lottery tickets has been placed by another State? These are the two primary questions that arise in the two review applications and the three Civil Writ Petitions that have been listed before this Bench.

(2) M/s Thomson Press (India) Pvt. Ltd., Faridabad, is a registered dealer under the Haryana General Sales Tax Act, 1975 and the Central Sales Tax Act, 1956. It is engaged in printing of books, periodicals, magazines, annual reports of the companies, brochures, folders and lottery tickets etc. The work undertaken by the petitioner involves use of advanced technology, sophisticated machinery and technically trained personnel. The petitioner is required to maintain a high degree of confidentiality to the satisfaction of its customers. The petitioner filed its sales tax returns. It claimed deduction of certain amounts on the ground that lottery tickets were exempted from the payment of sales tax. Its claim for exemption was allowed. Later on the Revisional authority-cum-Deputy Excise and Taxation Commissioner, re-opened certain assessments and issued notices under the State Act as also under the Central Act. It was observed that printing of tickets did not amount to sale of lottery tickets. The petitioner was, therefore, called upon to show cause why the assessment order be not revised. In respect of the assessment year 1986-87, the assessment authority has framed the assessment and held that the petitioner was liable to pay Rs. 30,02,159 under the State Act and Rs. 31,01,917 under the Central Act. The petitioner filed Civil Writ Petition No. 337 of 1992. A copy of the assessment order dated January 14, 1992 passed by the assessing authority was placed on record as Annexure P-1. The petitioner filed five other writ petitions. In all these petitions, the provisions of the amending Act and the notices issued by the revisional authority were challenged. In Civil Writ Petition No. 337 of

1992, even the validity of the assessment order was challenged. A-11 these six writ petitions filed by the petitioner were listed for hearing alongwith a bunch of other writ petitions filed by different petitioners including the East India Cotton Manufacturing Company, Faridabad. The petitions were disposed of by the Full Bench to which two of us (Jawahar Lal Gupta & N. K. Sodhi, JJ.), were parties. The Bench *inter alia* held that the impugned provisions were *intra vires*; the value of goods falling within the purview of various sub-clauses of clauses (j) and (1) of Section 2 of the Haryana General Sales Tax Act, 1973 is exigible to tax; the inter-state sale is outside the scope of State Act for the purposes of levying of tax and that the particular activity of processing of grey cloth into finished cloth by the East India Cotton Manufacturing Company amounted to inter-state sale in the facts and circumstances of the case. The matter was remitted to the assessing authority for fresh decision. The petitioner has filed a Review Application No. 147 of 1993 with the prayer that the order of assessment be set aside and directions be given to the assessing authority to re-decide the case.

(3) The State of Haryana has also filed a Review Application No. 205 of 1993. It has been prayed that the conclusion recorded by the Bench that the activity "of processing of grey cloth into finished cloth by the East India Cotton Manufacturing Company in the facts and circumstances of the case amounts to inter-state sale" suffers from an error apparent on the record and be rectified.

(4) Civil Writ Petition No. 14757 of 1993 has been filed against a notice received by M/s Thomson Press (India) Pvt. Ltd. Two other petitions viz. Civil Writ Petitions Nos. 14758 of 1993 and 4502 of 1995 impugn the orders of assessment. Since all the cases involve identical questions, these are being disposed of by one order.

(5) So far as Review Application No. 205 of 1993 filed by the State of Haryana, is concerned, it may be noticed at the outset that it is the admitted position that a petition for Special Leave has already been filed by the applicant. Since Hon'ble the Supreme Court is already seized of the matter, we find no justification for the action of the State in filing the instant petition. In any event, we find no ground to vary the order already passed by us. Consequently, the Review Application No. 205 of 1993 is dismissed.

(6) This brings us to the consideration of the contentions raised in the other cases.

(7) Mr. Chawla, learned counsel for the petitioner in Review Application No. 147 of 1993 as also the other writ petitions, has submitted that the Full Bench having not pronounced upon the validity of the assessment order, which was specifically challenged, the decision deserves to be reviewed. He further submitted that the printing of lottery tickets as undertaken by the petitioner is execution of a works contract. The orders having been placed by different States other than Haryana and no amendment having been made by the Parliament in the Central Sales Tax Act, neither the goods involved in the execution of the work nor the end product were exigible to the levy of sales tax under the State Act or the Central Act. Learned counsel placed strong reliance on the decision of their Lordships of the Supreme Court in *State of Tamil Nadu v. Anandam Viswanathan* (1), to contend that the printing of lottery tickets involved expertise and confidentiality and thus amounted to the execution of a works contract. He prays that a clarification in the same terms as in the case of East India Cotton Manufacturing Company namely, that the lottery tickets having been printed at the instance of States other than Haryana, in execution of a works contract, the goods were not exigible to the levy of Sales Tax under the State and the Central Acts be given.

(8) On the other hand, Mr. Sibal, learned counsel for the respondents contended that all goods consumed in the execution of a works contract are deemed to have been sold in the State of Haryana and are, thus, exigible to the levy of sales tax under the State Act. He further submitted that it is only the final product that has moved to another State in the Course of inter state trade and the tax under the Central Act has been rightly levied on the value of those goods. According to the learned counsel, the fact that the Central Sales Tax Act has been amended is of no consequence in view of the 46th amendment of the Constitution. Mr. Sibal also submitted that the application for Review is not competent.

(9) A 'works contract' can be of two types. It may be "entire and indivisible" like the one for the construction of a building according to specifications where the person executing the work is entitled to receive the total price. It can also be a composite contract wherein the price of the inputs and the charges for labour or

expertise etc. are separately fixed. In an indivisible contract, no sale of goods is involved. In the latter case, however, tax can be levied on the price of the goods as fixed under the contract. There was divergence of judicial opinion on the levy of sales tax in case of a works contract. This controversy was settled by the Supreme Court in *State of Madras v. Gannon Dunkerley & Company (Madras) Ltd.* (2). It was *inter alia* held that the "sale of goods" in Entry 48 in List II of the 7th Schedule to the Government of India Act, 1935, had the same meaning as in the sale of Goods Act, 1930. In case of a building contract which was indivisible, there was no sale of materials involved in the construction of the building and as such, it was not within the competence of State Legislature to levy tax on the supply of materials. It was, however, clarified that the position in case of composite contract could be different. As a necessary consequence, the State Legislatures were held to be not competent to levy sales tax on the materials involved in the execution of a works contract. The Law Commission considered the matter. It *inter alia* suggested the insertion of a wide definition of sale so as to cover the works contract in Article 366 of the Constitution. As a result, Clause 29-A was added in Article 366 by the 46th amendment of the Constitution. A legal fiction could be introduced and an indivisible contract made divisible. A contract for execution of work can now be fictionally divided into one for sale of goods and the other for supply of labour and services. However, the power of the Provincial Legislatures under Entry 54 in List II remains subject to the provision in Entry 52-A of List I of the 7th Schedule whereunder Parliament alone has the power to levy "taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-state trade and commerce." Wherever the sale or purchase of goods occasions the movement of goods from one State to another, it is deemed to have taken place in the course of inter-state trade or commerce. In the cases covered by Section 3, 4 and 5 of the Central Act, the State Legislature has no competence to provide for the levy of sales tax. This principle shall apply even in the case of works contract. The position cannot be different in a case where an indivisible contract is made divisible by the legal fiction introduced by a State Legislation in pursuance to the 46th amendment. Once the contract occasions the movement of

the end product from one State to another, the inputs or the goods involved in the execution of the works contract shall also be deemed to have moved and the levy of sales tax in such a case would be outside the field of Legislative competence of the State Legislature. By introducing a fiction, the State Legislature cannot convert a sale in the course of inter-state trade and commerce into a local sale. In fact, this is the view expressed by the Full Bench in conclusions 3 and 4 in the East India Cotton Manufacturing Company's case (supra). This is also the position that emerges from the decision of the Supreme Court in *Gannon Dunkerley & Co. and others v. State of Rajasthan & others* (3).

It is in this background that the contentions raised by the learned counsel for the parties have to be examined. The questions that arise for consideration are :—

- (i) Is the Review Petition competent ?
- (ii) Does the printing of lottery tickets amount to execution of a 'works contract' ?
- (iii) Is the State of Haryana competent to levy sales tax on the goods involved in the execution of a works contract where the order for printing of lottery tickets has been placed on the petitioner by another State and the goods have been accordingly supplied to the customer ?

Re. (i)

(10) It is the admitted position that the petitioner had prayed for the quashing of the assessment order dated January 14, 1992. Indisputably, the Bench while deciding the case has not passed any order in respect of this prayer. In the circumstances of the case, we are satisfied that the grievance made by the petitioner is just and fair. There is a mistake which deserves to be rectified. We are, accordingly, of the opinion that the prayer of the petitioner for passing a specific order with regard to the validity of the order dated January 14, 1992, deserves to be allowed. Accordingly, we hold that the present petition for review of the order passed by the Full Bench is competent.

Re. (ii)

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(11) According to Mr. Chawla, the printing of lottery tickets is not merely a simple process of printing of slips of paper. It involves a sophisticated and technical process, expertise and a high degree of confidentiality. It, thus, amounts to the execution of a 'works contract'. Mr. Sibal disputes this.

It is the admitted position that the petitioner had entered into contracts with various State Governments or licenced agents for the printing of lottery tickets. The paper was either supplied by the customer or by the petitioner. According to the petitioner, one of the main features of the contract is maintenance of strict security and confidentiality. It involves a highly sophisticated and technical process. The petitioner prepares a live or ammonia proof of the ticket to be printed. After its approval by the customer, a chromoline proof with camera work, planning and scanner, is prepared. Thereafter, a processed plate is prepared and the tickets are printed. The defective tickets are destroyed under the supervision of the customer. They are numbered and thoroughly checked by the checkers. These are then bound, sticked and cut to the size as per the requirement of the order placed by the customer. The printed tickets are then sent under the security arrangements to the Director of the State Lottery. The customers are not separately billed for the cost of material, and the labour. A consolidated bill including charges for processing, plate making, printing, numbering and binding including the cost of paper, is submitted to the customer. These averments have not been denied by filing a written statement. Furthermore, a copy of one of the order placed on the petitioner by the Directorate of State Lotteries, Himachal Pradesh, has been produced as Annexure P-12. A perusal thereof shows that the numbering of tickets for each draw in different series was separately specified. The tickets had to be printed with counterfoils and numbered at two places in different types. It was stipulated that "Micro lettering 'Himachal Pradesh State Lottery' should be clearly printed on the tickets". The size of tickets was specified. Key to the digits was required to be given on the back of the tickets. The emblem of the State of Himachal Pradesh had to be superimposed in such a way that half of it appeared on the tickets and the other half on the counterfoil. The emblem of a smaller size had to be superimposed on the top of the ticket in the centre. The lottery ticket was to have four colours. Three of these were required to be on the front of the tickets and one on the back. The material for printing on reverse of the lottery tickets was to be supplied by the customer. The specimen signatures

of Mr. Avay Shukla, Director, Himachal Pradesh State Lotteries were required to be printed on the tickets. The art work was to be supplied by M/s Anu Agency, New Delhi. The proof of the art work had to be got approved from the Deputy Director. The printing material had to be supplied by the specified dates. Do these facts constitute the execution of a 'works contract' ?

(12) When stationery is printed and sold as such, the transaction would amount to sale of goods. However, where the end product is not a commercial commodity and cannot be sold as such to anyone or everyone in the market by the printer, the transaction would not normally amount to sale of goods but would be execution of a works contract. The printing of currency notes at Nasik, of cheque books for a Bank, questions papers for a University is not the same thing as printing of letterheads or account books etc. Undoubtedly, paper and ink for necessary inputs in both cases. Still the former would be execution of a works contract while the latter would be sale of goods. The use of paper and ink are only incidental in case of a works contract. The printing of lottery tickets also involves not only skill and expertise but also confidentiality and security. Every printer may not be able to do the job.

(13) The rule in this behalf was initially enunciated by the Supreme Court in *Government of Andhara Pradesh v. Guntur Tobaccos* (4). The matter was again elaborately considered in *State of Tamil Nadu v. Anadam Viswanathan* (5). The question that arose in this case was whether the charges for printing of question papers could be included in the assessable turnover of the assessee. On behalf of the assessee, it was pleaded that the contract was for work and labour and that she was not liable to pay sales tax thereon. The Government's stand was that the contract was for the sale of printed material to the respective educational Institutions. The questions that their Lordships posed were—".....Would printing question papers and incidentally supplying the papers upon which such questions were printed entail the entire cost to be liable to sales tax ? As was put before us, the question is, can one sell printed question papers and charge for the same ?" After reviewing the case, their Lordships were pleased to hold as under :—

"The primary difference between a contract for work or service and a contract for sale is that in the former there is in the

(4) 16 STC 240.

(5) 73 S.T.C. 1.

person performing or rendering service, no property in the thing produced as a whole, notwithstanding that a part or even the whole of the material used by him may have been his property. Where the finished product supplied to a particular customer is not a commercial commodity in the sense that it cannot be sold in the market to any other person, the transaction is only a works contract. See the observations in Court Press Job Branch, *Salem v. State of Tamil Nadu* (1983) 54 STC 382 (Mad.) and *Commissioner of Sales Tax v. Raina Fine Arts Printing Press* (1984) 56 STC 77 (M.P.).

In our opinion, in each case the nature of the contract and the transaction must be found out. And this is possible only when the intention of the parties is found out. The fact that in the execution of a contract for work some materials are used and the property in the goods so used, passes to the other party, the contractor undertaking to do the work will not necessarily be deemed, on that account, to sell the materials. Whether or not and which part of the job-work relates to that depends, as mentioned hereinbefore, on the nature of the transaction. A contract for work in the execution of which goods are used may take any one of the three forms as mentioned by this Court in *Government of Andhra Pradesh v. Guntur Tobaccos* (1965) 16 STC 240.

In our opinion, the contract in this case is one, having regard to the nature of the job to be done and the confidence reposed, for work to be done for remuneration and supply of paper was just incidental. Hence, the entire price for the printed question papers would have been entitled to be excluded from the taxable turnover, but since in the instant case the demand notes prepared by the assessee showed the costs of paper separately, it appears that it has treated the supply of paper separately. Except the materials supplied on the basis of such contract, the contract will continue to be a contract for work and labour and no liability to sales tax would arise in respect thereof. The High Court was, therefore, right in the view it took in Civil Appeal Nos. 2346-47 of 1978."

(14) Thus, one of the tests is—Can the product be sold to any person in the market or has it to be supplied to the particular customer? If it cannot be sold in the market and has to be supplied to a particular customer, the transaction can normally be described as execution of a works contract. In such a case, the supply of material is just incidental. Similar appears to be the position in the present case. The petitioner could not have sold the lottery tickets in the market to any person. These had to be supplied to the customer. These involved not only expertise but also confidentiality. The supply of paper and ink in the circumstances of this case was only incidental. As a result, the amount charged by the petitioner for the printing of lottery tickets from different customers could not be included in the taxable turnover. It is undoubtedly true that in *Viswanalathan's* case (supra), the cost of paper was included in the taxable turnover but this was only on account of the fact that “the demand notice prepared by the assessee showed the cost of paper separately.....” Such is not the position in the present case.

(15) There is another aspect of the matter. A perusal of the order of assessment shows that the authority itself has proceeded on the basis that the petitioner was executing a works contract and has levied tax “on the value of goods transferred in execution of a works contract.” This being so, the respondents cannot be allowed to approbate and reprobate. They cannot be heard to say that the petitioner had not executed a works contract.

(16) Accordingly, the second question is answered in the affirmative and it is held that the printing of lottery tickets amounts to execution of a works contract.

Re. (iii)

(17) Under Entry 54 in List II, the State Legislature is competent to provide for the levy of “taxes on the sale or purchase of goods.” The taxing event is the sale or purchase of goods. However, when the sale or purchase takes place in the course of inter-state trade and commerce, the power to levy taxes vests exclusively in the Parliament. The State Legislature has no competence to provide for the levy of a tax in such a case even though a sale or purchase of goods may be there. Pursuant to the decision in *Gannon Dunkerley's* case (supra), no tax could be levied in case of goods used in the execution of a works contract. This was so because the execution of a works contract did not amount to sale or purchase of goods. It was in order to overcome this handicap that the 46th amendment was made in

the Constitution and it was specifically provided that tax on the sale or purchase of goods shall include a tax on the transfer of property in goods involved in the execution of a works contract. Resultantly, a fiction can be introduced by Legislation that the goods involved in the execution of a works contract have been sold or purchased. However, the limitation on the competence of the State Legislature in respect of even a fictional sale which takes place in the course of inter-state trade and commerce, subsists. As such the State Legislature is not competent to provide for the levy of tax on such a fictional sale when it takes place in the course of inter-state trade and commerce.

(18) When the petitioner prints lottery tickets, in pursuance to a contract with the State of Haryana, the provisions of the Haryana General Sales Tax Act in so far as these provide for the levy of sales tax on the inputs involved in the execution of a works contract, shall be application. However, when the petitioner prints the lottery tickets at the asking of a State other than Haryana, the position is different. The provisions of the Central Sales Tax Act have not been amended. The fiction of a deemed sale has not been introduced. As a result, the goods involved in the execution of the works contract cannot be said to have been fictionally sold. The question of levy of tax on the inputs under the State Act or the Central Act would not arise.

(19) Mr. Sibal submits that in view of the 46th amendment, it was not necessary for the Parliament to amend the Central Act. We cannot accept this contention. The 46th amendment only embodies a wider definition of sale. It only introduces a fiction and enables the Legislature to make law on that basis. It does not *ipso facto* amend the provisions of the Act. Since the Parliament has not amended the Central Act, there is no fictional sale and as such, no tax can be levied.

(20) Accordingly, the third question is answered in the negative.

CONCLUSION :

In view of the above, we hold and order that :—

- (1) In the facts and circumstances of these cases, the printing of lottery tickets amount to execution of a 'works contract'.

- (ii) The State of Haryana is not competent to levy sales tax on the transfer of property in goods involved in the execution of a 'works contract' in a case where the order for printing of lottery tickets has been placed by another State, and there is movement of the end product in the course of inter-state trade and commerce.
- (iii) Clause 29-A which was added in Article 366 by the 46th Amendment of the Constitution only embodies an enabling provision. It does not, however, ipso facto authorise the State Legislature to levy taxes on the sale or purchase of goods where such sale or purchase takes place in the course of inter-state trade and commerce. The power in this behalf vests exclusively in the Parliament and unless the provisions of the Central Sales Tax Act, 1956 are amended, the fiction introduced under the State Act by the Haryana Legislature would not permit the levy of sales tax.
- (iv) Review Application No. 147 of 1993 filed by the petitioner is allowed. The order of assessment dated January 14, 1992, a copy of which has been appended as Annexure P-1 with CWP No. 337 of 1992, is set aside.
- (v) Review application No. 205 of 1993 filed by the State of Haryana is dismissed.
- (vi) Civil Writ Petitions Nos. 14757-14758 of 1993 and 4502 of 1995 are allowed. The orders of assessment impugned in CWPs Nos. 14757 of 1993 and 4502 of 1995 are set aside.
- (vii) The cases are remitted to the assessing authority for a fresh decision in accordance with law and the conclusion recorded above.
- (21) In the circumstances of these cases, we make no order as to costs.

J.S.T.

Before Hon'ble S. S. Grewal, J.

DIAL SINGH.—Petitioner.

versus

STATE OF PUNJAB.—Respondent.

Crl. R. No. 747 of 1993

6th December, 1993

Juvenile Justice Act, 1986—One of the accused claiming separate trial under Juvenile Act—Power of Sessions Judge to decide the question.