

### **Payment of High rental would not mean transfer of property is involved**

The Hon'ble Kerala High Court in the case of *Prodair Air products India Pvt. Ltd. v. State of Kerala [W.A. No. 374 of 2021 dated April 3, 2023]* held that payment of fixed cost under a contract would not mean that the contract is of transfer of property.

#### **Facts:**

M/s. Prodair Air Products India Pvt. Ltd. ("**the Appellant**") is engaged in the production and sale of industrial gases such as Hydrogen and Nitrogen. The Appellant entered into a contract with the Bharat Petroleum Corporation Limited ("**BPCL**") to Build, Own, Operate ("**BOO**") and maintain a hydrogen and nitrogen production plant own its cost, at BPCL's site on lease basis. As per agreement the Appellant would raise separate invoices for fixed charges and variable charges. The fixed charges comprises amount towards return on investment of BOO operator, component related to wholesale price index for manufactured gases and towards manpower cost whereas variable cost towards supply of gases based on the actual reading.

Moreover, the agreement contained a clause that BPCL has an option to take over the production plant if the agreement is not renewed upon completion of term of 15 years from the date of commencement of the supply of gases to BPCL. However, the agreement envisaged that the production plant would be the property of the appellant during the term of the agreement.

A show cause notice ("**SCN**") was issued by the Revenue Department ("**the Respondent**") for the assessment years 2016-17 and 2017-18 alleging the agreement entered into between the Appellant and BPCL is of transfer of property in the gas manufacturing plant and not of supplying gases. Accordingly, the Appellant would be liable to pay tax @ 14% applicable to works contracts (as against 5% applicable to supply of gases) under the Karnataka Value Added Tax Act ("**the KVAT Act**").

Later, the order was passed by the Intelligence Officer imposing penalty on the Appellant under the KVAT Act.

Aggrieved by the order of the Respondent the Appellant filed a writ petition before the Kerela High Court [*W.P(C).No.18443/2020 dated October, 23,2020*] which was dismissed by the single bench of the same High Court.

The Appellant preferred to file writ appeal before the Kerela High Court W.A.No.374 of 2021, against the disposed writ petition(ibid).

**Issue:**

Whether the fixed consideration under a BOO contract would be constituted as deferred payment for transfer of property?

**Held:**

The Hon'ble Kerela High Court in **W.A. No. 374 of 2021** held as under:

- Observed that, since the ownership of the gas plant continued with the Appellant for the term agreed in contract or till the BPCL exercised its option to take over the plant as per terms of the agreement by paying the fair value to the Appellant.

Merely the fact that the portion of the investment in plant and machinery is being recovered by the Appellant as fixed component of the gas price would not mean that transfer of the property is involved.

- Hel that, Respondent has erred in treating the recovery of a portion of the investment in plant and machinery, the fixed component of the price of the gas supplied as payment of transfer of property and since the taxable event under the KVAT Act is transfer of the property which is not present in the instant case. Thus, assumption of the Respondent that fixed payment to Appellant is taxable event was wrong.

- Accordingly, the petition was allowed by setting aside the impugned judgment of the Single Judge and also setting aside the penalty orders for assessment years 2016-17 and 2017-18.

*(Author can be reached at [info@a2ztaxcorp.com](mailto:info@a2ztaxcorp.com))*

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