

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.09.2016

Date of Reserving the Order	Date of Pronouncing the Order
02.09.2016	12 .09.2016

Coram

THE HON'BLE MR.JUSTICE T.S. SIVAGNANAM

W.P.No.28067 to 28069 of 2015

M.P.Nos.1 to 1 of 2015

M/s.VBHC Chennai Value Homes Private Ltd.,
Rep., by its Assistant Vice-President (Finance),
Sandeep Santoki
205, Valayakkaranai Village,
Oragadam - 603 204.
Sriperumbudur Taluk,
Kancheepuram District. ... Petitioner in all W.Ps.

Vs

The Assistant Commissioner (CT)
Orgadam Assessment Circle,
3/177, 2nd Floor, Bazaar Street,
Hajiyar Nagar,
Padappai - 601 301. ... Respondent in all W.Ps.

Common Prayer : These Writ Petitions are filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus, to call for the records of the respondent in TIN No.33090889241/2013-14, TIN No.33090889241/2012-13 and TIN No.33090889241/2011-12 respectively and quash the order dated 31.07.2015, passed therein and further direct the respondent herein to complete the assessment for the assessment years 2011-12, 2012-13 and 2013-14 along with the assessment for the assessment year 2014-15.

For petitioner : Mr.N.Venkataraman Senior Counsel
for Mr.L.Murali Krishanan

For Respondents : Mrs.S.Kanmani Annamalai
Additional Government Pleader

COMMON ORDER

The petitioner, in all these Writ Petition, is one and the same and the challenge is to the orders of assessment under the Tamil Nadu Value Added Tax Act, 2006, (TNVAT Act), for the years 2013-14, 2012-13 and 2011-12 respectively. Since common issues arise for consideration, I have heard all the Writ Petitions together and they are disposed of by this common order.

2. Heard Mr.N.Venkataraman learned Senior Counsel appearing for Mrs.L.Murali Krishanan, learned counsel for the petitioner and Mr.S.Kanmani Annamalai, learned Additional Government Pleader appearing for the respondent.

3. The petitioner is a private limited company, incorporated under the provisions of Indian Companies Act and engaged in the business of promotion and construction of flats. The impugned assessment orders pertaining to a project conceived and developed by the petitioner called "VBHC Oragadam", in which the petitioner proposed to construct 148 flats. The petitioner is stated to have entered into a Joint Development Agreement with the owner of the land and the construction commenced in January 2012, after obtaining necessary approvals. The manner in which the petitioner transacts business, has been set out in paragraph 3 of the affidavit filed in support of the Writ Petition, stating that when a proposed purchaser intends to purchase a flat, he enters into a construction agreement with the petitioner and the petitioner executes a sale deed for sale of undivided portion of the land and the sale is duly registered. The petitioner deducts the land cost and reports the construction cost as total turnover in its VAT returns as well as the service tax returns.

4. So far as the payment of tax under TNVAT Act, the petitioner claims deduction on 30% of the total turnover in terms of Rule 8(5)(d) of the TNVAT Rules and pays tax at appropriate rate on the balance turnover after availing Input Tax Credit of the tax paid on the purchases. The petitioner is stated to have paid Service Tax on the labour portion of the contract. The petitioner completed the construction during March 2014, however at that time, 50% of the flats remained unsold. The petitioner would state that after completion of the construction, more particularly, after receipt of the completion certificate, the petitioner cannot enter into construction agreements for the sale of unsold flats and therefore, the unsold flats have to be sold as "immovable property" and such sale cannot be subjected to levy of sales tax, since at the relevant time, 50% of the flats remained unsold. Therefore, in

the monthly return for October 2014, the petitioner reversed 50% of the Input Tax Credit availed by it in respect of purchases made for the project in the earlier years. During the period of construction between 2012 to 2014, the petitioner purchased goods locally from registered dealers on payment of tax and has claimed Input Tax Credit over the said period and has been utilising the same, for payment of output tax. While so, a VAT audit was conducted, in which certain defects were pointed out which paved way for issuance of a pre-revision notice dated 20.04.2015.

5. The learned Senior counsel appearing for the petitioner pointed out that totally there are eight issues, which are common for all the three assessment years, which are as follows:-

- 1) Reversal of ITC for non-filing of "C" forms;
- 2) Reversal of ITC under Section 19(2)(v);
- 3) ITC on purchases in returns without purchase;
- 4) ITC availed ineligibly on interstate purchases;
- 5) ITC reversal on purchases from RC cancelled dealers;
- 6) Sale of fixed assets;
- 7) Deemed sale value; and
- 8) Cross verification;

It is submitted by the learned Senior counsel that sofar as the issue Nos.1 to 6 are concerned, all liabilities have been discharged and the petitioner does not raise any contention in this regard in these Writ Petitions. It is submitted that only three remaining issues to be considered in all these Writ Petitions are pertaining to the tax computed on the deemed sale value of the goods involved in the execution of works contract by adding transport charges and gross profit to the purchase turnover reported in the monthly returns with an allegation that there was a short fall in payment of tax by the petitioner.

6. The second issue to be considered is with regard to the reversal of Input Tax Credit by cross verification of the purchases reported by the petitioner with annexure-1 of the selling dealer, wherein it is alleged that they have reported lesser turnover and the proposal is to reverse Input Tax Credit in respect of the differential turnover. Sofar as the third issue pertaining to computation of the deemed sale value, the learned Senior counsel has drawn the attention of this Court to the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of Gannon Dunkerley & Co., vs. State of Rajasthan reported in (1993) 88 STC 204. The learned counsel by referring to the said decision submitted that the taxable event is the transfer of property in goods involved in the execution of the works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the

levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. It is submitted that when 50% of the flats remained unsold on the date when the completion certificate was issued by the competent authority any further sale beyond the said date, would amounts to sale of immovable property and the same is not liable to tax under TNVAT Act. Therefore, it is contended that the respondent erroneously computed the taxable turnover without reference to the provision of Rule 8(5) of the TNVAT Rules, which would require that the taxable turnover in respect of transfer of property in goods involved in the execution of works contract has to be computed.

7. Further, it is submitted that the provisions of Section 3-B of the Tamil Nadu General Sales Tax Act, 1959, with necessary modifications relating to second sale exemptions have been enshrined in Rule 8(5) of the TNVAT Rules and the respondent is bound to compute the taxable turnover for the purpose of levy of tax under Section 5 of the TNVAT Act and adhere to provisions of Rule 8(5). The learned Senior counsel referred to the decision in the case of State of Andhra Pradesh & Ors., vs. Larsen & Turbo Ltd & Ors., reported in [2008] 17 VST 1 (SC) and pointed out that one of the questions which was decided in the said judgment was whether the turnover of the sub-contractor is to be added to the turnover of L&T. In other words, the question is whether goods employed by the sub-contractor occur in the form of single deemed sale or multiple deemed sale. Referring to the decision of the Constitution Bench in the case of Builders' Association of India and others v. Union of India and others reported in [(1989) 73 STC 370], wherein it was held as follows:-

"Ordinarily unless there is a contract to the contrary in the case of works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building"

8. By referring to the above passage, it is submitted that in case of works contract, the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed when the goods or material used or incorporated in the building. It is submitted that this concept was lost sight of by the Assessing Officer while completing the assessment. Referring to the decisions in the case of Sri Vinayaga Agencies vs. Assistant Commissioner (CT), Vadapalani-I Assessment Circle & Anr., reported in [2013] 60 VST 283, and Althaf Shoes (P) Ltd., vs. Assistant

Commissioner (CT), Valluvarkottam Assessment Circle, Chennai reported in [2012] 50 vst 179 (Mad), it is submitted that the purchasing dealer cannot be mulcted with the liability on account of a fault committed by the selling dealer. Therefore, it is submitted that finding rendered by the Assessing Officer in the impugned orders of assessment under the said three issues are erroneous.

9. The learned Additional Government Pleader submitted that during the course of VAT Audit on the place of business of the petitioner, the following defects were noticed:-

- (i) Tax liability on deemed sale value in works contract for the years 2011-12 to 2014-15;
- (ii) Input Tax Credit Reversal on cross verification of buyer and seller as per Annexure-I of buyer and Annexure-II of sellers for the year 2011-12 to 2013-14;
- (iii) Levy of tax on sale of assets for the years 2012-13 and 2013-14;
- (iv) Reversal of Input Tax Credit on interstate sales without "C" Forms; and
- (v) Penalty under Section 27(3) and 27(4) of the Act on suppression and escapement of turnover.

10. It is submitted that opportunity was granted to the petitioner to submit their objections and the Assessing Officer has correctly estimated the deemed sale value involved in the works contract by adding gross profit and freight. Relying upon the decision in the case of Kamatchi Laminations vs. State of Tamil Nadu reported in 95 STC 378, it is submitted that the profits which are relatable to the supply of materials can be included in the value of the goods and profits which are relatable to supply of labour and service to be excluded. Therefore, it is submitted that the contention of the dealer, the taxes leviable only on the purchase turnover in respect of goods involved in the works contract, has no rational basis. Further, it is contended that the petitioner has not proved that they have paid tax for availing the Input Tax Credit from the selling dealer and no documentary evidence has been produced for sufferance of sales tax on the purchase by the assessee. It is further submitted that when the contract is indivisible one, the method adopted by the petitioner by arriving at the contract value less 30% towards labour and services is incorrect. With regard to the mismatch, it is submitted that if the purchases made by the petitioner is from genuine dealers and the amount has been paid to the sellers, it would have been reflected in the seller's Annexure-II. Further, it is submitted that the petitioner without availing the statutory remedy available under the TNVAT Act, has filed these Writ Petitions raising all

factual issues. Further, it is submitted that the petitioner has followed a different procedure other than the procedure to be followed while opting to pay tax under Section 5 of the TNVAT Act, which is only with an object of evading the tax and adjusting the entire liability from the Input Tax Credit. The petitioner has not given any details as to how many flats were sold, but reversed Input Tax Credit on 50% unsold flats stating that 50% of the flats alone have been sold. Therefore, it is submitted that if the petitioner is aggrieved, they should be directed to avail the statutory remedy available under the Act.

11. I have elaborately heard the learned Senior counsel appearing for the petitioner and learned Additional Government Pleader appearing for the respondent.

12. As pointed out by the learned Senior counsel for the petitioner, though several defects were pointed out in the pre-revision notice, dated 20.04.2015, the petitioner would contest only three of the issues pertaining to deemed sale value, cross verification and pertaining to the sale of fixed assets, as it is stated that the liability under the other issues have been discharged. This statement is taken on record. It is seen that to the pre-revision notice issued to the petitioner, an elaborate reply has been given, apart from submitting additional written submissions at the time of personal hearing. The Assessing Officer has referred to the contentions raised by the petitioner in their objections taken note of the decisions referred to by them and proposed to discuss all the issues in seriatim.

13. The endeavour of the learned Senior counsel for the petitioner is to convince this Court that the computation of the deemed sale value as done by the Assessing Officer in contra distinction with the procedure adopted by the petitioner is erroneous. The case of the petitioner itself is that the entire construction has been completed and the completion certificate has been issued by the Planning Authority, yet on the date of issuance of such completion certificate, 50% of the flats remained unsold. Therefore, it is their case that so far as the transfer of those 50% of the flats, the petitioner cannot enter into a construction agreement, as the construction is already over and what is being sold, is an immovable property and not liable to tax.

14. Thus, the factual issue is as to how many number of flats have been sold, and what remained unsold on the date of issuance of completion certificate, whether the procedure adopted by the petitioner for the purpose of availing the Input Tax Credit was justifiable, whether it confirms to the procedure

under Section 5 or whether there is an infraction of Rule 8(5) etc.

15. The legal position with regard to works contract has been decided by the Hon'ble Supreme Court in two of the decisions referred to by the learned Senior counsel namely, in the cases of Gannon Dunkerley & Co., (supra), and Larsen & Tourbo Ltd & Ors.(supra). However, to apply these decisions, it is essential that a thorough factual exercise has to be done. The transactions appear to be complicated and there are several transactions, especially when the project consist of 148 flats, which is stated to have been completed and completion certificate was issued during March 2014. These complicated factual issues has to be adjudicated bearing in mind the legal principle enunciated in the aforementioned judgment. However to adjudicate the factual issues, the petitioner should first furnish adequate information. The mere statement that 50% of the flats remained unsold on the date of issuance of the completion certificate may not be sufficient for the Assessing Authority to examine the controversy by applying the legal principle enunciated in the cases of Gannon Dunkerley & Co., (supra), and Larsen & Tourbo Ltd & Ors.(supra). Recently the Hon'ble Supreme Court in the case of Smt.B.Narasamma vs. Deputy Commissioner Commercial Taxes Karnataka & Anr., reported in 2016 (7) Scale 685, considered the aforementioned decisions in a batch of appeals arising out of a judgment of the High Court of Karnataka. The question which was considered by the Hon'ble Supreme Court was whether iron and steel reinforcements of cement concrete that are used in buildings lose their character as iron and steel at the point of taxability, that is, at the point of accretion in a works contract. Though, the appeals concerned regarding the rate of taxability of the declared goods, that is, goods declared to be of special importance under Section 14 of the Central Sales Tax Act, 1996, the Hon'ble Supreme Court referred to the above mentioned judgments, more particularly, with regard to the point of accretion in a works contract and the following paragraphs would be relevant:-

13. Having heard learned counsel for the parties, we are of the opinion that Shri N. Venkatraman is right. The matter is no longer res integra. Two important propositions emerge on a conjoint reading of Builders Association and M/s. Gannon Dunkerley (supra). First, that works contracts that are liable to be taxed after the 46th Constitution Amendment are subject to the drill of Article 286(3) read with Section 15 of the Central Sales Tax Act, namely, that they are chargeable at a single

point and at a rate not exceeding 4% at the relevant time. Further, the point at which these iron and steel products are taxable is the point of accretion, that is, the point of incorporation into the building or structure. 14. The relevant paragraphs from these two decisions, therefore, need to be set out. In Builders Association (supra), this Court held: "We are of the view that all transfers, deliveries and supplies of goods referred to in clauses (a) to (f) of clause (29-A) of Article 366 of the Constitution are subject to the restrictions and conditions mentioned in clause (1), clause (2) and sub-clause (a) of clause (3) of Article 286 of the Constitution and the transfers and deliveries that take place under sub-clauses (b), (c) and (d) of clause (29-A) of Article 366 of the Constitution are subject to an additional restriction mentioned in sub-clause (b) of Article 286(3) of the Constitution. [para 32] In Benjamin's Sale of Goods (3rd Edn.) in para 43 at p. 36 it is stated thus:

"Chattel to be affixed to land or another chattel.—Where work is to be done on the land of the employer or on a chattel belonging to him, which involves the use or affixing of materials belonging to the person employed, the contract will ordinarily be one for work and materials, the property in the latter passing to the employer by accession and not under any contract of sale. Sometimes, however, there may instead be a sale of an article with an additional and subsidiary agreement to affix it. The property then passes before the article is affixed, by virtue of the contract of sale itself or an appropriation made under it." In view of the foregoing statements with regard to the passing of the property in goods which are involved in works contract and the legal fiction created by clause (29-A) of Article 366 of the Constitution it is difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution

of the works contract, but a conglomerate, that is the entire building that is actually constructed. After the 46th Amendment it is not possible to accede to the plea of the States that what is transferred in a works contract is the right in the immovable property.

The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials.

We are surprised at the attitude of the States which have put forward the plea that on the passing of the 46th Amendment the Constitution had conferred on the States a larger freedom than what they had before in regard to their power to levy sales tax under entry 54 of the State List. The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that sub-clause (b) of Article 366(29-A) should be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under clause (29-A) of Article 366 is to be found only in entry 54 and not outside it. We may recapitulate here the observations of the Constitution Bench in the case of Bengal Immunity Company Ltd. [AIR 1955 SC 661 : (1955) 2 SCR 603 : (1955) 6 STC 446] in which this Court has held that the operative provisions of the several parts of Article 286 which imposes restrictions on the levy of sales tax by the States are intended to deal with different topics and one could not be projected or read into another and each one of them has to be obeyed while any sale or purchase is taxed under entry 54 of the State List.

We, therefore, declare that sales tax laws passed by the legislatures of States levying taxes on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract are subject to the restrictions and conditions mentioned in each clause or sub-clause of Article 286 of the Constitution. We, however, make it clear that the cases argued before and considered by us relate to one specie of the generic concept of "works contracts". The case-book is full of the illustrations of the infinite variety of the manifestation of "works contracts". Whatever might be the situational differences of individual cases, the constitutional limitations on the taxing power of the State as are applicable to "works contracts" represented by "building contracts" in the context of the expanded concept of "tax on the sale or purchase of goods" as constitutionally defined under Article 366 (29-A), would equally apply to other species of "works contracts" with the requisite situational modifications." (Paras 38-41) In M/s. Gannon Dunkerley (supra), this Court held: "Apart from the limitations referred to above which curtail the ambit of the legislative competence of the State Legislatures, there is clause (3) of Article 286 which enables Parliament to make a law placing restrictions and conditions on the exercise of the legislative power of the State under Entry 54 in State List in regard to the system of levy, rates and other incidents of tax. Such a law may be in relation to (a) goods declared by Parliament by law to be of special importance in inter-State trade or commerce, or (b) to taxes of the nature referred to in sub-clauses (b), (c) and (d) of clause (29-A) of Article 366. When such a law is enacted by Parliament the legislative power of the States under Entry 54 in State List has to be exercised subject to the restrictions and conditions specified in that law. In exercise of the power conferred by Article 286(3) (a) Parliament has enacted Sections 14 and 15 of the Central Sales Tax Act, 1956.

No law has, however, been made by Parliament in exercise of its power under Article 286(3) (b) .

For the same reasons Sections 14 and 15 of the Central Sales Tax Act would also be applicable to the deemed sales resulting from transfer of property in goods involved in the execution of a works contract and the legislative power under Entry 54 in State List will have to be exercised subject to the restrictions and conditions prescribed in the said provisions in respect of goods that have been declared to be of special importance in inter-State trade or commerce.

So also it is not permissible for the State Legislature to impose a tax on goods declared to be of special importance in inter-State trade or commerce under Section 14 of the Central Sales Tax Act except in accordance with the restrictions and conditions contained in Section 15 of the Central Sales Tax Act.

Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. We are also unable to accept the contention urged on behalf of the States that in addition to the value of the goods involved in the execution of the works contract the cost of incorporation of the goods in the works can be included in the measure for levy of tax. Incorporation of the goods in the works forms part of the contract relating to work and labour which is distinct from the contract for transfer of property in goods and, therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by Article 366(29-A) (b) .

16. Similarly, with regard to the mismatch, the petitioner can very well establish through records, regarding the payment of sale price etc., and without furnishing specific details with regard to the transactions, the petitioner cannot say that the selling dealer alone has to be proceeded against. The initial burden of proof is on the petitioner and if he discharges the burden to the satisfaction of the Assessing Officer, then only the burden of proof shifts, so at the very threshold, this Court cannot be called upon to apply the decisions in the case of Sri Vinayaga Agencies (supra) and Althaf Shoes (P) Ltd., (supra), without there being a basic factual exercise done in the matter. Therefore, to decide this issue also, the petitioner has to necessarily place additional facts. Similarly, with regard to the sale of fixed assets, wherein the petitioner's contention is that the Assessing Officer was wrong in construing the deletion of assets in the balance sheet, as sale of assets by the petitioner and ignored the FIR and the insurance documents submitted by the petitioner in support of their case that the deletion of assets in the balance sheet was due to theft of assets. With regard to transfer of construction equipment to the petitioner's group company, resulting in deletion of assets in the balance sheet, the petitioner has reported the same in its monthly returns and stated that they have discharged the appropriate tax liability and only the amount that was paid during the personal hearing, has been considered. Therefore, this issue also requires to be reconsidered.

17. Hence for all the above reasons, the Writ Petitions are partly allowed and the findings rendered by the Assessing Officer in the impugned assessment orders, insofar as the three issues namely, issue pertaining to deemed sale value, issue arising out of cross verification and issue relating to sale of fixed assets, is remanded to the respondent for fresh consideration. The respondent is directed to afford an opportunity of personal hearing, take note of the law laid down by the Hon'ble Supreme Court in the aforementioned decisions and redo the assessment under the above three heads in accordance with law after perusing the documents which shall be produced by the petitioner. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

pbn

To

The Assistant Commissioner (CT)
Orgadam Assessment Circle,
3/177, 2nd Floor, Bazaar Street,
Hajiyar Nagar,
Padappai - 601 301.

+lcc to Ms.Hema Muralikrishnan, Advocate, S.R.No.57758
+lcc to the Special Government Pleader(T), S.R.No.51876

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M.P.Nos.1 to 1 of 2015

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