

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 04-08-2016

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

WRIT APPEAL No.679 of 2013

&

MP.1 of 2013

M/s.Greymoore International
Rep. by its Proprietor - John Cherian
No.13/1C, Brooke Bond Layout
Krishnasamy Mudaliar Road
Coimbatore - 641 002
Coimbatore District ...Appellant/Petitioner

-vs-

The Assistant Commissioner
(Commercial Taxes)
R.S.Puram East Assessment Circle
Coimbatore ...Respondent/Petitioner

Prayer: Writ Appeal filed under Clause 15 of the Letters Patent, against the order, dated 11.02.2013 in W.P.No.1364 of 2011. Writ petition filed under Article 226 of the constitution of India, praying for issuance of a Writ of Certiorari to call for the impugned proceedings of the respondent in TNGST No. 1941820/2004-05 dt 14.12.2010 quash the same as illegal and contrary to the Clarification issued by the Commissioner of Commercial Taxes in D. Dis. Acts Cell-II/56922/2000 dt 25.9.2000 and Lr. No. L. Dis. Acts Cell-IV/80171/2002 dt 22.1.2003 which is binding upon him as per Section 28-A(3) of the TNGST Act 1959 in so far as assessment year TNGST 2004-05 is concerned.

For appellant : Mr.C.Baktha Siromoni
For respondent : Mr.Kanmani Annamalai,
AGP (Taxes)

JUDGMENT

(Judgment of the Court was made by S.MANIKUMAR, J.)

Challenge in this appeal is to an order, made in W.P.No.1364/2011 dated 11.02.2013, by which, the writ court, declined to issue a Certiorari, and to quash the proceedings of the Assistant Commissioner (Commercial Taxes), Coimbatore dated 14.12.2010, as illegal and contrary to the

clarifications issued by the Commissioner of Commercial Taxes in D.Dis.Acts Cell-II/56922/2000, dated 25.9.2000 and Lr.No.L.Dis.Acts Cell-IV/80171/2002, dated 22.1.2003, binding upon him, as per Section 28-A(3) of the TNGST Act, 1959 insofar as assessment year TNGST 2004-2005 is concerned.

2. Facts as deduced from the material on record are that the appellant is a dealer registered under the erstwhile Tamil Nadu General Sales Tax Act, 1959, on the file of the respondent. The appellant is a contractor for windows and doors and mainly engaged in the nature of 'works contract', at the premises of their customers, and according to the specifications, provided by them. In the course of their regular business, the appellant purchased raw materials or other goods in the nature of Aluminium channels, mainly used in Aluminium partition works or erection of Aluminium doors, at the place of the customers situated, inside the State of Tamil Nadu. Goods purchased from local dealers inside the State are done, as against Form XVII made on concessional levy, at the rate of 4% along with the surcharge due.

3. The appellant has further contended that from the year 2001 onwards, they have availed option of payment of tax at the compounded rate of 4% prescribed, under Section 7-C of the local Act, by addressing an option letter to the Assistant Commissioner (Commercial Taxes), Coimbatore/respondent. Hence, each year, the appellant has availed the concession under Section 7-C, the compounding provision.

4. For the Assessment year TNGST 2004-2005, the appellant has been originally assessed, on a total and taxable turnover of Rs.70,59,413/- after scrutiny of the originals of the works contract, the extent of execution and accordingly, payments are received, in relation to the contract executed. In the year 2004-2005, the appellant purchased Aluminium sections, used in Aluminium doors/window works to the tune of Rs.28,94,102/- against Form XVII document, thereby, availing the concessional rate of tax. Turnover reported by the assessee was also duly accepted by the respondent. Assessment was completed vide order dated 19.04.2006, and the appellant paid the tax, at the rate of 4%, under Section 7-C of the Tamil Nadu General Sales Tax Act, 1959.

5. When the matter stood thus, the Assistant Commissioner (Commercial Taxes), the respondent herein, proposed to revise the above completed assessment, by issuing a notice dated 18.11.2010, contending inter alia that the works carried on by the appellant, do not fall under the category of works contract, and that it was a mere sale of doors and windows and therefore, the benefit of assessment, under compounding provision Section 7-C of the Act, was not eligible, and that the activity of the appellant was an outright sale and therefore, the turnover is assessable under Section 3(2) of the then Tamil Nadu General Sales Tax Act. Supporting the

proposal, the respondent contended that the appellant had effected purchases of Aluminium sections, to the tune of Rs.28,94,102/- against Form XVII, which admittedly mean that the goods purchased under the cover of Form XVII was subjected to manufacturing activity, and so saying, proposed to levy tax on the entire turnover of Rs.70,59,413/- at the rate of 12% under Section 3(2) of the TNGST Act, 1959.

6. The proposal for revision has been objected to by the appellant vide letter dated 02.12.2010 inter alia contending that the doors/windows cannot be pre-fabricated, and fixed as such, at the customer site, and it involves, varying sizes in accordance with actual requirements, at the place of the customer. Further, it has been contended that both the customer and the appellant have been raising quotations/bills describing the nature of work carried out, as supplying, fabrication and fixing, at the site. The appellant has further contended that perusal of the work orders, would reveal the fact that the intention between the parties was to execute the works contract, based on the specification provided, and that it was not a ready made or a product that could be brought, under the definition of sale. It is also the contention of the appellant that they were also registered with the file of the Central Excise Department, as works contractors, and been regularly, paying service tax on the nature of activity carried on by them. Despite the above, the Assistant Commissioner (Commercial Taxes)/respondent, vide order dated 14.12.2010 has mulcted the appellant with tax liability, at the rate of 12%, on the entire turnover of Rs.70,59,413/- and fastened penalty, at the rate of 150%. Being aggrieved by the same, the appellant has filed W.P.No.1364/2011 for a Writ of Certiorari to quash the order dated 14.12.2010.

7. On the facts and circumstances, the writ court, has observed as here under:

"4. From the facts pleaded, it is seen that the petitioner-assessee is a dealer in aluminium doors, windows, etc. and they did not dispute that they fabricated and erected aluminium doors, windows, etc., as per the orders of the customers giving specifications, designs and size. In order to have a proper execution of the work thus granted, the petitioner-assessee took the raw materials to the site of customers and executed the work. It is no doubt true that in executing the work, the assessee had to expend on labour."

8. While addressing the issue that came up for consideration before the writ court as to, whether the contract is for a 'sale' or 'works contract', by observing that the above said issue is squarely covered by a decision of a Hon'ble Division Bench of this court in T.C.(R) No.1977 of 2006 dated 20.04.2012 and on the facts and circumstances of the present case, vide order dated 11.02.2013, the writ court, dismissed the writ petition.

9. Assailing the correctness of the order made in W.P.No.1364/2011 dated 11.02.2013, the instant writ appeal has been filed.

10. Explaining the nature of contract, Mr.C.Baktha Siromoni, learned counsel for the appellant submitted that the appellant has undertaken to do Aluminium partition work, performed at the site of the customers. Raw materials like, Aluminium and rods, section angles, glass, plywood and other hardware items were supplied at the site of the customers, where the contract has to be carried, and after taking measurements, the assessee had to execute the work, as per the specifications under the contract, Aluminium sections and channels were cut into required sizes, and joined with bolts and screws, and by using rubber beadings to make Aluminium doors and windows at the site, and partition works were done by the appellant.

11. Learned counsel for the appellant further submitted that the case of the appellant differs from the case of manufacturing iron shutters and subsequently, erected in another required place of the customer. He therefore submitted that only in the case of a contract of fixing iron shutters, the predominant element of 'sale' would be present, and whereas, the case of the appellant of entering into a works contract, for Aluminium partition works, the same cannot be compared with erection and installation of lifts, at the customers place, which is dealt with in State of Andhra Pradesh vs. Kone Elevators (India) Limited reported in (2005) 140 STC 22. He further submitted that section 7-C of the Tamil Nadu General Sales Act, 1959 provides a facility, for an assessee engaged in works contract, within the State of Tamil Nadu, to opt for payment, at a concessional rate of 4% on the entire works contract receipts, for the year and thus, the appellant has rightly filed the same for the assessment year 2004-2005 and that the original assessment was completed on 29.12.2004. However, after five years, and by change of opinion, the respondent has revised the assessment, under a different head, section 3(2) of the Tamil Nadu General Sales Tax Act, 1959, by levying tax, at the rate of 12%, as per first schedule of Part B of TNGST Act, on the entire works contract receipts of Rs.70,59,413/- for the Assessment year 2004-2005, which is erroneous.

12. Bringing it to the notice of the court that the principles of law decided in T.C.(R) No.1977/2006 dated 20.04.2012, rendered by this court and applied by the writ court, in declining the relief, prayed for by the appellant, for issuance of a writ of certiorari and to quash the order dated 14.12.2000 has been reversed, by the Hon'ble Supreme Court in Kone Elevator India Private Limited vs. State of Tamil Nadu reported in (2014) 7 SCC 1, Mr.C.Baktha Siromoni, learned counsel for the appellant submitted that inasmuch as the decision of the Hon'ble Division Bench, referred to above,

has been reversed, the appellant is entitled to a writ of certiorari, as prayed for.

13. Responding to the above, Mr.Kanmani Annamalai, learned Additional Government Pleader (Taxes), appearing for the respondent, fairly submitted that the dictum of this court in T.C.(R) No.1977/2006, has been reversed by the Hon'ble Apex Court but, requested this court, to remit the matter to the Assessing Officer.

14. Heard the learned counsel for the parties and perused the material on record.

15. Before adverting to the issues raised, let us have a cursory look at the relevant provisions of the TNGST Act, 1959 for the purpose of adjudication of the issues raised before us.

Section 3(2) - Subject to the provision of sub-section (1), in the case of goods mentioned in the First Schedule, the tax under this Act shall be payable by a dealer, at the rate and at the point specified therein on the turnover in each year relating to such goods:

Provided that all spare parts, components and accessories of such goods shall also be taxed at the same rate as that of the goods if such spare parts, components and accessories are not specifically enumerated in the First Schedule and made liable to tax under that Schedule:

Provided further that in the case of goods mentioned in the First Schedule which are taxable at the point of first sale, the tax under this Act shall be payable by the first or earliest of the successive dealers in the State who is liable to tax under this section.

Section 7-C. Payment of tax at compounded rates by (works contractors)- (1) Notwithstanding anything contained in section 3-B, every dealer referred to in item (vi) of clause (g) of section 2, May, at his option, instead of paying tax in accordance with section 3-B, pay, either on the total value of each works contract or on the total value of all works contract, executed by him in a year, tax calculated at the following rate, namely;-

- (i) Civil Works contract. Two percent of the total contract value of the civil works executed;
- (ii) All other works Contracts. Four percent of the total contract value of the works executed.

16. Perusal of the copies of the works contract dated 15.05.2004 and 28.05.2004 respectively, for the Assessment Year 2004-05 executed, in favour of the appellant shows that the works to be done, are fabrication, supplying and fixing of anodised Aluminium sections, as per the annexure to the contract, at the site. Perusal of the revised Assessment Order shows that the assessee, in reply to the notice dated 18.11.2010, has categorically replied that the activity to supply aluminium sections, hardware locks and beading etc, at different sites and fabrication of the same, to suit different sizes, at the site and that the doors and windows, cannot be said to be pre-fabricated. It is the further contention of the appellant that after the works contract was received, fabrication was done at the site, glasses and doors was fixed at the site and therefore, there is no question of any manufacturing activity or fabrication done, at any other place, except at the worksite, and in such circumstances, the activity would not fall under the purview of sale, nor there was any trading transaction. Going through the material on record, we are of the considered view that the explanation offered has not been considered, in proper perspective with reference to the meaning of the word 'sale' or 'works contract'.

17. Going through the material on record, it could be deduced that the Assessing Officer, has merely considered that there was purchase of raw material against Form XVII declaration, the assessee had fabricated goods and supplied the same, and therefore, it is a supply contract and not works contract. Decision in T.C.(R) No.1977/2006 dated 20.04.2012 has been rendered by a Hon'ble Division Bench of this court, on the basis of the decision of the Hon'ble Apex Court in State of Andhra Pradesh vs. Kone Elevators (India) Limited reported in (2005) 140 STC 22 and Apparels and Handloom Exporters Association and others vs. State of Tamil Nadu and others, reported in (2003) 129 STC 167. Now after considering a plethora of judgments, in the recent decision of the Hon'ble Apex Court in Kone Elevator India Private Limited vs. State of Tamil Nadu reported in (2014) 7 SCC 1 a Constitutional Bench of the Apex Court, has overruled the judgment in State of Andhra Pradesh vs. Kone Elevators (India) Limited reported in (2005) 140 STC 22. The said position has not been disputed, by Mr.Kanmani Annamalai, learned Additional Government Pleader.

18. As principles of law laid down in T.C.(R) No.1977 of 2006, by a Hon'ble Division Bench of this court, following State of Andhra Pradesh vs. Kone Elevator (India) Pvt. Ltd. has been reversed and upon perusal of the nature of contract work assigned to the appellant, we are satisfied that a single composite contract of fabrication, supplying and fixing, at the site has been executed between the parties, we are of the considered view that the judgment of the Hon'ble Apex Court in Kone Elevator India Private Limited vs. State of Tamil Nadu reported in (2014) 7 SCC 1 to the case on hand, squarely

applies, and in such circumstances, the order impugned before us, is liable to be set aside.

19. Though, Mr.Kanmani Annamalai, learned Additional Government Pleader prayed for a direction to remand the matter, for fresh assessment, on the facts and circumstances of the case, to consider the nature of the contract, we are not inclined to issue any such direction, as prayed for, as it would amount to resurrecting a matter, already decided by the Hon'ble Supreme Court. Under Article 141 of the Constitution of India, all the authorities, including the courts, are bound by the law declared. The Authorities under the erstwhile TNGST Act, 1959, are bound, by the law laid down.

In the light of the discussion and the decisions considered, the impugned order dated 11.02.2013 made in W.P.No.1364 of 2011 is set aside.writ appeal is allowed. The appellant is entitled to a writ of certiorari as prayed for. No cost.

Sd/-
Assistant Registrar(J)

//True Copy//

Sub Assistant Registrar

Asr

TO

The Assistant Commissioner (Commercial Taxes)
R.S. Puram East Assessment Circle, Coimbatore.

+ 1 cc to Mr.Special Government Pleader, Sr.44769

W.A.No.679 of 2013

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