IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.07.2016

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.Nos.14766 & 14767 of 2009
and
M.P.Nos.1 & 1 of 2009

W.P.No.14766/2009

M/s.Atlantis Engineering
Plot 27-A, Venkateswara Colony
Nehru Nagar, Kottivakkam
Chennai - 600 041. .. Petitioner

..Vs..

The Commercial Tax Officer
Thiruvanmiyur Assessment Circle
Chennai - 600 090. .. Respondent

Prayer

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, to call for the records of the respondent in TNGST.0922650/2004-05 and quash the orders dated 28.05.2009 made therein.

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For Petitioner
in both WP's : Mr.C.Baktha Siromoni

For Respondents
in both WP's : Mr.Manokaran Sundaram, A.G.P.,

COMMON ORDER

Heard Mr.Baktha Siromoni, learned counsel appearing for the petitioner and Mr.Manokaran Sundaram, learned Additional Government Pleader appearing for the respondents.

2.The petitioner who is a registered dealer on the file of the respondent under the erstwhile Tamil Nadu General Sales Tax Act, 1959 (TNGST Act) has filed this writ petition challenging the revised assessment orders passed by the respondent dated 28.05.2009 for the assessment year 2004-05 and 2005-06.

3.The case of the petitioner is that he is a works contractor and procure several items and install, erect, assemble and commission diesel generators on the site and on the platform provided by the customers. The petitioners return was accepted and assessment was completed by assessment order dated 15.06.2006. This assessment was made under Section 7-C of the Act, accepting the case of the petitioner that the nature of activity done by them is a works contract. Thus, the Assessing Officer was satisfied about the nature of the activity of the petitioner on the documents placed by the petitioner before the Assessing Officer.

4.While so, after about three years, the respondent issued notices dated 12.05.2009 stating that from the audit report for the year 2004-05, there was certain discrepancy in the declaration made and it shows that the petitioner themselves had declared that they had effected only sales of Generators with its acoustic enclosures and not manufactured any product or executed works contract and that the installation and commissioning are only incidental to the supply of Generators.

5.In view of the same, the respondent proposed to revise the assessment already made at 4% under Section 7-C of the Act and proposed to assess the turn over at 16%. Though such pre-assessment notice was issued to the petitioner, it appears that the petitioner did not file their objections which resulted in the assessment being framed exparte, which are impugned in the writ petition.

6.The learned counsel appearing for the petitioner submitted that the nature of work done by the petitioner is undoubtedly a works contract and in the decision of the Hon'ble Supreme Court in the case of Kone Elevator India Private Limited v. State of Tamil Nadu reported in (2014) 7 Supreme Court Cases 1, while holding that the view taken by the Supreme Court in the case of State of A.P. v. Kone Elevators (India) Ltd., reported in (2005) 3 Supreme Court Cases 389 is no longer a good law, pointed out that after the goods are assembled and installed with skill and labour at the site, it becomes a permanent fixture of the building and the involvement of technical skill and experience pertains to the precision in execution for rendering safe and satisfactory service and the obligation to maintain lift in safe and satisfactory working condition, which are integral to the supply and installation of the lift, it is not a chattel sold as chattel or a chattel being attached to another chattel and therefore, it would not be appropriate to term it as a contract for sale on the bedrock that the components are brought to the site and prepared for delivery.

7.After holding so, the Hon'ble Supreme Court quashed the show cause notices which were issued taking recourse to re-open the assessment. Therefore, it is submitted that the nature of activity should have been considered as a works contract and the question of re-opening or re-assessing the concluded assessment proceedings does not arise.

8.After elaborately hearing the parties and perusing the materials placed on record, before going into the question as to whether the decision of the Hon'ble Supreme Court in the case of Kone Elevators should be made applicable to the case on hand, it has to be seen under what basis the revision of assessment was proposed by the respondent. On a mere reading of the impugned order as well as the pre-assessment notice dated 12.05.2009, it is evidently clear that the respondent issued the notice not on his own volition but on account of an audit report. If that be the case, then it is a clear case of change of opinion which has resulted in the issuance of the revised assessment proceedings.

9.It is a well settled legal position that mere change of opinion cannot be a reason for reopening. This is sufficient to hold that the impugned order is unsustainable in law and therefore, the effect of the decision of the Hon'ble Supreme Court in the case of Kone Elevators on the facts of the present case are not gone into.

10.Accordingly, the writ petitions are allowed and the impugned orders are quashed. Consequently, connected miscellaneous petitions are closed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

The Commercial Tax Officer
Thiruvanmiyur Assessment Circle
Chennai - 600 090.

+1 cc to the Special Government Pleader taxes
High Court Madras sr 43241

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