IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.09.2016

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.33013 & 33014 of 2016

M.Gunasekaran,
S/o.Munusamy
No.38/49, Town Hall 3rd Street,
Arakkonam,
Vellore District. .. Petitioner in W.P.No.33013 of 2016

M/s.Janani & Co.,
rep by its Managing Partner
Mr.Gunasekaran C
No.38/49, Town Hall 3rd Street,
Arakkonam-631 001. .. Petitioner in W.P.No.33014 of 2016

Versus

1.The Divisional Railway Manager
Chennai Division,
Sourthern Railway,
Park Town,
Chennai-3.

2.The Commercial Tax Officer,
Egmore II Assessment Circle,
Egmore,
Chennai-600 031. .. Respondents in both the Writ Petitions

Prayer in W.P.No.33013 of 2016: Writ Petitions are filed under Article 226 of the Constitution of India, seeking for a Writ of Mandamus, directing the 1st respondent to refund VAT deducted at source in respect of C.A.No.211/West/MAS dated 20.06.2016 amounting to Rs.50998/-.

Prayer in W.P.No.33014 of 2016: Writ Petitions are filed under Article 226 of the Constitution of India, seeking for a Writ of Mandamus, directing the 1st respondent to refund VAT deducted at source in respect of C.A.No.63/Central/MAS dated 09.02.2016 amounting to Rs.49812/-.

For Petitioner in both Writ Petitions	:	Mr.G.Jeremiah
For R1 in both Writ Petitions	:	Mr.P.T.Ramkumar
For R2 in both Writ Petitions	:	Mr.K.Venkatesh Government Advocate (Taxes)

COMMON ORDER

Heard Mr.G.Jeremiah, learned counsel for the petitioner and Mr.P.T.Ramkumar, learned counsel, who accepts notice on behalf of the first respondent and Mr.K.Venkatesh, Government Advocate (Taxes), who accepts notice on behalf of second respondent and with the consent on either side, the writ petitions are taken up for final disposal.

2 In these writ petitions, the petitioner seeks for a direction upon the 1st respondent to refund the Value Added Tax collected at source in respect of two contracts awarded to them.

3 The petitioner's case is that they have been granted track maintenance work by the 1st respondent which is a labour contract and the question of deducting tax at source would not arise. This issue has arisen even as early as in the year 2002 and the competent officer, viz., the Additional Divisional Railway Manager of the Railways sent a communication dated 27.02.2002 addressed to the Commissioner of Sales Tax, Chennai, seeking the following clarification:-

> "....
> [b]The jurisdiction of Chennai division covers part of Tamil Nadu and Andhra Pradesh States [Villupuram to Chennai, Chennai to Gudur, Chennai to Jolarpettai and Chennai-Arakkonam-Renigunta]. When contracts are finalised in a section, the jurisdiction of execution often falls on both the States in a single contract. It may please be clarified how sales tax should be recovered from bills relating to works executed in the jurisdiction of two states.
>
> [c]In some of our major high value contracts relating to complete tract renewal etc., all the major supply items like sleepers, rails and other fastenings required to lay the tract are supplied by the railway and the scope of the contract is only physical laying of track using labour. In such contracts, the contractor is

required to use very small quantity of grease and other lubricants or required to do a little welding work. The value of these contractor supply items in these contracts is very small more often it is less than 1% of the contract value. The balance 99% or so constitutes only labour cost. It is not clear how sales tax recovery should be made from such contracts."

4 Pursuant to the same, the Commissioner of Sales Tax, Chennai, sent the clarification sought for by the Additional Divisional Railway Manager, vide letter dated 08.04.2002, which is to the following effect:-

Lr.No.Acts Cell 1/16090/2002 dated 08.04.2002

Sir,

Sub:Works contract-deduction of tax under section 7-F-TDS-certain clarification requested - Reg.

Ref:From the Additional Divisional Railway Manager, Southern Railway, Chennai-3, letter No.DO.W.55/MAS/Sales Tax dated 27.02.2002.

The Additional Divisional Railway Manager informed as follows:-

1. Sales Tax at the appropriate rate has to be deducted from the payments made to the works contractors after 10.06.99. The Work completed in full or part before or after 10.06.99 will attract TDS, if payment are made 10.06.99.
2. Sales Tax calculated on the notional value of works executed within the State of Tamil Nadu may be recovered.
3. Labour contracts are not liable to sales tax and hence, there is no need to deduct tax at source. Consumable purchased locally and used in labour contract are not liable to tax.

Sd/- Chelvakumar,
For Special Commissioner and
Commissioner of Commercial Tax."

5 Pursuant to the said clarification received from the Commissioner of Sales Tax, the Railway Administration issued a Circular to all their Departments communicating the clarification asking them to take note of that while effecting

recovery of taxes vide Circular dated 08.01.2003. Thus, it appears that when the Tamil Nadu General Sales Tax Act, 1956, was in vogue, the Railway Administration has been adhering to the Circular and in respect of labour contracts, no tax was collected. In fact, this was also made clear in the communication sent by the Additional Divisional Railway Manager. However, after the Value Added Tax regime, it appears that deductions are being done. These deductions done by the Railways is primarily for the reason that the Sales Tax Department have been insisting upon them to recover taxes and accordingly, a clause has been inserted in the agreement, viz., Clause No.23, which authorises the 1st respondent to effect deductions at the rate of 2% of the agreement value. It is not in dispute that in respect of the labour contracts the question of deduction of VAT at source does not arise. Though the clarification was given by the Commissioner of Sales Tax dated 08.04.2002, when the provisions of the Tamil Nadu General Sales Tax Act were in vogue, that by itself will not make a change because even in the VAT regime, the labour contracts are not liable to sales tax.

6 The petitioner's case is that 99% of the work allotted to them is labour contract and there is a minuscule apart from where the goods transferred and probably to that extent, the Railways may be entitled to deduct the tax ; but not at the rate of 2% of the agreement value, which would amount to taxing a contract which is not liable to be taxed. The contention advanced by the petitioner is sustainable and is in consonance with the clarification issued by the Commissioner of Sales Tax dated 08.04.2002. Therefore, the Railway Administration in stead of deducting 2% of the agreement value, they would be entitled to deduct th tax on the portion of the contract other than labour contract. This would be well within the knowledge of the Railway Administration since it is their Department which allots the work. The Railways do not dispute the fact that 99% of the work of track maintenance is labour intensive. Therefore, the deduction of tax at the rate of 2% cannot be on the entire agreement value.

7 In fact, the petitioner in WP.No.33013/2016 has filed a batch of writ petitions in WP.Nos.32282, 33015 & 33016/2016, wherein they have sought for a writ of prohibition, prohibiting the 1st respondent therein from deducting Value Added Tax at Source, by referring to the Circular dated 08.01.2003 and the said writ petitions were disposed of by a common order dated 21.09.2016 on the following lines:-

> "7 In the light of the above, there will be a direction to the 1st respondent to evaluate the terms of the contract, nature of the contract and ascertain the component which is taxable, i.e., other than labour contract and to

that extent, appropriate tax shall be deducted and remitted to the Sales Tax Department. On such returns being filed by the Railway Administration, the Sales Tax Department shall consider the returns and proceed to complete the assessments in accordance with the provisions of the Tamil Nadu Value Added Tax Act, 2006.

8 The learned counsel appearing for the 1st respondent submitted that there is an apprehension on the part of the Railway Administration that if such returns are filed, they may be liable for penalty by the 2nd respondent / Sales Tax Department. The 1st respondent need not have any such apprehension because the Commissioner of Sales Tax himself has clarified that the labour contracts are not liable to sales tax and there is no need to deduct the tax deduction at source and the consumables purchased locally and used in labour contracts are not liable to tax. Therefore, the Railway Administration is the best person who will know what is the nature of the contract and if it is purely a labour contract, the question of deducting the sales tax at source would not arise nor on the consumables purchased locally and used in the labour contract. Therefore, if such returns are filed, the question of levying penalty in the hands of the Sales Tax Department that the return is incorrect, would not arise as the Railway Administration has been directed to abide by the Circular issued by the Commissioner of Sales Tax, Government of Tamil Nadu.

9 Accordingly, the writ petition stands disposed of with the above directions/observations. No costs. Consequently, the connected miscellaneous petitions are closed."

8 In the light of the above finding rendered by this Court and taking note of the Circular issued by the Commissioner of Sales Tax, there will be a direction to the 1st respondent to consider the petitioner's representation dated 20.08.2016 and submit appropriate proposal to the 2nd respondent with their recommendations and observations which shall be specific to the contracts awarded to the petitioner and based on the recommendations/observations of the 1st respondent, the 2nd respondent shall consider the petitioner's claim for refund on merits and in accordance with law within a period of twelve weeks from the date of communication from the 1st respondent.

9 The writ petitions are disposed of with the above direction. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

AP

To

1.The Divisional Railway Manager
Chennai Division,
Sourthern Railway,
Park Town,
Chennai-3.

2.The Commercial Tax Officer,
Egmore II Assessment Circle,
Egmore,
Chennai-600 031.

+2cc to M/S.G.Jeremiah, Advocate Sr.54158, 54159
+1cc to M/S.P.T.Ramkumar, Advocate Sr.53930
+1cc to the Special Government Pleader Sr.54053

W.P.Nos.33013 and 33014 of 2016

rp[co]
srg 26/09/2016