THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

TAX REVISION CASE NO.21 OF 2016

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

This tax revision case is filed, under Section 22 (1) of A.P.G.S.T. Act, against the order passed by the Sales Tax Appellate Tribunal, Visakhapatnam in T.A. No.457 of 2008 dated 22.06.2015.

The petitioner herein entered into an agreement with the District Educational Officer (D.E.O.) for printing and supply of question papers. The D.E.O. supplied the questions to be printed and the petitioner, by using their own paper and ink, printed the question papers and supplied them to the D.E.O. In the assessment order, the assessing authority held that the said work of printing question papers was a works contract, and the material used therein like paper, ink, etc was liable to tax under Section 5F of the APGST Act. The petitioner's contentions, that the transaction was not a works contract, it was only a service contract, use of paper and ink in executing the said contract was only incidental, and no tax could be levied under Section 5F of the APGST Act, were rejected by the assessing authority.

Aggrieved thereby the petitioner carried the matter in appeal, and the appellate authority held that the transaction of printing and supplying question papers was not a works contract; it was only in the nature of a service contract; and it did not involve the sale of goods. The order of the Appellate Deputy Commissioner was revised by the Joint Commissioner. In the revisional order the Joint Commissioner held that, by virtue of the Forty-sixth amendment to the Constitution, the State was empowered to levy tax on the transfer of property in the goods involved in the execution of a works contract; and the petitioners were, therefore, liable to pay tax under Section 5F of the APGST Act. The Joint Commissioner treated the work of printing question papers as a works contract, and set aside the appellate order passed by the

Appellate Deputy Commissioner. Aggrieved thereby, the petitioner invoked the jurisdiction of the Tribunal.

In the order under revision before us, the Tribunal framed three questions for consideration, which read as under:

> (1) Whether printing of question papers and supplying them to the DEO on the order placed by him is a service contract or a works contract and whether the material used in executing the said work is exigible to tax under Section 5F of the APGST Act?
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> (2) Whether the impugned orders of the JC are sustainable under law, whether they warrant interference in these appeals, and whether the same are liable to be set aside?
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> (3) To what relief?

On question No.1 the Tribunal, after referring to **State of Tamil Nadu v. Anandam Viswanadhan**[1], **Builders Association of India v. Union of India**[2], **Rainbow Color Lab v. State of M.P.**[3], and **Associated Cement Companies Ltd v. Commissioner of Customs**[4], held that the transactions, involved in the appeals before it, related to printing of question papers and supplying them to the DEO; these transactions were works contracts; and the value of the goods, involved in the execution of the said works contract, was exigible to tax under Section 5F of the APGST Act. On point No.2, the tribunal held that the order of the Joint Commissioner was valid and did not warrant interference. The appeal was, accordingly, dismissed.

Sri V. Bhaskar Reddy, learned counsel for the petitioner, would submit that, while the dominant intention test laid down in the earlier judgments of the Supreme Court may no longer be applicable, the Tribunal had failed to consider certain other aspects; it is evident from the order of the assessing authority that the assessee was maintaining proper books of accounts; the assessing authority should have verified the petitioner's books of accounts, and ought to have determined the extent of the deemed sale of goods involved in the execution of the works contract; the assessing authority had erred in treating the entire consideration received by the assessee as works contract income, giving a deduction of merely 30%; the agreement between the petitioner and the D.E.O. required the petitioner to hand over the unused papers to the D.E.O; the papers which were not used for printing the question papers, and which were handed over by the petitioner to the D.E.O, would not fall within the ambit of a works contract; as the petitioner had purchased paper within the State, the 2nd sale of paper by the petitioner to the D.E.O. was exempt from tax under the A.P.G.S.T. Act; since printing of question papers requires a high degree of confidentiality to be maintained and necessary security arrangements to be provided, and as the contract specifically provides for each items separately, transfer of all the goods, referred to in the contract, could not have been treated as a deemed sale of goods; and, while a part thereof may, in view of the law declared by the Supreme Court in **Associated Cement Companies**[4], be required to be treated as a works contract, the other part would, undoubtedly, constitute sale of goods.

A works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services. The expression "sale", which was earlier given a restricted meaning by adopting the definition of the word "sale" contained in the Sale of Goods Act, has been undone by the Forty-sixth Constitutional Amendment so as to include works contracts. (**State of Karnataka v. Pro Lab**[5]; **Kone Elevators India (P) Ltd. v. State of Tamilnadu**[6]). The distinction between a contract for the sale of goods, and a contract for work (or service), has almost diminished in matters of composite contracts involving both a contract of work/labour and a contract for sale for the purposes of Article 366 (29-A)(b). A transfer of property in goods, under clause 29(A)(b) of Article 366, is deemed to be a sale of goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made. For this reason the traditional decisions, which hold that the substance of the contract must be seen, have lost their significance. What was viewed traditionally has to be now understood in the light of the philosophy of Article 366(29-A). (**Larsen and Toubro Limited v. State of Karnataka**[7]).

For sustaining the levy of tax on the goods deemed to have been sold in the execution of a works contract, three conditions must be fulfilled: (1) there must be a works contract, (2) the goods should have been involved in the execution of a works contract, and (3) the property in those goods must be transferred to a third party either as goods or in some other form. Article 366(29-A)(b) serves to bring transactions, where the essential ingredients of 'sale' as defined in the Sale of Goods Act, 1930 are absent, within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be a sale even though it may not be a sale within the meaning of the Sale of Goods Act. (**Larsen and Toubro Limited**[7]).

The term 'works contract' in Article 366(29-A)(b) is wide, and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of contracts. Parliament had such a wide meaning of "works contract" in its view at the time of the Forty-sixth Amendment. The object of insertion of clause 29-A in Article 366 was to enlarge the scope of the expression "tax on sale or purchase of goods", and overcome **State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.**[8]. Seen thus even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such a contract does not cease to be a works contract. The additional obligations in the contract would not alter the nature of the contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of a works contract are satisfied in a contract then, irrespective of additional obligations, such a contract would be covered by the term 'works contract'. Nothing in Article 366(29-A)(b) limits the term "works contract", and the term "works contract" cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into existence some "works". The term "works contract", in Article 366(29-A)(b), takes within its fold all genre of works contracts and is not restricted to one specie of contract to provide for labour and services. The Parliament had all genre of works contract in view when clause 29-A was inserted in Article 366. (**Larsen and Toubro Limited**[7]; **Kone Elevator India P. Ltd**[6]; **Pro Lab**[5]).

After the Forty-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29- A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. (**Kone Elevator India P. Ltd**[6]; **Larsen and Toubro Limited**[7]; **Bharat Sanchar Nigam Limited v. Union of India**[9]). The question, whether the contract involves a dominant intention to transfer the property in goods, is not material. It is not necessary to ascertain what is the dominant intention of the contract. Even if the dominant intention of the contract is not to transfer the property in goods, and it is the rendering of service or the ultimate transaction is the transfer of immovable property, it is even then open to the States to levy sales tax on the materials used in such a contract if it, otherwise, has the elements of a works contract. The view taken by the two-Judge Bench of the Supreme Court, in **Rainbow Color Lab**[3], that the division of the contract after the Forty-sixth Amendment can be made only if the works contract involved a dominant intention to transfer the property in goods, and not in contracts where the transfer of property takes place as an incident of a contract of service, is no longer good law. **Rainbow Color Lab**[3] has been expressly overruled by a three-Judge Bench of the Supreme Court in **Associated Cement Companies**[4]. (**M/s Larsen and Toubro**[7]; **Pro Lab**[5]; **Kone Elevator India P. Ltd**[6]).

The dominant nature test has no application to a composite transaction covered by the clauses of Article 366(29A). (**Pro Lab**[5]; **M/s Larsen and Toubro**[7]; **Bharat Sanchar Nigam Limited**[9]; **Associated Cement Companies**[4]). The "dominant nature test" or, for that matter, the "degree of intention test" or the "overwhelming component test" has no application in determining whether a contract is a works contract. The term "works contract", as used in Clause (29A) of Article 366 of the Constitution, takes in its sweep all genre of works contracts. Once the characteristics of a works contract are met, in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract. (**Kone Elevator India P. Ltd.**[6]; **Larsen and Toubro**[7]). In holding that the dominant intention test was no longer applicable, the Tribunal has not erred in law. We are in agreement with the conclusion of the tribunal that the subject contract would fall within the ambit of a "works contract" and not a contract either of sale of goods or a contract of service where the sale of goods is merely incidental.

Sri V. Bhaskar Reddy, learned counsel for the petitioner, would fairly state that the other contentions including that one part of the subject contract related to sale of goods and only the other part related to execution of works contract, or that the assessing authority could not have treated the subject contract as a works contract and provided standard deduction of merely 30% when the assessee had maintained books of accounts, were not raised before the Tribunal as the entire case before the Tribunal revolved around the question whether the contract was a works contract or a contract for service wherein the sale of goods was merely incidental. These and the other contentions urged before us by Sri V. Bhaskar Reddy, learned counsel for the petitioner, were, admittedly, not urged before the Tribunal. We cannot examine these contentions raised for the first time before us, and which had not been raised before the Tribunal, as a revision, under Section 22 (1) of the A.P.G.S.T. Act, is available only on questions of law and not on questions of fact.

As the Tribunal is the final Court of fact, and as none of the aforesaid contentions which require a finding of fact to be recorded, were even urged before the Tribunal, they cannot be examined for the first time in revision proceedings under Section 22 (1) of the A.P.G.S.T. Act. We see no reason, therefore, to examine these contentions urged, for the first time, before us as none of them relate to pure question of law and are, largely, questions of fact.

The revision fails and is, accordingly, dismissed. The miscellaneous petitions pending, if any, shall also stand closed. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date:16.06.2016

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THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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TREV.C. No.21 of 2016
Order of the bench delivered by the
Hon'ble Sri Justice Ramesh Ranganathan)

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Date:16.06.2016

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[1] (1989) 73 STC 1

[2] (1989) 73 STC 370

[3] (2000) 118 STC 9

[4] (2001) 124 STC 59

[5] (2015) 8 SCC 557

[6] (2014) 71 VST 1 (SC)

[7] (2013) 65 VST 1 (SC

[8] AIR 1958 SC 560

[9] (2006) 3 SCC 1