THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 04.07.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Appeal No.1536 of 2010
M.P.No.1 of 2010

The Commercial Tax Officer,
Korattur Assessment Circle,
18, Railway Station Road,
Korattur, Chennai. ... Appellant

-vs-

M/s.Sintech,
No.55, N.P.Sidco Industrial Estate,
Chennai 600 098. ... Respondent

Writ Appeal filed under Clause 15 of Letters Pattent, against the order dated 06.02.2008 in W.P.No.26831 of 2007 direct under Article 226 of the Constitution of India seeking for issuance of Writ of Certiorari calling for the impugned proceedings of the respondent in TNGST.1442149/04/05/A5 23 dated 13.7.2007 and quash the same.

For Appellant : Mr.Kanmani Annamalai,
Special Government Pleader (Taxes)

For Respondents : Mr.R.Senniappan

JUDGMENT
[Judgment of the Court was made by S.MANIKUMAR, J.]

Challenge in this appeal is to an order, made in W.P.No.26831 of 2007, dated 06.02.2008, passed by the Writ Court, quashing the impugned notice, dated 13.07.2017, for the revised assessment, issued under Section 16 of the Tamil Nadu General Sales Tax Act, 1959 (In short, "TNGST Act") .

2. Short facts leading to the appeal are that the respondent-Company is engaged in the business of works contract for supply, fabrication and installation of sign boards and they have registered themselves as dealer, on the file of the appellant, both under the Tamil Nadu General Sales Tax Act, 1959 and Central Sales Tax Act, 1956. During the financial year 2004-05, they have received the work order from Indian Oil Corporation Ltd., and Bharath Petroleum Corporation Ltd., and since the works contract attracts tax provisions, the respondent has opted for payment of tax, at compounded rate, as provided under Section 7-C of the TNGST Act and filed the return in Form A-1. Accepting the said returns, the appellant has permitted the respondent to pay taxes, as per the abovesaid Act and thereafter, assessment order has been passed on 27.04.2006. However, the impugned order, dated 13.07.2007, proposing to revise the assessment under Section 16 of the TNGST Act and assess the turnover of Rs.72,18,858/-, to tax at 12%.

3. Aggrieved by the same, the respondent has filed W.P.No.26831 of 2007, contending inter alia that for the assessment year 2004-2005, they had exercised the option of paying the tax at compounding rate, as required under Section 7-C of the TNGST Act, by filing the return in Form A-1 and once compounding option was accepted by the Department, a compounding order was also passed to that effect. Therefore, the respondent has contended that their transactions would not come under the category of "works contract", thereby, the appellant to assume jurisdiction to revise the assessment and levy tax on the transaction as ordinary sale by invoking the provisions of Section 16 of the TNGST Act does not arise. Reliance was also made to a decision of the Hon'ble Supreme Court reported in 103 STC 95 [State of Tamil Nadu v. Devendran & Co.]. Though the appellant has contended that re-assessment was proposed to be done not under a different head, but it was assessed at a rate lower than at which it is assessable, considering the provisions under Section 7-C(4) of the TNGST Act and also the provisions contained before the amendment in Section 7-C(4) of the TNGST Act, this Court, vide dated 06.02.2008, held as follows:

> "8. The learned counsel also produced the work order issued by Indian Oil Corporation in favour of the petitioner, which was also submitted to the respondent. Therefore, the only question that remains for consideration is whether the respondent had power under Section 16 of the TNGST Act to reopen the assessment on the basis of the judgment of the Supreme Court in (2005) 140 STC 22 [cited supra]. The reliance placed upon the said judgment of the Supreme Court in Kone Elevators case is totally misconceived as in the present context, the petitioners have agreed to

compound rate by paying the tax in terms of Section 7-C of the TNGST Act and also filed the returns in Form A-1. In such a case, the question of revising the compounding order does not arise especially when a dealer is exercising option in payment of rates in compound rate and the petitioner was also made to pay tax at 4% on the entire contract value. Section 16 of the TNGST Act is not intended to withdraw the said option exercised by the petitioner dealer.

9. In the light of the above and in view of the judgment of the Supreme Court in Devendran and Company case (cited supra), the writ petition will stand allowed. The impugned order dated 13.7.2007 will stand set aside."

It is worthwhile to consider the observations made in 47 STC 264 [Deputy Commissioner of Commercial Taxes, Vellore v. Devendran & Co.], affirmed by the Hon'ble Supreme Court in 103 STC 95 [State of Tamil Nadu v. Devendran & Co.], as follows:

"In this case, as we pointed out already and as admitted, the entire sales turnover relating to the tanned hides and skins had been assessed at 1-1/2 per cent under item 7(b) and the sales turnover was assessable only under that item. Only if the whole or any part of this turnover had escaped such assessment, the whole or any part of the turnover can be said to have been assessed at a lower than the rate at which the same was assessable so as to attract the provisions of Section 16(1)(b). That not being the case, the order of the Tribunal cannot be said to be erroneous in law and consequently the tax revision case is dismissed."

4. Assailing the correctness of the order made by the writ Court, the Commercial Tax Officer, Chennai, in the instant appeal, has contended that issue of pre-revision notice was necessitated, when it was found that their transactions were only outright sales, falling under Section 3(2) of the TNGST Act, 1959, based upon the records and principles laid down in State of Andhra Pradesh v. Kone Elevators (India) Ltd., reported in (2005) 140 STC 22.

5. The appellant has further contended that it is not the question of revoking the option already granted to the assessee, under Section 7-C of the Act, which cannot be done, unless the assessee concerned withdraws such an option, but it is the question, as to whether, the transactions altogether would fall within the scope of works contract, under Section 3-B of the

Act. He further submitted that once the dealer was found falling outside the ambit of Section 3-B, the question of continuing to avail option, under Section 7-C of the said Act, does not arise, since the latter Section, cannot be invoked, unless the transaction of the dealer, fell within Section 3-B of the Act.

6. Reverting the decision relied on by the Writ Court in 47 STC 264 [Deputy Commissioner of Commercial Taxes, Vellore v. Devendran & Co.], the appellant has further submitted that in the above reported case, when the sales turnover had been assessed, the corresponding purchases were estimated for part of the sales turnover already assessed and in the instant case, the transactions were found out to be outright sales and not works contract.

7. The appellant has further contended that once a dealer has been granted permission to compound taxes, under Section 7-C of the Act, their assessment cannot be revised thereafter, for any reasons, whatsoever, since if it was later on found that their transactions turned out to be not works contract, but outright sales, the assessing authority has every right to cancel the compounding order and revise the assessment and therefore, the findings of the Writ Court is unsustainable.

Heard the learned counsel appearing for the parties and perused the materials available on record.

8. 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 provisions 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 per cent of the total contract value of the civil works executed
(ii) All other Works contracts	Four per cent of the total contract value of the works executed.

9. Notice, dated 13.07.2007, has been issued, to the dealer, for revision of assessment, under Section 15 of the TNGST Act, 1969, for the assessment year 2004-05, on the following issues,

"(1) The copy of order of works contract has not been furnished by the dealers, at the time of final assessment.

(2) As per the decision in STC 140 in the case of Tvl.Kone Elevators Ltd., it was held that the supply and installation of goods at the purchaser's premises does not amount to works contract but amounts to sale.

(3) It is also not known, whether the materials were owned by the dealers or supplied by the purchasers. If the materials were owned by the dealers and works executed at site, the supply and fixing of sine board at the site or premises does not amount to works contract but it will be treated as sale and liable to levy of tax at 12.6%."

In the said notice, the Commercial Tax Officer, Korattur Assessment Circle, has stated that in the absence of any objections to the above details, it is proposed to revise the assessment, under Section 16 of the TNGST Act, with connected records, in support of the claim.

10. However, instead of submitting the objections, the writ petitioner/respondent, has chosen to file W.P.No.26831 of 2007, contending inter alia that during the financial year 2004-05, they have received the work order from the Indian Oil Corporation Ltd., and Bharath Petroleum Corporation Ltd., for supply, fabrication and installation of retail visual identity elements (sign boards) at retail outlets of the said companies.

11. The respondent has further contended that as the transaction is the works contract, executed at the retail outlets and considering the difficulties in maintaining the in the books of accounts, opted at compounded rate, under Section 7-C of the TNGST Act. Returns filed, as per the provisions of Section 7-C, have been accepted and therefore, there is no need for revision, under Section 16 of the TNGST Act. One of the reasons assigned in the notice, dated 13.07.2007, of the Commercial Tax Officer, Korattur Assessment Circle, proceedings impugned in the writ petition, is that the order of the works contract, has not been furnished by the dealer, at the time of final assessment.

12. Further, perusal of the order impugned before us, indicates that during the course of hearing, learned counsel for the respondent had produced the works order, issued by the Indian Oil Corporation, in favour of the respondent. Thus, from the order impugned, it could be deduced that what was required by the assessing officer, under Clause 1 in the notice, dated 13.07.2007, is stated to have been produced before the Court. When the production of the work order is a matter of record, the same cannot be doubted, having regard to the above, the Writ Court, at Paragraph 8, had proposed to consider, as to whether, the appellant has power, under Section 16 of the TNGST Act, to re-open the assessment, on the basis of the judgment of the Hon'ble Supreme Court in State of Andhra Pradesh v. Kone Elevators (India) Ltd., reported in (2005) 140 STC 22. On the aspect of the matter of judicial record, we deem it fit to consider few decisions,

"...........

13. From the opening sentence of Paragraph 8 of the order, impugned before us and in the light of the decisions, stated supra, we are of the view that the respondent has satisfied the requirement of Clause 1 of the notice, dated 13.07.2007. As regards Clauses 2 and 3 of the notice, dated 13.07.2007, extracted supra, the Constitutional Bench of the Hon'ble Apex Court, after considering the plethora of judgments in M/s.Kone Elevator India Pvt. Ltd., v. State of Tamil Nadu reported in 2014 (7) SCC 1, overruled the judgment made in State of Andhra Pradesh v. Kone Elevators (India) Ltd., reported in (2005) 140 STC 22.

14. In view of the subsequent decision of the Hon'ble Supreme Court in M/s.Kone Elevator India Pvt. Ltd., v. State of Tamil Nadu reported in 2014 (7) SCC 1, contentions to the contra, made in this appeal, relying on an earlier decision reported in (2005) 140 STC 22 [State of Andhra Pradesh v. Kone Elevators (India) Ltd.,], is not tenable. Besides, the writ

Court has also taken note of the Division Bench judgment of this Court in State of Tamil Nadu v. Devendran & Co. reported in 47 STC 264, which dealt with the application of Section 16 of the TNGST Act, wherein, it has been held that if earlier assessment is made on a particular percentage and subsequently, if the assessing authority wanted to reopen the assessment, by taking away part of the sales turn over from the turn over already assessed for finding out the corresponding purchase turn over of raw hides and skin and subject it to a tax at 13% by invoking Section 16 of the TNGST Act, the same power is not available to the authorities. The finding of the Tribunal was affirmed by the Division Bench in the following lines:

> "In this case, as we pointed out already and as admitted, the entire sales turnover relating to the tanned hides and skins had been assessed at 1-1/2 per cent under item 7(b) and the sales turnover was assessable only under that item. Only if the whole or any part of this turnover had escaped such assessment, the whole or any part of the turnover can be said to have been assessed at a lower than the rate at which the same was assessable so as to attract the provisions of Section 16(1)(b). That not being the case, the order of the Tribunal cannot be said to be erroneous in law and consequently the tax revision case is dismissed."

15. The judgment of the Hon'ble Division Bench in 47 STC 264 was affirmed by the Supreme Court in State of Tamil Nadu v. Devendran & Co. reported in 103 STC 95. On the facts and circumstances of the case, the writ Court has also held that the respondent has agreed to compound rate by paying the tax in terms of Section 7-C of the TNGST Act and also filed the returns in Form A-1. It was further held that the question of revising the compounding order does not arise especially when a dealer is exercising option in payment of rates in compound rate and the respondent was also made to pay tax at 4% on the entire contract value and therefore, Section 16 of the TNGST Act is not intended to withdraw the said option exercised by the petitioner dealer.

16. Though Mr.Kanmani Annamalai, learned Special Government Pleader (Taxes), submitted that the law decided in State of Andhra Pradesh v. Kone Elevators (India) Ltd., reported in (2005) 140 STC 22, has to be applied to the facts of the case and not the subsequent decision rendered by the Hon'ble Supreme Court in M/s.Kone Elevator India Pvt. Ltd., v. State of Tamil Nadu reported in 2014 (7) SCC 1, it could be seen that the issue, as to whether, the manufacture, supply and installation of lifts, to be treated as, "sale" or "works contract", has been pending from the year 2005 onwards. For brevity, Paragraphs 2 to

4 of the judgment reported in 2014 (7) SCC 1, are extracted hereunder:

"2. By an order dated 13.2.2008 in Kone Elevator India Private Limited v. State of Tamil Nadu and others [(2010) 14 SCC 788], a three-Judge Bench of this Court, while dealing with the writ petition preferred by Kone Elevator India Pvt. Ltd. along with Special Leave Petitions, noted that the question raised for consideration in the said cases is whether manufacture, supply and installation of lifts is to be treated as "sale" or "works contract", and a three-Judge Bench, in State of A.P. v. Kone Elevators (India) Ltd., [(2005) 3 SCC 389], had not noticed the decisions rendered by this Court in State of Rajasthan v. Man Industrial Corporation Ltd., [(1969) 1 SCC 567], State of Rajasthan and others v. Nenu Ram [(1970) 26 STC 268 (SC)], Vanguard Rolling Shutters and Steel Works v. Commissioner of Sales Tax [(1977) 2 SCC 250] and perceiving the manifest discord, thought it appropriate that the controversy should be resolved by the larger Bench. Thereafter, keeping in view the commonality of the controversy in Civil Appeal No.6285 of 2010 and other Special Leave Petitions, they were tagged with the originally referred matters. Thus, the matters are before us.

3. The seminal controversy which has emerged in this batch of matters is whether a contract for manufacture, supply and installation of lifts in a building is a "contract for sale of goods" or a "works contract". Needless to say, in case of the former, the entire sale consideration would be taxable under the sales tax or value added tax enactments of the State legislatures, whereas in the latter case, the consideration payable or paid for the labour and service element would have to be excluded from the total consideration received and sales tax or value added tax would be charged on the balance amount.

4. Keeping in mind the said spinal issue, we think it apposite to briefly refer to the facts as adumbrated in the writ petition preferred by Kone Elevator India Pvt. Ltd. The petitioner is engaged in the manufacture, supply and installation of lifts involving civil construction. For the Assessment Year 1995-96, the Sales Tax Appellate Tribunal, Andhra Pradesh, considering the case of the petitioner, opined that the nature of work is a "works contract", for the erection and commissioning of lift cannot be treated as "sale". On a revision being filed, the High Court of Andhra Pradesh affirmed the view of the tribunal and dismissed

the Tax Case (Revision) filed by the Revenue. Grieved by the decision of the High Court, the State of Andhra Pradesh preferred special leave petition wherein leave was granted and the matter was registered as Civil Appeal No. 6585 of 1999 and by judgment dated 17.2.2005 in Kone Elevators (supra), the view of the High Court was overturned. After the pronouncement in the said case, the State Government called upon the petitioner to submit returns treating the transaction as sale. Similarly, in some other States, proceedings were initiated proposing to reopen the assessments that had already been closed treating the transaction as sale. The said situation compelled the petitioner to prefer the petition under Article 32 of the Constitution. As far as others are concerned, they have preferred the writ petitions or appeals by special leave either challenging the show cause notices or assessment orders passed by the assessing officers or affirmation thereof or against the interim orders passed by the High Court requiring the assessee to deposit certain sum against the demanded amount. That apart, in certain cases, appeals have been preferred assailing the original assessment orders or affirmation thereof on the basis of the judgment in Kone Elevators (supra)."

18. As the issue was pending in the Hon'ble Apex Court, when the instant Writ Appeal was filed and taking note of the fact that the revision of assessment for the year 2004-05, under the TNGST Act, 1969, was sought to be made, by issuance of a show cause notice, dated 13.07.2007, the contention of the learned Special Government Pleader (Taxes), cannot be countenanced. Further, it is well settled principles of law that the decision of the Hon'ble Supreme Court, rendered subsequently, on the same issue, can be taken note of, in pending litigation, on the file of the Courts.

19. Instant Writ Appeal has been filed solely based on the judgment of the Hon'ble Supreme Court in State of Andhra Pradesh v. Kone Elevators (India) Ltd., reported in (2005) 140 STC 22. Subsequently, in 2014, the Hon'ble Supreme Court has re-visited the decision rendered earlier and accordingly, answered that the manufacture, supply and installation of lift, etc., would fall within the ambit of ‘Works Contract’. Decision of the Hon'ble Supreme Court reported in 2014 (7) SCC 1, squarely applies to the pending appeal.

20. In the light of the above discussion and decisions, we are of the view that the appellant has not made out a strong case for reversal. There are no merits in the appeal and hence, the Writ Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To:
The Commercial Tax Officer,
Korattur Assessment Circle,
18, Railway Station Road,
Korattur, Chennai.

+1cc to Special G.P(T) Sr.46438

+1cc to Mr.R.Senniappan, Advocate sr.46690

W.A.No.1536 of 2010

ssI(co)
ss(6/10/2017)