IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 13.07.2018
CORAM

THE HON'BLE MR. JUSTICE S.MANIKUMAR
and
THE HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

W.A.No.1390 of 2018

Reliance Generators Pvt. Ltd.,
Represented by its Director,
C.Balasubramanian,
No.27, Railway Colony,
4th Street, Aminjikarai,
Chennai – 600 029.
(Cause title accepted vide order
of the Court dated 06.03.2014
made in M.P.No.1 of 2013 in
W.P.No.39977 of 2013.) ...Appellant/Petitioner

Vs.

1.Union of Inida,
Represented by its Secretary,
Department of Telecommunication,
New Delhi.

2.Bharat Sanchar Nigam Ltd.,
Represented by Pr. Chief Engineer (EL),
Chennai Zone, No.33,
Ethiraj Salai,
Chennai – 600 008.

3.The Executive Engineer (EL),
BSNL, Electrical Division,
166, T.V.Swamy Road, (W),
R.S.Puram, Coimbatore – 2.

4.The Executive Engineer (EL),
BSNL, Electrical Division,
1/241, Meyyanur Road,
Salem – 636 004.

5.The Executive Engineer (EL),
BSNL, Electrical Division,
St.Marys Complex, 1st Floor,
No.62-A/1, Promenade Road,
(Juman Centre),
Trichy – 620 001.

6.The Executive Engineer (EL),
BSNL, Electrical Division,
Nataraja Complex,1st Floor,
29, Melur Road, K.K.Nagar,
Madurai –20.

7.The Executive Engineer (EL),
BSNL, Electrical Division-II,
Aarthi Chambers, 1st Floor,
No.189, Anna Salai,
Chennai-6. ... Respondents/Respondents

PRAYER: The Writ Appeal has been filed under Clause 15 of Letters Patent, against the order passed in W.P.No.11462 of 2006 dated 18.10.2012 dismissing the writ petition.

WP.No.11462 of 2006:Petition filed under Article 226 of the Constitution of India to issuea writ of mandamus directing the respondents to jointly and severally pay the petitioner the amount of Rs.30 70 579/- (Rupees Thirty Lakhs seventy thousand Five hundred seventy nine only) representing the difference between schedule rate of 16% and concessional rate of 4% due to the change character of the First Respondent into the Second Respondent and consequent denial of concessioal rate of tax @ 4% for the Assessment year 2000 - 2001.

For appellant : Mr.T.V.Lakshmanan
For Responents : Mr.S.Udayakumar

O R D E R

SUBRAMONIUM PRASAD, J.

The instant writ appeal is directed against the order dated 18.10.2012 passed by the learned single judge in W.P.No.11462 of 2006. The appellant is the writ petitioner.

2. It is the case of the appellant that it is engaged in the business of supplying, installing, testing and commissioning of Diesel Generator Sets of different capacities and in accordance with the specifications given by the Government of India which was having a monopoly for providing telephone services in the country.

3.On and from 01.10.2000 telephone service in the country are being carried out by BSNL (respondent No.2), which is a Government Company. As on the date of formation of BSNL the contracts awarded to the appellant and in relation to which disputes arise fell into two categories viz (i) Where the negotiations were completed and offer of the appellant was accepted but materials not supplied (ii) Where while the tender was initiated by the Department of Telecommunication, the offer by the appellant was to be made or acceptance had not been completed. It is the contention of the appellant that before BSNL was incorporated, any supply made to the Department of Telecommunication was exigible to concessional rate of 4% of sales tax where as after 01.10.2000 supply made to BSNL was to be taxed at higher rate of 16%.

4.The Commercial Tax Assessing Officer issued a pre-assessment notice on 04.06.2004 for the assessment year 2000-2001 proposing to assess the supplies made to the BSNL after 01.10.2000 at 16% irrespective of the fact whether the notice inviting tender was issued by the Department of Telecommunication or such offer was made to the first respondent by the appellant, or such offer was accepted by the Department of Telecommunication or any subsequent process was carried out by the Department of Telecommunication, before the BSNL was incorporated. It is submitted that in a total sum of Rs.30,70,579/-, has been paid towards difference between the schedule rate of 16% and the concessional rate of 4% due to the change in the character to the Department of Telecommunication. It is the case of the appellant that it is not liable to pay taxes at 16% and it is the liability of Union of India to pay the amount and therefore that amount paid by the appellant, must be returned to it.

5.The instant writ petition has therefore been filed for a writ of mandamus directing the Union of India and the BSNL to jointly and severally pay a sum of Rs.30,70,579/- representing the difference between the schedule rate of 16% and the concessional rate of 4% due to the change in the character to the department of Telecommunication.

6.The Union of India and the BSNL filed counter opposing the writ petition. It was contented that the writ petition is barred by latches. It was also contented that there was no ambiguity in the contract and that in all the contracts framed, it was specifically mentioned that the award of rates is inclusive of all taxes levied including work contracts. It was stated that the appellant did not raise any claim regarding differential payment of sales tax during the execution of work or at the time of acceptance of bills. It was stated that there was an arbitration clause in the Contract and the writ was not maintainable.

7.The learned Single Judge by the impugned order dismissed the writ petition. The learned Single Judge found that there was no justification for the petitioner in approaching the High Court after a long delay. The learned Single Judge also held that the writ petition is mis-conceived. The learned Single Judge has observed as under:-

> *"It is apparent that both parties were of the view that the transactions involved were work contracts and it was 'work contract tax' under the Tamil Nadu Government Sale Tax Act, which would stand attracted. The communications of the petitioner, after the formation of the second respondent, speak only of liability towards additional tax on the misunderstanding that while works contract Tax was 4% in respect of the first respondent undertaking it would be 16% in respect*

of the second respondent. The second respondent in its communication dated 01.11.2004, rightly has pointed that the rate of Work Contract Tax under the TNGST Act, does not change whether it is Central Government / a Corporation or body established by or under a Central Act (in this case BSNL). Section 7 C of the Tamil Nadu Government Sale Tax Act provides for payment of tax at compounded rates by a works contractor. The petitioner has sought assessment of tax on the basis that all the work carried out under various contracts were work contracts. This only further affirms the decision that all parties were under the impression that the tax payable would be that as provided for in respect of works contract."

8.This order is sought to be challenged in the instant appeal.

9.Heard, the learned counsel for the both parties and perused the materials available on records.

10.Material on record discloses that the Commercial Tax Officer had issued a notice on 30.12.2005 proposing to revise the assessment for the year 2001-2002. Pursuant to the notice there was a revised assessment and the total and taxable turnover was department as under:-

"Thus the total and taxable turnover for 2001-2002 is determined as below.

Turnover in 1st sales of Generators taxable at 16% determined Rs.1,47,08,860.00.

Tax due Rs.23,53,418,.00

Tax paid Rs. 4,78,216.00

Balance Rs.18,75,202.00

A notice in form B3 is issued."

11.This order has not been challenged the writ petition. The instant writ petition is therefore an attempt by the appellant to reopen the assessment. The appellant has to challenge this order by filing an appeal before the Appellate Authority. The instant proceedings cannot be used by the appellants to get back the tax paid by it and get the Assessment Proceeding set aside.

12. In any event, the parties were *ad-idem* that the appellant was liable to pay the tax which is levied on works contract under the Tamil Nadu General Sales Tax Act. The respondents are right in contending that the terms of the contract indicated that the rate given by the appellant included the tax payable towards work contract and there was no ambiguity. The order of the learned single judge therefore does not require any interference.

12.The writ appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True copy//

Sub Assistant Registrar

To

1.The Secretary,
Union of Inida,
Department of Telecommunication,
New Delhi.

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VD(CO)
sm:27.8.2018

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