

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN
T.C.Nos.92 & 95 of 2018

The State of Tamil Nadu,
Rep. by the Deputy Commissioner (CT),
Madurai Division, Madurai .. Petitioner in both cases

Vs.

Tvl.Raj Mosaic Tile Works,
Sudandirapuram,
Madurai. .. Respondent in T.C.No.92/2018

Tvl.Raj Floorings,
Irudaya Nagar Main Road,
Madurai. .. Respondent in T.C.No.95/2018

Prayer: Petitions filed under Section 38 of the TNGST Act, 1959,
to revise the order of the Tamil Nadu Sales Tax Appellate
Tribunal (AB), Madurai dated 04.02.2002, in Madurai Tribunal
Appeal Nos.198, 199, 200, 201, 202, 203, 204, 205, 310/99 and
396/97 & 206, 207, 208, 209, 210, 211, 212, 213, 214, 215/99 and
422/00 respectively.

For Petitioner : Mr.V.Hari Babu
Additional Government Pleader (Taxes)

C O M M O N O R D E R

(Order of the Court was made by S.MANIKUMAR, J.)

Instant Tax Cases (Revision) are filed against the order of
the Tamil Nadu Sales Tax Appellate Tribunal (AB), Madurai, dated
04.02.2002, made in Madurai Tribunal Appeal Nos.198, 199, 200,
201, 202, 203, 204, 205, 310/99 and 396/97 & 206, 207, 208, 209,
210, 211, 212, 213, 214, 215/99 and 422/00 respectively.

2. As instant Tax Case Revisions have been preferred on the
same set of facts, they are taken up together and disposed of by
means of a common order.

3. Short facts leading to filing of the revisions are that
the Assessing Authority, in all the cases, determined the
taxable turnover based on the return filed by the assesseees.

The Assessing Authority had taken the entire amount received by the assesseees on the execution of works contract on mosaic. As the gross amount had been charged by the assesseees for supplying, laying, polishing of mosaic tiles and the value of the goods and labour charges being not separately shown by the assesseees, the Assessing Authority allowed 30% towards labour charges and assessed the balance of 70% as sale of finished goods.

4. Aggrieved over the assessment made by the Assessing Authority, the dealers, preferred appeals, before the Appellate Assistant Commissioner (CT), Madurai (South), who remanded the matter back to the Assessing Authority, vide order dated 18.12.1998, to consider the charges and deductions allowable under Section 3B of the TNGST Act.

5. Against the orders of the Appellate Assistant Commissioner (CT), Madurai (South), the dealers filed appeals before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Madurai.

6. The Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Madurai, vide order dated 04.02.2002, allowed the appeals filed by the dealers holding that the sand used for the execution of works contract alone would be taxable and the value of other items used should be given exemption under Section 3-B (2)(c) of the TNGST Act, 1959 because the materials involved had already suffered tax and used in the same form, in the execution of works contract. It was held that even for 'sand', there was no liability for the years 1989-90 to 1993-94 as per Notification.

7. Seeking reversal of the order of the Tribunal, Mr.V.Hari Babu, learned Additional Government Pleader (Taxes), submitted that:

(i) Appellate Tribunal has failed to note that the dealers had purchased raw material, but not used the same as it is, while executing the works contract. The dealers had converted the materials purchased into mosaic tiles in their own place of business, converted the raw materials purchased into a finished product, i.e., mosaic tiles, which is a different product manufactured from out of white cement, red oxide etc., The dealers executed the works contract i.e., flooring of mosaic tiles, and during the process of execution of works contract what was transferred by the dealers is only a finished product which is totally a distinct and different commercial commodity, from the raw materials purchased. The finished product which has emerged had not suffered tax earlier. Therefore, the transfer of such goods during the course of execution of the works contract is a deemed sale as per Section 2(j), (n) of the

TNGST Act. Thus, the dealers are not eligible for deduction of raw materials purchased according to Section 3(2)(b) of the TNGST Act. Since they have not used the raw materials purchased in the same form while executing the works contract, but utilised the same for manufacture of mosaic tiles which was ultimately used for executing the works contract.

(ii) Appellate Tribunal has failed to note that the bills issued by the dealers, revealed that the dealers had charged only a gross amount of supply, laying and furnishing of mosaic tiles. The dealers have not charged separately for the value of goods supplied and labour charges, etc. Therefore, in the absence of the above details, the Assessing Officer had allowed a deduction of 30% on the total contract amount according to Section 3(2)(b) of the TNGST Act, which is quite reasonable and in conformity with law.

(iii) Appellate Tribunal has failed to note that in the absence of value of mosaic tiles as per accounts, the levy of tax at 70% of the value of the contract amount assessed by the Assessing Officer is quite in order.

(iv) Appellate Tribunal has failed to note that as soon as a separate commercial commodity, i.e., mosaic tiles emerged, it become taxable goods in view of the fact that the identity of the materials purchased from registered dealers are charged. Therefore, as per the decision in Kamatchi Laminations Vs. State of Tamil Nadu reported in 95 STC 378 and the decision in Tamil Nadu Mosaic Manufacturing Association reported in 97 STC 503, the order of the Tribunal is erroneous.

(v) Appellate Tribunal has failed to interfere with the order of the Assessing Authority who had rightly assessed the turnover to tax under the TNGST Act in this case.

(vi) In any event, the order of the Appellate Tribunal is against the principles laid down in the case of Nathan and Co., reported in TNCTJ (20) 1996-97.

8. Heard the learned Additional Government Pleader (Taxes) and perused the materials on record.

9. Let us consider as to how the Appellate Assistant Commissioner (CT), Madurai (South) has dealt with the facts and issues. For the sake of convenience, the order dated 18.12.1998, passed in the appeals filed by M/s.Raj Floorings (Respondent in T.C.No.95 of 2018) is extracted hereunder:

"5. I heard the arguments of both the sides and also perused the connected records. The only point for consideration in these appeals are:

i. Whether the appellants is entitled to the claim of exemption under Section 3(B) 2 (b) and also other deductions as per account?

ii. Whether the levy of penalty is correct in respect of A.P.497/97. A.P.498/97, AP.499/97 and AP.500/97?

6. As far as these appeals are concerned. The appellants is a works contractor who had undertaken the working of laying and polishing of Mosaic tiles, when, it had been admitted that it is only works contract then the appellants is eligible for deductions as enshrined under Section 3B of the TNGST Act'59. While making an assessment having considered that the transactions related to works contract, the Assessing Officer had allowed exemption, so to say, deductions under Section 3B 2(e) of the TNGST Act'59. The appellants in all the four appeals agitated this deduction on the ground that they have got separate figures for the various labour charges that had been incurred by them during the course of the execution of works contract and they have also claimed that the raw materials that had gone in for the execution of works contract had been purchased from local registered dealers and they have all suffered tax. They have also further stated that they got the records in support of their claim and it had also gone into the accounts. The main question that comes in for consideration is how the higher judicial forums had treated this kind of transactions has to be seen firs. Then various other factor can be discussed. The High Court of Madras in the case of Chandrasekaran Vs. State of Tamil Nadu reported in 78 STC 147 had held that,

"A contract of sale is a contract whose main object is the transfer of the property in and the delivery of the possession of chattel as a chattel to the buyer...."

"The contentions of the case for decision was for laying of mosaic tiles at a particular rate

for particular area and not for more supply of tiles. The final bill made it clear that the contract was for only and indivisible and that it was indivisible works contract and not for a contract for sale of tiles and the fact that the customer had agreed to supply water, electricity, supported labour etc, could not detract from the nature of work, if other wise it was an indivisible works contract".

7. So, in this judgment, the High Court of Madras had held that laying and polishing for mosaic tiles in an indivisible contract. Whether this above decision is applicable to the instant case has to be considered? In the instant case, the assessing authority himself had stated that the appellant had collected charges for manufacturing, laying and polishing. So, this clearly proves that it is an indivisible contract and it is not a contract for sale of tiles. Further more, the higher judicial forums had held in several how the transactions of works contract has to be dealt in.

8. The Supreme Court of India, in the case of Builder's Association of India and others Vs. Union of India and others reported in 73 STC 37(SC) had declared that:

"After the Forth-sixth Amendment, the works contract which was in indivisible one in by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and service. After the 46th Amendment, it has become possible for the states to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials had been supplied under a distinct and separate contract by the contractor for the purpose of construction of a building, the assessment of sales

tax could be made ignoring the restrictions and conditions incorporated in Article 286 of the constitution."

9. In the above decision, the Supreme Court upheld the levy of sales tax on the turnover relating to work contract with the deductions of turnover relating to the labour consumables etc, and in the absence of such details with proof in certain percentage of turnover as envisaged in the provisions of the Act and Rules. The Supreme Court again reported in 88 STC 284 in the case of Ganon Dunkerley and Co, Vs. State of Rajasthan and others had allowed the validity of deductions. It had also examined the validity of the provisions enabling the various case of deductions of turnover depending upon the nature of works contract for the levy of tax towards labour and other service connected with the works contract and it also upheld it.

Section 3-B after the amendment is as follows:-

Section 3-B levy of tax on the transfer of goods involved in the works contract.

(1) Notwithstanding anything contained in sub-sections (2-A), (2-B), (3), (4) (7) and (8) of Section 3 or Section 7A but subject to the other provisions of this Act including the provisions of sub-section (1) of section 3, every dealer referred to in item (vi) of clause (g) of section (2) shall pay, for each year, a tax on his taxable turnover of transfer of property in goods involved in the execution of works contract at the rates mentioned in sub-section (2) of section 3 or as the case may, section 4.

Explanation : Where any works contract, involves more than one items of work, the rate of tax shall be determined separately for each such item of work.

(2) The taxable turnover of the dealer of transfer of property in the execution of

works contract shall on and from 26th day of June 1986, be arrived at after deducting the following amounts from the total turnover of that dealer.

(a) all amounts involved in respect of goods involved in the execution of works contract in the course of export of the goods out of the goods into the territory of India or in the course of Inter-state trade or commerce.

(b) all amounts for which any goods, specified in the First schedule for second schedule, are purchased from registered dealers liable to pay tax under this Act and used in the execution of works contract in the same form in which such goods were purchased.

(c) all amounts relating to the sale of any goods involved in the execution of works contract which are specifically exempted from tax under any of the provisions of the Act.

(d) all amount paid to the sub-contractors as consideration for execution of works contract whether wholly or partly, provided that no such deduction shall be allowed unless the dealer claiming deductions, produces proof that the sub-contractor is a registered dealer liable to pay tax under this Act and that the turnover of such amounts is included in the return filed by such sub-contractors, and

(e) all amounts towards "labour charges and other like charges" not involving any transfer of property in goods, actually, incurred in connection with the execution of works contract, or such amounts calculated at the rate specified in col.3 of the Table below, if they are not ascertainable from the books of accounts maintained and produced, before the assessing authority.

The Table

Sl.No.	Type of works contract	Labour or other charges as a percentage value of the works contract.
1.	Electrical contracts	15
2.	All structural contracts	15
3.	Sanitary contracts	25
4.	Watch and/or Clock repair contract	50
5.	Dyeing contracts	50
6.	All other contracts	30

10. The present provision was substituted by act 25/95 by Gezzette dt. 28.5.93 effective from 12.3.93. Even though it was amended from 12.3.93, it had been specifically stated that the taxable turnover to be arrived under this sub-section 3B are effective from 26.6.86 and the levy of sales tax on works contract was made retrospective from 26.6.86.

11. Prior to the amendment on 12.3.93, the provisions were as follows:

"Notwithstanding anything contained in section 3, 4, 5, 7 or 7A, but subject to the other provisions of this Act, every dealer referred to in item (vi) of clause (g) of section 2 whose total turnover relating to the business of transfer of property in goods involved in the execution of works contract is not less than fifty thousand rupees and every casual trader or agent of a non-resident dealer in respect of such business whatever be his turnover for the year, shall pay for each year a tax on his turnover of transfer of property in goods involved in the execution of works contract mentioned in col.2 of Fourth each rule at the rates specified in the

corresponding specific in column (3) of the said schedule".

As per section 3B 2(B) of the TNGST Act'59, the amount for which any goods in the first schedule or second schedule are purchased from the registered dealers liable to pay tax under this Act and used in the works contract in the same form in which such goods were purchased are eligible for deductions. The appellants had claimed exemption under Section 3(B) 2(b) and he also relied on Commissioner of Commercial Taxes instructions for the goods that had gone in for manufacturing of mosaic floors is the transfer of property the same form. But the assessing authority is stated that the appellants are not eligible for deduction under Section 3B 2(b). This has to be seen in the light of various judicial pronouncements."

12. In a similar case before the High Court of Madras reported in 78 STC 147 in the case of S.Chandrasekaran Vs. State of Tamil Nadu in which the appellants was a proprietor of a concern which manufacture mosaic floor tiles and under took the laying of mosaic flooring. An agreement was entered into by the appellants and the customer. Which provided that the appellants would supply, lay and polish mosaic flooring and agree the cost per square feet. The customer has to pay by way of advance 3% of the value of works 35% of the value of the work after delivery of the tiles. 20% after laying of tiles and balance after polishing. The customer has to bear the charges for transport charges for material to the customers place and to make available sand, cement, electricity, water, support labour and was polish and turpentine. The Assistant Commercial Tax Officer held that 65% of the total value of the work represented the price of mosaic tiles supplied and brought that amount to tax under TNGST ACT 1959. While disposing of the case, the High Court had held as follows:

"That there was no tangible material before the Assistant Commercial Tax Officer to arrive

at the conclusion that 65% of the value of the works represented, value of the tiles, this was a guess. the nature of the contract could not depend on made of payment in the contract could not depend on made of payment in the contract and the fact that 65% of the value of work was to be paid on delivery of tile was not conclusive. Therefore the conclusion that the contract was devision was groundless, a class scrutiny of the contract that it was one for laying for mosaic tiles at a particular rate for a particular area and not for mere supply of tiles. the final bill given by the appellants made it clear that the contract was for one and indivisible and that it was indivisible works contract and not for a contract for sale of tiles and the fact that the customers had agreed to supply water, electricity, supported labour etc. could not detreat from the nature of work, if otherwise it was an indivisible works contract".

13. In the instant case also, the assessing authority had assessed 70% of the amount received towards contract as sale of tiles taxable at 16%. The case which had been referred is squarely applicable to the case on hand. The High Court had clearly held that it is a works contract and in such case, the appellants come under section 3B and is eligible for various deductions. When the appellants is eligible for various deduction, he is also eligible for deductions under section 3B 2(b) and also other deductions that are available under Section 3B.

14. After the Forty Sixth Amendment, a legal fiction was introduced. Whereby the works contract, which was entire and indivisible has to altered into a contract which is divisible into one for sale of goods

and other supply of labour and services one position of a contractor in relation to a transfer of property in goods in the execution of works contract is not different from that of a dealer in goods who is liable to pay sale tax on the sale price charged from the customer for the goods sold. The sale price includes the cost of bringing the goods to the place of sale" (97 STC 503 at 531).

"The amounts so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. The value of the goods in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting there from the charges towards labour and services which would cover;

(a) labour charges for execution of the works;

(b) amount paid to a sub-contractor for labour and service;

(c) charges for planning, designing and architect's fees;

(d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;

(e) cost of consumables such as water, electricity, fuel etc. used in the execution of the works contract, the property in which is not transferred in the course of execution of works contract and

(f) cost of establishment of the contractor to the extent it is relevalbe to supply of labours and services;

(g) other similar expenses relatable to supply of labour and services and;

(h) profit earned by the contractor to the extent it is relatable to supply of labour and services.

The amounts deductible under those heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor".

15. So far as the case is concerned, the appellants was having separate accounts for the materials that had been purchased and utilised in the course of works contract and he had also represented that he had maintained separate figures for various charges that had been incurred during the course of works contract. Despite the fact that the appellants had produced various figures relating to various charges to the assessing authority at the time of final assessment the charges that had been listed out by the appellants had not be taken into consideration by the assessing authority. So, to consider the charges and deductions allowable under section 3B of the TNGST Act'59, the matter is remanded back to the assessing authority for reconsideration in the light of the various judicial pronouncements and also the decisions rendered in Tamil Nadu Mosaic Manufacture Associations Vs. State of Tamil Nadu reported in 97 STC 502 in the decision of the High Court of Madras in the case of Lamination and also the amended provision enshrined under Section 3B of the TNGST Act'59.

16. The second issue related to the levy of penalty in respect of A.P.No.498/97, 497/97, 499/97 & 500/97, the appellants had stated that the assessment made is not a best judgement assessment and so penalty can not levied under Section 12(3)(b). As far as these assessment are concerned, the turnovers are available in the books of accounts. When the turnover is found in books of accounts and had been culled out for assessment, it can not be treated as suppression as per the decision of the Supreme Court reported in 28 STC 700 in the case of S.G.Jeyaraj Nadar and Sons. When it had been decided that the assessment is not a best judgement assessment and the turnover that had been taken for

assessment and had not also been treated as suppression as it is found in the books, the penalty is not leviabale. So, the penalty levied by the assessing authority is set aside.

17. In fine, the appeals in respect of A.P.No.490/97, A.P.502/97, A.P.501/97, A.P.503/97, A.P.504/97 and A.P.505/97 are "REMANDED" and in respect of A.P.No.498/97, A.P.497/97, A.P.499/97 and A.P.500/97 are "PARTLY REMANDED AND PARTLY ALLOWED".

10. Against the above order of the Appellate Authority, the dealers filed appeals before the Tribunal. Upon hearing the rival parties, the Tribunal, vide common order dated 04.02.2002, held as follows:

"6. We heard the arguments of both the sides and perused the connected records relating to the appeals.

7. The points for consideration in the 40 appeals are:

"(i) Whether the assessment made under Sec.3-B of the TNGST Act, 1959 by the Assessing Officer and remanded confirmed by the Appellate Assistant Commissioner is justifiable or not ?

(ii) Whether the penalty of Rs.18,494/- under Section 12(3)(b) of the Act in MTA.No.352/00 only in the case of Tvl.Ponmari Mosaic Flooring works for the year 1993-94 sustained by the Appellate Assistant Commissioner is correct or not ?"

8. Points (i) and (ii) :

We have gone through the entire records relating to these appeals in details. The scrutiny of the appeal records relating to these appeals revealed that the Assessing Officer had granted relief to the extent of 30% of the total turnover related to the execution of works contract done by the appellants and considered 70% of the turnover related to the works contract for the purpose of levy of tax. Further scrutiny of the appeal records revealed that the Assessing Officer had taken a stand that the appellants

have not maintained separate accounts for various inputs used for the execution of works contract. Contrary to this learned counsel at the time of hearing had contended that the appellants were maintaining detailed accounts and having separate figures for the following:

(i) Raw materials purchased from local registered dealers.

(ii) Cost of consumables such as water, fuel used in the laying of mosaic tiles.

(iii) Cost of sand purchased.

(iv) Contract expenses.

(v) Company coolies expenses.

(vi) Contract coolie expenses.

(vii) Machinery expenses.

(viii) Electricity charges etc.

They have also contended that the above said informations were also furnished to the Assessing Officer at the time of check of accounts and they are surprised with the Assessing Officer had not considered the same, but followed the ratio of 70% : 30% while passing the assessment order. The learned counsel had further argued that the same facts were put forth before the Appellate Assistant Commissioner at the time of hearing and the Appellate Assistant Commissioner has also gone through the entire records maintained by the appellants and had also given his categorical findings while disposing of all these cases. The learned counsel had further argued that the Appellate Assistant Commissioner while disposing all these appeals had stated that appellants had not maintained separate accounts for the various inputs they have utilized for the execution of works contract they have done. the learned counsel had further contended that the Appellate Assistant Commissioner having convinced that the appellants were maintaining separate stock accounts for the various inputs they have used for the execution of works contract instead of allowing these appeals had remanded the same back to the Assessing Officer for fresh consideration but in some cases confirmed the orders of the Assessing Officer. The contention of the learned counsel seems to be

acceptable for the reason that the Appellate Assistant Commissioner had given his categorical findings in his orders that the appellants have maintained separate stock account for the various raw materials utilized for the purpose of execution of works contract. The learned counsel had further contended that the entire raw materials utilized for the execution of works contract have been purchased from within state and suffered tax and the items used for the execution of works contract were tax suffered goods except sand. Therefore, we are of the view that the sand used for the execution of works contract alone is taxable and the value of other items used should be given exemption under Section 3(B)(2)(c) of the TNGST Act, 1959. At the time of hearing the learned counsel had also brought to our notice the Notification in G.O.P.No.198 CT & RE dated 25.03.1989. According to which sand used is not taxable for tax for the period from 1989-90 to 1993-94 with effect from 25.03.1989. From the above said Notification it is clear that the sand used for the execution of works contract is liable to be taxed for the following years 1986-87, 1988-89, 1994-95, 1995-96 and 1996-97. The sand used for the execution of works contract, which are to be taxable, is worked out as follows after adopting a reasonable G.P. of 10%.

.....
Tvl.Raj Floorings:

Tvl.Raj Mosaic Tile Works:

With the above modification the concerned Assessing Officer is directed to levy appropriate rate of tax for the turnover sustained in respect of sand. The rest of the turnover sustained by the Appellate Assistant Commissioner in all the above appeals are hereby ordered to be deleted. Further, we also set aside the assessment made by the Assessing Officer and remanded by the Appellate Assistant Commissioner are deleted from assessment eligible for exemption under Section 3(b)(2)(e) of the Act in respect of Tvl.Raj Flooring in

MTA.Nos.209/99 to 213/99 for the year from 1989-90 to 1993-94; Tvl.Raj Mosaic Tiles works in MTA.Nos.201/99 to 205/99 for the year from 1989-90 to 1993-94 and Tvl.Mother India Mosaic Industries..... We also further delete the assessment made by the Assessing Officer and sustained by the Appellate Assistant Commissioner in respect of Tvl.Ponmari Mosaic Flooring Works in In view of the above facts and circumstances of these cases, the orders of the Appellate Assistant Commissioner are set aside and granted relief to the extent stated above.

In the result, the appeals stand as follows:

- (1) Raj Floorings, Madurai :
MTA Nos.209/99 to 213/99 stand allowed and MTA Nos.206/99 to 208/99, 214/99, 215/99 and 422/00 stand modified.
- (2) Raj Mosaic Tile Works, Madurai:
MTA Nos.201/99 to 205/99 stand allowed and MTA Nos.198/99 to 200/99, 310/99 and 296/97 stand modified.
- (3)
- (4)
- (5)"

11. Appellate Authority and Tribunal are the final fact finding authorities and when the books of accounts were produced, the Appellate Authority has analysed the same and found that the dealers were having separate accounts for the materials that had been purchased and utilised in the course of works contract and that they have also maintained separate figures for various charges that had been incurred during the course of works contract. Both the Appellate Authority and the Tribunal have properly analysed the facts and evidence and accordingly answered the issues in favour of the assessee. There is no perversity in the finding. There is no question of law much less substantial question of law warranting reversal of the impugned order.

12. Accordingly, Tax Case Revision Petitions are dismissed. No costs.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

dm/kk

To

The Tamil Nadu Sales Tax Appellate Tribunal
(Additional Bench),
Madurai.

KAN (CO)
sm:23.4.2018

T.C.Nos.92 & 95 of 2018



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