

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD**

WRIT PETITION No.7987 of 2018

ORDER: (Per Hon'ble Sri Justice T. Amarnath Goud)

This writ petition arises out of the order dated 19.02.2018 passed by the Deputy Commissioner (Commercial Tax), Kurnool, the first respondent, in DC Order No.1556, in relation to the tax period from April, 2011 to July, 2012.

2. The petitioner is a registered works contractor under the Andhra Pradesh Value Added Tax Act, 2005 (for short, the A.P.VAT Act) at Kurnool. The petitioner executed works contracts with the Government prior to 14.09.2009 for laying of roads and maintenance for Executive Engineer, R & B, Adoni. As per the terms of the contract and also as per Section 22(3) of the A.P.VAT Act, the Government Contractee has to add Value Added Tax (VAT) component to the contract value and deduct the same and pay to the Commercial Tax Department and issue Tax Deduction at Source (TDS) Certificate to the petitioner. At the time of entering into contracts, the rate of tax on works contracts as per Section 4(7)(b) of the A.P.VAT Act was 4% and hence the Government Contractees have added 4% to the bills of the petitioner towards VAT component and deducted the same and paid to the Commercial Tax Department and issued TDS Certificates to the petitioner. An amendment was made to Section 4(7)(b) vide G.O.Ms.No.1718, Rev (CT-II) Department, dated 13.09.2011, enhancing the rate of tax from 4% to 5% with effect from

14.09.2011. However, even after such amendment, the Government Contractee added tax @ 4% only and deducted the same from the bills of the petitioner and paid to the Commercial Tax Department, as it was an ongoing contract and has not deviated from the contractual obligations.

3. While so, the third respondent issued a show cause notice vide AAO No.8502 dated 11.09.2014 to the petitioner proposing to impose tax @ 5% with effect from 14.09.2011 for the period from April, 2011 to July, 2012 and calculated the differential tax at Rs.15,17,733/-. The petitioner filed its objections dated 14.08.2014 bringing to his notice the judgment of this Court in **M/s.Nithin Sai Constructions, Anantapur V/s State of Andhra Pradesh**¹, and requested to drop the proposal of imposing higher tax. The third respondent considered the objections of the petitioner and passed assessment order dated 11.09.2014 dropping the show cause notice.

4. Thereafter, the first respondent, in exercise of his *suo motu* powers of revision under Section 32(2) of the A.P.VAT Act, issued revision show cause notice dated 30.06.2016, proposing to revise the assessment order passed by the third respondent and enhancing the tax from 4% to 5% from 14.09.2011. He proposed to impose differential tax of Rs.22,52,072/- from September, 2011 to July, 2012. The petitioner filed its objections dated 14.10.2017 before the first respondent, but the first respondent rejected the

¹ W.P.No.27295 of 2012 dated 31.08.2012

same and passed the impugned order dated 19.02.2018 holding that the petitioner is liable to pay tax on the works contracts @ 5% with effect from 14.09.2011 with a liberty to the petitioner to claim the differential liability of sales tax from the Government Contractee.

5. Admittedly, the Government cannot enrich itself at the cost of a citizen which is contrary to the Constitution of India. One wing of the State extending the contractual obligations with the citizen cannot cause him hardship through other wing of the State. It is a settled principle of law that no tax can be collected in contravention to the law. This Court in **M/s.Nithin Sai Constructions's** case (1 supra), held as follows:

“ The estimates are prepared for any work taking into accounts the percentage of VAT prevailing at the time of estimation. The bills are also prepared accordingly. In case, deduction towards the VAT is made over and above the percentage mentioned in the estimates, serious loss would occur to the contractor. If the percentage of VAT has been increased after the contract was awarded, the Government can certainly revise the estimates on that ground.

Hence, the writ petition is disposed of, directing that the respondents shall deduct only that much of VAT as is provided for in the estimates of the works assigned to the petitioner and incorporated in the agreements.”

6. It is necessary to refer to Section 263 (1) of The Income-tax Act which reads as under:

“**263.** (1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or

modifying the assessment, or cancelling the assessment and directing a fresh assessment.”

7. The Supreme Court in **Malabar Industrial Co. Ltd. V/s CIT**², interpreted the expression ‘prejudicial to the interests of the revenue’, as under:

“ The expression ‘prejudicial to the interests of the revenue’ has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every order made by the Assessing Officer resulting loss of revenue cannot be treated as prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law.”

8. It is necessary to refer Sections 4(7)(b), 22(3) and 32(2) of the A.P.VAT Act which read as under:

“4. Charge to tax:

(1) to (6) ...

(7) Notwithstanding anything contained in the Act; -

(a) ...

(b) Any dealer executing works contract may in *lieu* of the amount of tax payable by him under clause (a) opt to pay by way of composition at the rate of 5% of the total amount received or receivable by himself towards execution of the works contract either by himself or through sub-contractor subject to such conditions as may be prescribed:-

Provided that the sub-contractor, executing works contract on behalf of the contract, who opts to pay tax under this clause, shall be exempted from levy of tax.

22. Due date for Payment of Tax:-

(1) and (2) ...

(3) The Central Government or the State Government or an industrial, commercial or trading undertaking of the Central Government or of the State Government or a local authority or a statutory body or a company registered under the Companies Act, 1956 or any other person notified by the Commissioner, shall deduct from out of the amounts payable by them to a dealer in respect of works contract executed for them, an amount calculated at such rate as may be prescribed and such contractee deducting

² (2000) 2 SCC 718

tax at source shall remit such amount in the manner prescribed.

Provided that no deduction shall be made from any amounts paid as consideration to any sub-contractor if tax was already deducted by the contractee.

32. Revision by Commissioner & other prescribed authorities:

(1) ...

(2) Powers of the nature referred to in sub-section (1) may also be exercised by the Additional Commissioner, Joint Commissioner, Deputy Commissioner and Assistant Commissioner in the case of orders passed or proceedings recorded by the authorities, officers or persons subordinate to them:

Provided that the power under sub-sections (1) or (2) shall not be exercised by the authority specified therein in respect of any issue or question, which is the subject matter of an appeal before or which was decided on appeal by the Appellate Tribunal under section 33:

Provided further that this restriction is not applicable in respect of other issues or questions, which are not the subject matter of an appeal before the Appellate Tribunal."

9. The impugned order has not appreciated the applicability of prejudicial to the interest of the revenue. The amendment to the A.P. VAT Act came into force after commencement of the contractual obligation and hence subsequent amendment cannot have retrospective effect on the contract of the petitioner. Since the Government Contractee has not extended the benefit of payment of differential tax to the petitioner, the respondents are refrained from demanding the same from the petitioner.

10. Though the demands made subsequently, the payments are not attracted by the enhanced tax. The first respondent is not justified in saying that the order of the third respondent is erroneous as the differential tax by virtue of the amendment cannot

be imposed on an ongoing contract. The order-in-original of the third respondent is well considered and the order of the first respondent dated 19.02.2018 is contrary to law and thus the same is liable to be set aside.

11. The writ petition is accordingly allowed, setting aside the order of the first respondent in DC Order No.1556 dated 19.02.2018. Pending miscellaneous petitions, if any, shall also stand closed. No order as to costs.

SANJAY KUMAR, J

T.AMARNATH GOUD, J

Date: 28.08.2018
TJMR

