IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.01.2019

CORAM
THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Tax Case (Revision) Nos.32 and 33 of 2013

Tvl.Hindustan Construction Co. Ltd.,
Break Water Project,
Ennore, Chennai - 17. ..Respondent/Petitioner in both the Revisions

-vs-

The State of Tamil Nadu,
Rep. by The Joint Commissioner (CT),
Chennai (Central) Division,
Chennai - 6. ... Appellant/ Respondent in both the Revisions

Common Prayer: Tax Case (Revisions) filed under Section 38 of the Tamil Nadu General Sales Tax Act (TNGST Act), 1959 against the order of the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai dated 19.11.2012 in STA.Nos.290/2008 and 291/2008 for the assessment years 2003-04 and 2004-05 and against the order the order of Deputy Commissioner of (CT), Chennai in TNGST/1101673/2003-04; 2004-05 dt.02/01/2006 28/02/2005 and order dt.18/09/2008 in A.P.No. 109/2005 and 37/2006 by Joint Commissioner(CT), Chennai.

For Petitioner
in both the Revisions : Mr.S.Ramanathan

For Respondent
in both the Revisions : Mr.V.Haribabu
Additional Government Pleader

COMMON ORDER
(Order of the Court was made by T.S.Sivagnanam, J.)

These tax case revisions are filed by the dealer under the Tamil Nadu General Sales Tax Act, 1959 (TNGST Act) challenging the orders passed by the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai in STA.Nos.290 and 291 of 2008 dated 19.11.2012 for the assessment years 2003-04 and 2004-05.

2.These tax case revisions have been admitted on the following substantial questions of law:

> "1.Whether on the facts and in the circumstances of the case the Hon'ble Tribunal was correct in holding that Form XXXVII B is essential to prove that the sub contractors are registered dealers and have paid the taxes, when Section 3-B(2)(d) of the TNGST Act grants exemption kon the payments made to sub contractors subject tot he condition that sub contractors are registered dealers and that such amounts (payments) are included in the return filed by the sub contractors?
>
> 2.Whether the Hon'ble Tribunal having held that Section 3-B of the Act clearly speaks about the works contract and not defined the principal and agents relationship was correct in remanding the case to ascertain whether Form XXXVII-B is available for all sub contractors when those Forms are not prescribed as per Section 3-B of the TNGST Act for claiming exemption and the petitioner cannot file the Form XXXVII-B also as directed by the Hon'ble Tribunal?
>
> 3.Whether the explanation 1 to Section 2(1)(aa) of the Additional Sales Tax Act which deals with transactions of the Principal and Agent would be applicable to main contractor and sub contractor. When the Agent is selling the goods of the principal and on behalf of the principal whereas the sub contractors are independently dealing the goods and not in the name of the main contractor?"

3.Heard Mr.S.Ramanathan, learned counsel for the petitioner and Mr.V.Haribabu, learned Additional Government Pleader for the respondent/revenue.

4.The assessment for the relevant years was completed under the provisions of the TNGST Act vide orders dated 28.02.2005 (2003-04) and 02.01.2006 (2004-05). The petitioner/dealer claimed exemption in respect of payment made to sub contractors during both the assessment years. The Assessing Officer verified the claim for exemption and found the same to be in order and accordingly allowed the exemptions and computed the total turnover. With regard to the levy of additional sales tax, the Assessing Officer added the payments made to the sub contractors for the purpose of computing the total turnover though for the purpose of levy of sales tax, the same was exempted. Aggrieved by such orders, the assessee preferred an appeal before the Appellate Deputy Commissioner (CT)-VI, Chennai. Before the First Appellate Authority, the petitioner dealer disputed the inclusion of payments made to the sub contractors in the taxable turnover for the purpose of arriving at the turnover liable to additional sales tax and levying additional sales tax on the same. The First Appellate Authority after considering the submissions on either side accepted the stand taken by the petitioner/dealer and allowed the appeal. At this juncture, it would be relevant to take note of the following finding rendered by the First Appellate Authority:

> "....... The equation of the payments made to sub-contractors with that of the the transaction between a principal and agent is not tenable, as there is no actual transfer of property in goods from the side of the main contractor, but in the case of consignment sales, the goods actually more from the principal to agent. As rightly contended by the learned Advocate, entire goods required to carry out the works contract are procured by the sub-contractor ony and used in the works contract and hence the deemed sale value of such goods become the taxable turnover of the sub-contractor only. The principal agent relationship will be apply only in cases where there is buying and selling as per the explanation I-B of Sec.2(n) which define 'SALE' and it will not be applicable to the main contractor and sub contractor as there is no buying or selling is involved in this case."

5.Aggrieved by the same, the revenue filed an appeal before the Tribunal. We have perused the grounds of appeal filed before the Tribunal by the revenue and the only contention raised by the revenue is that the entire job is accomplished by the main contractor partly by them and partly by the sub-contractor and the main contractor is solely responsible to carry out the entire job. Therefore, the main contractor, namely, M/s.Hindustan Construction Co. Ltd., namely, the petitioner/dealer acted as a principal placing sub contractor as an agent in the executing of contract by them to the customers and therefore, the payments made to sub contractors would necessarily form part of taxable turnover of the main contractor for the purpose of levy of Additional Sales Tax (AST). The petitioner resisted the contentions raised by the revenue before the Tribunal contending that they have made payment to the sub contractors during the relevant assessment years and those sub contractors are registered dealers and the turnover is eligible for exemption as per Section 3-B(2)(d) of the TNGST Act and the Assessing Officer himself has granted exemption on the said turnover while arriving at the taxable turnover and therefore it would not form part of the taxable turnover also. Further, it was contended that the payment would not be liable for tax under Section 7C of the TNGST Act and therefore, by adding the said turnover for the purpose of arriving the turnover for AST is not correct and without jurisdiction. Further, the petitioner contended that the revenue is not correct in relying upon the explanation to Section (1) to Section 2(1)(aa) of the Additional Sales Tax Act as they have failed to consider that the said explanation relates to agents, principal and in the petitioner's case, it is the main contractor and sub-contractor. Therefore, the explanation will not be applicable. Furthermore, the Assessing Officer himself has granted exemption on the payments made to sub contractors and therefore, it would not form part of the taxable turnover and hence, no additional sales tax can be levied on the said turnover as the charging section, namely, Section 2(1)(aa) clearly reads that the additional sales tax is leviable only on the taxable turnover. Further, the petitioner contended that the payments made to the sub contractor is the turnover of the sub contractor and those sub contractors are registered dealers and the turnover has been assessed to tax and additional sales tax at the hands of the sub contractor and therefore, levying additional sales tax at the hands of the petitioner would amount to double taxation of the same turnover.

6.The Tribunal after considering the submissions made on either side accepted the case of the petitioner and held that if the payments made to sub contractors were properly assessed at their end both under the Tamil Nadu General Sales Tax Act, 1959 and Tamil Nadu Additional Sales Tax Act, 1970, it would not form part of the taxable turnover of the main contractor for levying AST. Further, the Tribunal held that Section 3B of the Act clearly speaks about the works contract and not defines the principal ad agent relationship. Accordingly, it held that the payment made to the sub contractors is an exempted turnover and are not eligible for levy of AST. However, after having come to such a conclusion, the Tribunal held that such an exemption would be applicable only if Form XXXVII-B was filed as proof of levy of tax and AST at sub-contractors end.

7.This finding of the Tribunal is wholly without jurisdiction as it was never the case of the revenue that Form XXXVII-B was required to be filed for exempting the turnover for the purpose of levy of AST. In other words, this issue was never raised by the revenue before the Tribunal. Furthermore, it is not the case of the revenue that sub-contractors are not registered dealers and neither it is their case that they have not paid taxes or AST. In fact, the finding rendered by the Tribunal on this aspect is clearly in favour of the petitioner and against the revenue. In such circumstances, we hold that the finding rendered by the Tribunal that the petitioner should file Form XXXVII-B is wholly without jurisdiction and beyond the scope of the appeal filed by the revenue. Hence, we are of the considered view that the order passed by the Tribunal to that extent is unsustainable.

8.For the above reasons, these tax case revisions are allowed and the substantial questions of law are answered in favour of the petitioner. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1.The Joint Commissioner (CT),
Chennai (Central) Division,
Chennai - 6.

2.The Tamil Nadu Sales Tax Appellate Tribunal (Main Bench),
Chennai

3.The Assistant Commissioner (CT),
Zone VIII,
Chennai -6.

4.The Deputy Commissioner (CT) VI,
Chennai – 108

+1cc to Mr.S.Ramanathan, Advocate, S.R.No.685
+1cc to the Government Pleader(Taxes), S.R.No.1126

T.C.(R) Nos.32 and 33 of 2013

SJ(CO)
RRS(31/01/2019)