

**IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT: HYDERABAD**

Coram :

*** The Honourable Mr. Justice V.RAMASUBRAMANIAN
and
The Honourable Mr. Justice P. KESHA VA RAO**

+ Writ Petition No.12557 OF 2018

% Delivered on: 30- 04-2019

Between:

M/s. Theme Ambience Constructions Private Limited,
Road No.12, Banjara Hills, Hyderabad, represented by
its Director.

.. Petitioner

v.

\$ The Commercial Tax Officer, Jubilee Hills Circle,
Mayur Kushal Complex, Abids, Hyderabad.

.. Respondents

! For Petitioner

: M/s. AVA Siva Kartikeya

^ For Respondents

: GP for Commercial Taxes
Mr. T. Vinod Kumar,
Special Standing Counsel

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> Head Note

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? Cases referred

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1. 2015 (81) VST 1
2. 2015 (61) APSTJ 1

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HONOURABLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HONOURABLE SRI JUSTICE P. KESHA RAO

WRIT PETITION No.12557 OF 2018

ORDER: *(Per Hon'ble Sri Justice V. Ramasubramanian)*

Challenging an Order of Assessment passed under the Telangana Value Added Tax Act, 2005, (for short 'the Act'), way back in the year 2013 and the rejection of the first appeal arising there from, the Dealer has come up with the above writ petition.

2. Heard Mr. A.V.S. Siva Karthikeya, learned counsel for the petitioner, and Mr. T. Vinod Kumar, learned Special Standing Counsel for Commercial Taxes.

3. The petitioner is a registered dealer on the rolls of the 1st respondent. They are engaged in the business of construction and sale of Residential Flats/Bungalows/Villas. According to the petitioner, they purchase suitable lands for construction, prepare lay outs, provide necessary amenities and construct and sell houses after obtaining necessary sanctions. It is the claim of the petitioner that for the purpose of raising funds, they sell some semi-finished buildings with a pre-condition that the task of developing and constructing should be entrusted only to the petitioner for Group Housing.

4. The petitioner was issued with a show-cause notice in Form VAT 305A, dated 20.06.2013, proposing to levy tax in terms of Section 4 (7) (e) and indicating that composition under Section 4 (7) (d) of the Act will not be allowed. The petitioner filed their objections on

15.07.2013. The objections were overruled and an order of assessment confirming the proposal was passed on 13.08.2013.

5. As against the order of assessment, the petitioner filed an appeal to the 3rd respondent. The appeal was rejected by an order, dated 26.06.2014 on the ground that the petitioner had not complied with the statutory pre-condition stipulated under Section 31. It appears that the petitioner paid 12.5% of the disputed demand, which is a pre-condition, after a delay of 11 days and 15 days. Therefore, the appeal was rejected.

6. Contending that they were not aware of the order of dismissal of the appeal and that they were taken by surprise when a demand notice dated 06.03.2018 under Section 8 of the Telangana Revenue Recovery Act, 1864 was received, the petitioner has come up with the above writ petition, challenging not only the order of assessment, but also the rejection of the appeal and the issue of the demand notice under the Revenue Recovery Act.

7. The main contention of the petitioner is that the Assessing Officer is not entitled to thrust an assessment under Section 4 (7) (c) and 4 (7) (e) of the Act merely on the ground that the transactions regarding land and building are split and that when the petitioner has been paying VAT at 4% of 25% of the gross receipts under Section 4 (7) (d) of the Act, for the value of both land and construction, the respondent cannot deny the benefit of composition under Section 4 (7) (d) of the Act. Another contention of the petitioner is that since returns are filed month-wise under the VAT Act, 2005 and since assessments are completed corresponding to each month, the order of assessment passed on

m13.08.2013 relating to the period from June, 2007 to March, 2013 is barred by limitation to some extent. Reliance is placed in this regard on the decision of this Court in **K.G.F. Cottons Private Limited v. Assistant Commissioner**¹.

8. The respondents have filed a counter affidavit contending *inter alia* that the writ petition has been filed after five years of the order of assessment, without explaining the delay; that though the petitioner is in the business of construction and sale of residential flats/bungalows/ villas since 2006-07, they obtained registration only on 05.09.2011 with effect from 01.09.2011; that therefore the business of construction of flats/buildings was carried on by the petitioner only as an unregistered dealer till 01.09.2011; that the petitioner was entering into two separate agreements, one for the sale of semi-finished structure and another for interior/additional works; that under the impugned order of assessment, the turn over corresponding to interior/additional works was subjected to tax under Section 4 (7) (c) read with 4 (7) (e) of the Act; that when an audit was conducted pursuant to the authorization, it was found that the petitioner did not offer to tax, the receipts from the second type of agreement relating to interior/additional works; that therefore a show-cause notice was issued and after considering objections, the impugned order was passed; that as against the impugned order of assessment, the petitioner filed a statutory appeal to the 3rd respondent on 11.10.2013 with a delay of 27 days; that while filing the appeal the petitioner did not even pay the prescribed fees and the mandatory pre-deposit as

¹. 2015 (81) VST 1

prescribed in Section 31; that therefore a show-cause notice was issued on 28.11.2013 to the Authorized Representative of the petitioner calling upon him to remove the discrepancies; that the Authorized Representative did not take steps forcing the Appellate Authority to issue a second notice, dated 16.01.2014 proposing to dismiss the appeal for failure to remove the defects; that in response to the second notice, the Authorized Representative sent a reply dated 27.01.2014 informing the Appellate Authority that pre-deposit and the appeal fees were paid respectively on 24.10.2013 and 29.10.2013; that upon finding that the payments were made beyond the time stipulated in the Act, an opportunity of hearing was granted; that the Authorized Representative appeared before the 3rd respondent on 21.06.2014 and made submissions; that thereafter the 3rd respondent dismissed the appeal on 26.06.2014, following the decision of this Court in **Ankamma Trading Company**; that the order of the Appellate Authority dated 26.06.2014 was served on the Authorized Representative, but the petitioner kept quiet for four years thereafter; that even penalty proceedings were initiated and an order of penalty was passed in Form VAT 203, dated 19.07.2014; that the order of penalty has also attained finality; that the petitioner is not entitled to the benefit of the decision of this Court in **M/s. Omega Shelters Private Limited**², since the petitioner was an unregistered dealer for a portion of the period; that as per the provisions of the Act, a dealer may opt for composition, at the time of commencement of the work by filing Form VAT 250; that when

². 2015 (61) APSTJ 1

admittedly the sale was of semi-finished constructions, the work had already commenced and hence the question of exercising option of composition did not arise; that in cases of this nature, there is wilful evasion and hence the larger period of limitation would apply and that therefore the writ petition is liable to be dismissed.

9. The petitioner has filed a reply to the counter affidavit filed by the respondents. It is contended in the reply that the Authorized Representative was seriously ill and he could not bring to the notice of the petitioner, the dismissal of the appeal; that if the petitioner was not entitled to composition, on the ground that the activity carried on by the petitioner is not treated as works contract, then the Assessing Authority ought to have assessed the petitioner under Section 4 (7) (a) of the Act and not 4 (7) (c) and 4 (7) (e) of the Act; that by an amendment Act No.21 of 2011, Section 4 (7) (c) of the Act was actually omitted with effect from 15.05.2011 and hence the impugned order is actually under a non-existent provision of law; that the Government had already issued a memo dated 17.06.2011 permitting the Apartment builders who have not registered and have not opted for composition, to register themselves and pay tax at 1%; that in pursuance of the Government Memo, dated 17.06.2011, the 5th respondent, viz., the Commissioner of Commercial Taxes issued a Circular dated 22.03.2012; that however the relief under the Circular was restricted to those transactions that took place up to the date of issue of the Memo dated 17.06.2011; that therefore the petitioner may be liable to pay tax only at 1% at least till 17.06.2011, in terms of

Section 4 (7) (d) of the Act; and that through a counter affidavit, the respondent cannot improve the impugned order of assessment.

10. We have carefully considered the above submissions.

11. At the outset, the writ petition is liable to be thrown out on the ground of delay and laches. The order of assessment challenged in the writ petition is dated 13.08.2013. The writ petition was filed on 11.04.2018. The petitioner has had knowledge of the order of assessment, as they seem to have filed an appeal under Section 31, with a delay of 27 days. Apart from the delay, there were also deficiencies in the presentation of the appeal, as the appeal fee was not paid and pre-deposit condition was not satisfied. Notices were issued by the Appellate Authority and the Authorized Representative confirmed having paid the prescribed fee and the pre-deposit condition after the expiry period of limitation. The Authorized Representative was heard in person and thereafter the order of dismissal of the appeal was passed on 26.06.2014. The order was also served on the Authorized Representative. But the petitioner kept quiet for a period of four years, to come up with a writ petition.

12. In the affidavit in support of the writ petition, the petitioner has not made a whisper about the service of the copy of the order of the Appellate Authority dated 26.06.2014, on their Authorized Representative. After the respondents filed a counter, the petitioner has come up with an explanation that the Authorized Representative became seriously ill and he did not forward the copy of the order.

13. But, once it is found that the order of rejection of the appeal was served on the Authorized Representative, then it is a matter between the petitioner and the Authorized Representative. The Department was not at fault, as they had complied with the statutory requirements. Therefore, the petitioner could not have kept quiet for four years after the order of the Appellate Authority, to come up with the above writ petition. Hence, even on the ground of delay and laches, the writ petition is liable to be thrown out.

14. The argument that the impugned order was passed under Section 4 (7) (c) of the Act, without noticing the omission of the said provision with effect from 15.09.2011 under Amendment Act No.21 of 2011, does not carry weight. This argument regarding omission of Section 4 (7) (c) of the Act with effect from 15.09.2011, was not raised by the petitioner in the reply to the show cause notice. It was not raised by the petitioner even in the course of arguments before the Assessing Officer. This point is not raised even in the affidavit in support of the writ petition. Therefore, the respondents did not have an opportunity to meet this contention. The entire affidavit in support of writ petition proceeds on the basis that the provisions of Section 4 (7) (c) of the Act cannot be thrust on a Dealer merely because the transactions are split. Therefore, in normal circumstances we should not permit the petitioner to raise the issue by way of oral arguments.

15. In any case, the impugned order of assessment covers the period from June 2007 to March, 2013. Section 4 (7) (c) of the Act was admittedly in force up to 15.09.2011. Therefore, at least the assessment

from June 2007 up to 15.09.2011 under Section 4 (7) (c) of the Act cannot be said to be under a non-existent provision of law. Therefore, the argument revolving around the omission of Section 4 (7) (c) of the Act has to be rejected.

16. Reliance is placed by the learned counsel for the petitioner on the Government Memo dated 17.06.2011, pursuant to which the Commissioner of Commercial Tax issued a circular dated 22.03.2012. Under the Government Memo dated 17.06.2011, the Government permitted those apartment builders who had not registered and not opted for composition under Section 4 (7) (d), to register themselves as Dealers and pay tax at 1% under composition scheme. The relevant portion of the Government memo dated 17.06.2011 reads as follows:

“3. Government, after careful examination, hereby order and permit those apartment builders, who have not registered and not opted for composition of tax under section 4 (7) (d) under APVAT Act, 2005 to register themselves as VAT dealers and pay tax @ 1% under composition scheme. They should also pay interest, as applicable under the APVAT Act, from the due date till actual payment of the VAT due.”

17. The Commissioner of Commercial Tax issued a circular dated 22.03.2012 in pursuance of the Government Memo. The operative portion of the circular reads as follows:

“1. It is informed that wherever, if any unregistered apartment builders comes forward and submits the details of turnovers on which tax and interest thereon are payable as per the above referred memo, such builders have to first obtain Registration Certificate under the provisions of APVAT Act, 2005.

2. Thereafter, based on the details furnished by the said builders and if necessary after making any enquiry, the concerned assessing authorities shall assess such builders to quantify the tax and interest as per Govt.memo in ref.2nd cited, and have to issue specific proceeding as per the submissions made by them as they have not filed any returns earlier which

can be deemed as assessed under Section 20 of the APVAT Act, 2005.

3. It is further informed that this memo was issued as one time measure to provide relief to such dealers who did not have Registration Certificate and not applied for composition. Thus the relief is available only for those transactions which occurred up to the date of issue of memo i.e. 17.06.2011. Any transaction occurring after 17.06.2011 will not come under the purview of the memo dt.17.06.2011.”

18. As seen from paragraph-3 of the circular dated 22.03.2011, it was a one time measure. It is not the case of the petitioner that they registered themselves pursuant to the said circular and also paid 1% along with interest under the composition scheme. Since the petitioner failed to avail the benefit by satisfying the twin conditions, viz., (1) getting registered and (2) paying 1%, the petitioner cannot today claim the benefit of the amnesty under the circular.

19. It is needless to point out that Section 4 (7) (d) of the Act contains certain conditions that are inbuilt for its application. Section 4 (7) (d) reads as follows:

“Every dealer engaged in construction and selling of residential apartments, houses, buildings or commercial complexes may, in *lieu of* the amount of tax payable by him under clause (a) opt to pay tax by way of composition at the rate of 5% on twenty five percent 25% of the amount received or receivable towards the composite value of both land and building or the market value fixed therefor for purpose of stamp duty whichever is higher, subject to such conditions as may be prescribed:

Provided that no tax shall be payable by the sub-contractor of a works contractor, who opts to pay and paid tax under this clause on the turnover relating to the amount received as a sub-contractor from such main contractor towards the execution of works contract, whether wholly or partly, subject to the production of evidence to prove that such main contractor has exercised such option in respect of the specific work and subject to such other conditions as may be prescribed.”

20. It may be seen from the provision extracted above that the same is applicable to “Dealers”. The word “Dealer” is defined in Section 2 (10) of the Act to mean any person who carries on or executes any works contract. But, the entitlement of a Dealer to the benefit of composition under Section 4 (7) (d) of the Act, as seen from provisions, is “subject to such conditions as may be prescribed”. The Government has framed a set of Rules known as Telangana Value Added Tax Rules, 2005 in exercise of powers conferred by the Section 78 of the Act. Rule 17.4 of these Rules deals with the manner in which apartment builders and developers under composition are to be treated. Under Rule 17.4 (b), the VAT Dealer should notify the Prescribed Authority in Form VAT 250, of his intention to avail composition for all works specified in clause (a) undertaken by him. But, the pre-condition is that the notification by the VAT Dealer to the Prescribed Authority should be before the commencement of the execution of the work.

21. The petitioner did not file Form VAT 250 before commencement of the work. Therefore, we do not know how the petitioner claims the benefit of composition under Section 4 (7) (d) of the Act. As a matter of fact, the copies of the agreements entered into by the petitioner with the purchasers of semi finished buildings were produced before the Assessing Authority. They were all dated for the years 2010 and 2011. It is not the case of the petitioner even today that Form VAT 250 was filed at any point of time either before 2010 or even thereafter. Therefore, the petitioner never exercised his option in a

manner prescribed by Section 4 (7) (d) of the Act and hence, he cannot claim the benefit of composition.

22. The last contention of the petitioner is that a portion of the order of assessment is barred by limitation, as assessments under the VAT Act are monthly. But, the respondent has taken a stand that enlarged period of limitation will apply in view of the suppression.

23. The question whether there was suppression and the question whether enlarged period of limitation will apply on account of suppression, are all mixed questions of fact and law. Therefore, the petitioner ought to have raised them in the appeal by filing it within time and by complying with the conditions for filing of the appeal in the proper form. Since the petitioner has failed to do so, the writ petition deserves to be dismissed.

24. Accordingly, the Writ Petition is dismissed. However, in the circumstances of the case, there shall be no order as to costs.

As a sequel thereto, Miscellaneous Petitions, if any, pending in the writ petition shall stand closed.

V. RAMASUBRAMANIAN, J

P. KESHA RAO, J

April 30, 2019

Mgr/KTL