IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.08.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.2451 of 2020
and
WMP. No.2845 of 2020

State Bank of India Officers Association (CC)-
SBIOA Represented by its
General Secretary Mr.R.Balaji,
SBIOA (CC) No.86 Fourth Floor,
Rajaji Salai, Chennai 600 001 .. Petitioner

Vs.

1 The Assistant Commissioner (ST),
Muthialpet Assessment Circle,
Room No.319, III Floor,
Integrated Commercial Taxes Office Complex,
Vepery, Chennai -600 003.

2 Assistant Commissioner of Commercial Taxes,
Egmore Assessment Circle,
No.88 V.R.Ramanathan Road,
Chetpet Chennai- 31.

3 Simplex Infrastructures Limited,
48 Casa Major Road Egmore,
Chennai- 600008. .. Respondents
(R2 & R3 suomoto impleaded)

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorari to call for the records in the proceedings in Reply Letter Rc.No.1/2017/A4/2016-17 dated 23.01.2020 issued by the Respondent and quash the same as arbitrary and illegal.

For Petitioner : Mr.Joseph Prabakar

For Respondent: Mr.Mohammed Shaffiq, Spl.G.P. - R1 & R2
Mr.K.A. Parthasarathi - R3

O R D E R

The petitioner is a Trade Union, the State Bank of India Officers Association, Chennai Circle, formed under the Indian Trade Union Act 1926 with its primary object being the organization, welfare and unity of members of the State Bank of India and the regulation of their relations.

2. The petitioner had developed a residential project called SBIOA Unity Enclave exclusively for members of the Union at Kancheepuram. It had, for this purpose, engaged Simplex Infrastructure Limited/R3 (suo motu impleaded by me on 03.02.2020) for construction of the project. There was no profit motive and the project was undertaken on cost basis wherein the cost of the residential unit purchased by a member would be borne in full by that member. The documentation entered into by the petitioner with R3 provided for the terms of payment which, as per the prevailing norms in the industry, were to be made slab-wise, based upon the progress of the contract.

3. The provisions of the Tamil Nadu Value Added Tax Act, 2006 (in short 'TNVAT Act') provide for the deduction of tax at source on remittances effected to payees including contractors at stipulated rates in terms of Section 13 of the TNVAT Act. Exceptions are carved out wherein remittances can be effected without deduction of tax and in such situations, the payee/contractor has the responsibility of producing a certificate in Form S on the strength of which remittances will be made by the payer without effecting the statutory deduction of tax or deducting tax at a rate lower than that stipulated. There are serious consequences of non-deduction wherein the entire tax liability in respect of the amount that was subject to deduction would be mulcted upon the payer/contractee. This is to ensure that the provisions of tax deduction are complied with fastidiously by payers.

4. There appears to have been a visit by the officials of the Enforcement Department in the premises of the petitioner, pursuant to which the petitioner received notice dated 12.01.2017 alleging that no tax had been deducted on the remittances made to the contractors/R3 and proposing consequential action in this regard both under Section 13 as well as under Section 5 of the Act. Despite objections to the pre-assessment proposals as aforesaid, an exparte order came to be passed on 28.05.2019 for the period 2016-17 even without extending an opportunity of hearing to the petitioner.

5. This order was challenged in W.P.No.22634 of 2019, which came to be dismissed on 01.08.2019 relegating the petitioner to alternate remedy. The order of the learned single Judge was confirmed in Writ Appeal on 06.01.2019.

6. The petitioner thereafter challenged the order of assessment dated 28.05.2019 by way of an application for rectification under Section 84 of the Act being advised that the same contained mistakes apparent on the face of record. This application was dismissed on the short ground that the petitioner ought to have filed an appeal as permitted by this Court in the earlier round of litigation, and the application filed under Section 84, according to the Assessing Officer, was not maintainable. Challenging order dated 23.01.2020, the petitioner is now before the Court.

7. It was felt that Simplex and its Assessing Officer were necessary and appropriate parties to this litigation and both parties were thus impleaded suo motu on 03.02.2020 as R3 and R2 respectively.

8. Heard Mr.Joseph Prabakar, learned counsel for the petitioner, Mr.Mohammed Shaffiq, learned Special Government Pleader for the Revenue, R1 and R2, and Mr.Parthasarathi for R3.

9. The following issues are identified for resolution and the discussion and conclusions in connection therewith are set out in seriatim thereunder:

(i) Whether the filing of Section 84 application by the petitioner despite being permitted to file an appeal in the earlier round of litigation is correct and permissible?

There is no serious contest to the position that once a challenge under Article 226 of the Constitution of India is rejected and the petitioner/assessee relegated to statutory remedy, it is at liberty to avail of any statutory remedy under the Act, be it appeal, revision or any other. Thus, resort to Section 84 by the petitioner is not misconceived and rejection of Section 84 application by the Assessing Officer solely on the ground that only an appeal should have been filed is erroneous. This issue is answered in favour of the petitioner.

10. (ii) Whether the impugned order is vitiated by violation of the principles of natural justice?

As far as the issue of violation of principles of natural justice is concerned, evidently, no opportunity had been granted by the Officer prior to passing of the impugned order. This submission is well founded. However, in the course of the hearing I find that there are no disputes in the facts and all facts as are necessary for the adjudication of the issues on merits are available on record having been filed both by the petitioner as well as by the Department before me. Thus, while accepting the argument that the impugned order is contrary to the principles of natural justice, I refrain from setting aside the order and granting the limited relief of remand and proceed to adjudicate the legal issues raised, on merits.

11. (iii) What is the proper scheme of tax deduction under the provisions of the TNVAT Act and whether the scheme has been followed/applied properly in the present case?

Tax deduction at source (TDS) is not a novel concept in revenue law and is well entrenched in the procedure for levy and collection of tax. The principle behind tax deduction is two-fold. Firstly, to address the problem posed by errant contractors who may shift business to other states to avoid detection and tax liability in the earlier place of business and secondly to reduce the burden of 100% tax payment at the stage of filing of return as some portion of the burden would have been met by deduction at source by the contractee.

12. The provisions of Section 7-F of the erstwhile Tamil Nadu General Sales tax Act 1959 dealt with the deduction of tax at source in regard to works contracts and Section 13, in the TNVAT, provided for mandatory deduction of tax at source by a contractee/payor to a contractor/payee, at stipulated rates based on the classification of the contract inter se the parties. The provisions of Section 13 are extracted in full hereunder:

> 13. Deduction of tax at source in works contract .--. (1) Notwithstanding anything contained in this Act, every person responsible for paying any sum to any dealer for execution of works contract shall, at the time of payment of such sum, deduct an amount calculated, at the following rate, namely:-
>
> (i) civil works contract
>
> (ii) civil maintenance works contract
>
> (iii) All other works contracts two per cent of the total amount payable to such dealer; two per cent of the total amount payable to such dealer; five per cent of the total amount payable to such dealers:
>
> Provided that no deduction under sub-section (1) shall be made where -

(a) no transfer of property in goods (whether as goods or in some other form) is involved in the execution of works contract; or

(b) transfer of property in goods (whether as goods or in some other form) is involved in the execution of works contract in the course of inter-State trade or commerce or in the course of import; or

(c) the dealer produces a certificate in such form as may be prescribed from the assessing authority concerned that he has no liability to pay or has paid the tax under section 5:

Provided further that no such deduction shall be made under this section, where the amount or the aggregate of the amount paid or credited or likely to be paid or credited, during the year, by such person to the dealer for execution of the works contract including civil works contract does not or is not likely to, exceed rupees one lakh.

Explanation.—For the purpose of this Section –

(a) the term ' person' shall include –

(i) the Central or a State Government;

(ii) a local authority;

(iii)a corporation or body established by or under a Central or State Act;

(iv) a company incorporated under the Companies Act, 1956 including a Central or State Government undertaking;

(v) a society including a co-operative society;

(vi) an educational institution; or

(vii) a trust; (b) the term "civil works contract" shall have the same meaning as in the Explanation to Section 6

(2) Any person making such deduction shall deposit the sum so deducted to such authority, in such manner and within such time, as may be prescribed.

(3) Any person who makes the deduction and deposit, shall within fifteen days of such deposit, issue to the said dealer a certificate in the prescribed form for each deduction separately, and send a copy of the certificate of deduction to the assessing authority, having jurisdiction over the said dealer together with such documents, as may be prescribed.

(4) On furnishing a certificate of deduction referred to in sub-section (3), the amount deposited under sub-section (2), shall be adjusted by the assessing authority towards tax liability of the dealer under section 5 or section 6 as the case may be, and shall constitute a good and sufficient discharge of the liability of the person making deduction to the extent of the amount deposited:

Provided that the burden of proving that the tax on such works contract has already been deposited and of establishing the exact quantum of tax so deposited shall be on the dealer claiming the deduction.

(5) Any person who contravenes the provisions of sub-section (1) or sub-section (2), shall pay, in addition to the amount required to be deducted and deposited, interest at two per cent per month of such amount for the entire period of default.

(6) Where the dealer proves to the satisfaction of the assessing authority that he is not liable to pay tax under section 5, the assessing authority shall refund the amount deposited under sub-section (2), after adjusting the arrears of tax, if any, due from the dealer, in such manner as may be prescribed.

(7) The tax or interest under this section shall become due without any notice of demand on the date of accrual for the payment by the person as provided under sub-sections (1) and (2).

(8) If any person contravenes the provisions of sub-section (1) or sub-section (2), the whole amount of tax payable shall be recovered from such person and all provisions of this

Act for the recovery of tax including those relating to levy of penalty and interest shall apply, as if the person is an assessee for the purpose of this Act

13. There are certain exceptions to the applicability of Section 13, such as if a contractor is of the view that tax need not be deducted at source by his payer for the reasons set out in the provisos to Section 13(1), being (i) there is no transfer of property in goods in the execution of the works contract and the contract was one of pure labour (ii) the transfer of property in goods was in the course of interstate trade or commerce or in the course of export (iii) the dealer produces a certificate to the effect that he has no liability to pay or has paid tax under Section 5 or (iv) his turnover is below the threshold of rupees one lakh.

14. In the case of point (iii), that the dealer has no liability to, or has paid the tax, a certificate of nil-deduction is to be obtained by the contractor to this effect from its assessing officer and furnished to the payer, upon the strength of which the payer will not deduct tax at source. For this, the contractor normally files an application before its jurisdictional Assessing Officer setting forth an estimate of its taxable turnover for the forthcoming assessment period. Upon consideration of the application and being convinced that the tax liability on such anticipated taxable turnover would be met by that dealer in full measure, the Assessing Authority is at liberty to issue a certificate in Form S setting out a) the anticipated turnover for the year in question, b) the tax liability thereupon, c) the amount for which no deduction need be effected by the payer/contractee.

15. As regards point (c) above, discretion vests in the Assessing Officer to estimate the proportion of total turnover in respect of which no tax need be deducted by the payer/contractee, and upon such estimation, a certificate in Form S is furnished by the officer to the contractor/payee indicating the amount in respect of which no deduction need by effected by the payer/contractee. Thereupon, remittances can be effected by the payer (in this case, SBIOA) to the payee (in this case, Simplex/R3) without deduction of tax at source.

16. In the present case, R3 filed an application dated 28.07.2014 seeking certificate of Nil deduction in respect of the entire contract value of a sum of Rs.550,66,54,537/-, extracted as below:

'The Assistant Commissioner (Commercial Taxes),
Egmore II Assessment Circle,
No.88, V.R.Ramanathan Road,

Chetpet, Chennai 600 031.

Dear Madam,

Request for the issue of VAT TDS Exemption Certificate in Form S.

We have been awarded a Civil Works Contract of Construction of the Proposed “Unity Enclave” Residential Township at Mambakkam, Chennai by State Bank of India Officers' Association (Chennai Circle) and the Value of the work is Rs.550,66,54,537/-. We have already incorporated this work site as an additional place of business in our TNVAT Registration Certificate.

As per the terms of the Contract (Copy of the Letter of Award dated 25.06.2014 issued to us is enclosed herewith for your ready reference) entered into by us with State Bank of India Officers' Association (Chennai Circle) for the said Work, the cost of all major materials namely Steel, Cement, Blue Metal, Sand, Bricks, Bitumen, Ceramic / Vitrified / Glazed Tiles, Granite, Paint, Doors & Windows, Flooring material etc. are included in our quoted rates.

The said Work is being executed by deploying our own Machinery and is also labour- intensive. Therefore, Service Component of the Contract Value is more than the Material Component.

A Statement containing the detailed Computation of the Net VAT Liability of the abovesaid works contract is enclosed herewith for your record. It may be inferred from the enclosed Statement that the Net VAT Liability works out to Rs.1,20,58,765/- (Rupees One Crore Twenty Lakh Fiftyeight Thousand Seven Hundred Sixtyfive Only).

Transfer Value of the materials mentioned in the enclosed Detailed Computation of Net VAT Liability for the said Work has been arrived at based on our experience in the execution of similar works in the past and is correct to the best of our knowledge.

As per the Assessment Order dated 18.07.2014 passed under Section 27 of the TNVAT Act for the year 2012-13, excess Tax of a sum of Rs.71,41,335/- (Rupees Seventyone Lakh Fortyone

Thousand Three Hundred Thirtyfive only) has been paid by us consequent to tax deducted at source by the Contractees under Section 13 of the TNVAT Act.

Even though excess Tax has been paid by us for the year 2013-2014 as well consequent to tax deducted at source by the Contractees under Section 13 of the TNVAT Act, we will be making payment of a sum of Rs.49,17,430/- (Rupees Fortynine Lakh Seventeen Thousand Four Hundred Thirty only) towards the Net VAT Liability for the above said Work as detailed hereunder:

Net VAT Liability for the said Work as per the
Rs.
Detailed Calculation enclosed herewith
1,20,58,765
Less:
Excess Tax Paid for the Financial Year 2012-2013
as per the Assessment Order dated 18.07.2014
71,41,335
____
Balance Amount Payable
49,17,430
____

We therefore request you to issue the VAT TDS Exemption Certificate in Form S for the abovesaid Work.

We shall be very much obliged if the Certificate is issued at the earliest.

Thanking you,

Yours faithfully,
for SIMPLEX INFRASTRUCTURE LIMITED

(J.S.RAGHAVAN)
MANAGEMENT ADVISOR'

Upon consideration thereof, R2 issues certificate dated 28.08.2014, valid for the period 01.04.2014 to 31.03.2015, on the basis of which the petitioner can proceed to effect remittances to R3 without deduction of tax at source. The certificate is as under:

First Form S issued for the period 2014 -2015

TIN: 33110540224/2014-2015
Office of the Assistant Commissioner of

Commercial Taxes,
Egmore II Assessment Circle,
No.88, V.R.Ramanathan Road,
Chetpet, Cheenai 600 031.

DATE: 28.08.2014.

FORMS
(See Rule 9(2))

No Liability Certificate in respect of Works Contractor

1	Name and address of the dealer	Tvl.Simplex Infrastructures Limited, 48, Cass Major Road, Egmore, Chennai.
2	Registration Certificate Number	33110540224/2014-2015
3	Status	Public Limited Company
4	Date of filing of application by the dealer for issuance of this Certificate	28.07.2014
5	Authority by whom works contract was assigned to the dealer with name, designation and address	State Bank of India Officers' Association (Chennai Circle), 64, Rajaji Salai, Chennai - 600 001.
6	Details of works contract	
	(a) No. and date of contract	Letter of Award- SBIDA/UNITY ENCLAVE/CONS/LOA/01/2014-15 dated 25.06.2014.
	(b) Description of the Contract	Construction of Proposed 'Unity Enclave' Residential Township consisting 21 Towers, Club House, Commercial Building and Basements including finishes, MEP Works and External Development at Mambakkam, Chennai.
	(c) Duration of works contract (date of commencement and date fixed for completion of works contract)	Thirty Months i.e. Form 25.06.2014 to 24.12.2016
	(d) Address of work site	Village Mambakkam, Mambakkam -Medavakkam Main Road, Chennai-600 127.
	(e) Value of Contract	Rs.550,66,54,537/- (Rupees Five Hundred Fifty Crore Sixty Six Lakh Fifty Four Thousand Five Hundred Thirty seven only)

I have examined the Contract/Purchase Bills/Returns filed in all deals and to the best of my knowledge and belief. I hereby certify that the Dealer has already paid the Tax relating to this Contract under Section 5 of the Tamil Nadu Value Added Tax Act 2006.

This Certificate is issued as contemplated in Clause (c) of the First Proviso to Sub-section (1) of Section 13 of the Tamil Nadu Value Added Tax Act, 2006.

This Certificate is valid till 31st march 2015 and is subject to revalidation thereafter.

Place : Chennai 600 031 Signature of the Assessing Officer,
Date: 28.08.2014 Name: E.KUPPAMMAL
Designation:ASSISTANT COMMISIONER
(COMMERCIAL TAXES) ,
EGMORE II ASSESSMENT CIRCLE.

17. The Second Form S for the period 2015-2016 is extracted below:

TIN: 33110540224/2015-2018
Office of the Assistant Commissioner of
Commercial Taxes,
Egmore Assessment Circle,
No.88, V.R.Ramanathan Road,
Chetpet, Cheenai 600 031.

DATE: 06.05.2015.

FORMS
(See Rule 9(2))

No Liability Certificate in respect of Works Contractor

1	Name and address of the dealer	Tvl.Simplex Infrastructures Limited, 48, Cass Major Road, Egmore, Chennai.
2	Registration Certificate Number	33110540224/2015-2018
3	Status	Public Limited Company
4	Date of filing of application by the dealer for issuance of this Certificate	13.03.2015

5	Authority by whom works contract was assigned to the dealer with name, designation and address	State Bank of India Officers' Association (Chennai Circle), 64, Rajaji Salai, Chennai - 600 001.
6	Details of works contract	
	(a) No. and date of contract	Letter of Award- SBIDA/UNITY ENCLAVE/CONS/LOA/01/2014-15 dated 25.06.2014.
	(b) Description of the Contract	Construction of Proposed 'Unity Enclave' Residential Township consisting 21 Towers, Club House, Commercial Building and Basements including finishes, MEP Works and External Development at Mambakkam, Chennai.
	(c) Duration of works contract (date of commencement and date fixed for completion of works contract)	Thirty Months i.e. Form 25.05.2014 to 24.12.2015.
	(d) Address of work site	Village Mambakkam, Mambakkam -Medavakkam Main Road, Chennai-600 127.
	(e) Value of Contract	Total Contract Value : Rs.550,66,54,537/- LESS: Value of Work executed upto 31st March 2015:Rs. 26,80,30,178/- Balance Value of Work to be executed as on 01st April 2015 : Rs.523,86,24,359/- (Rupees Five Hundred Twenty Three Crore Eighty six Lakh Twenty four Thousand three Hundred fifty nine only)

I have examined the Contract/Purchase Bills/Returns filed in all deals and to the best of my knowledge and belief. I hereby certify that the Dealer has already paid the Tax relating to this Contract under Section 5 of the Tamil Nadu Value Added Tax Act 2006.

This Certificate is issued as contemplated in Clause (c) of the First Proviso to Sub-section (1) of Section 13 of the Tamil Nadu Value Added Tax Act, 2006.

This Certificate is valid till 31st March 2016 and is subject to revalidation thereafter.

18. The second Form S dated 06.05.2015 relates to the period 01.04.2015 to 31.03.2016. The Assessing Authority, in column (e) setting out the value of contract commences with the total contract value in respect of which the application for issuance of Form S was filed by Simplex, reduces therefrom, the quantum of annual work carried out by the Simplex for the period 01.04.2014 to 31.03.2015, which was a sum of Rs.26,80,30,178/- and arrives at the balance of quantum work to be executed as on 01.04.2015, at a figure of Rs.523,86,24,359/-. This certificate thus permits the petitioner to make remittances of upto a sum of Rs.523,86,24,359/- without deduction of tax at source.

19. The Third Form S for the period 2015-2016 is as under:

Place : Chennai 600 031 Signature of the Assessing Officer,
Date: 06.05.2015
Name: J.KUMARI REMY
Designation: ASSISTANT COMMISIONER (COMMERCIAL TAXES),
EGMORE ASSESSMENT CIRCLE.

TIN: 33110540224/2016-2017
Office of the Assistant Commissioner of
Commercial Taxes,
Egmore Assessment Circle,
No.88, V.R.Ramanathan Road,
Chetpet, Cheenai 600 031.

DATE: 24.06.2016.

FORMS
(See Rule 9(2))

No Liability Certificate in respect of Works Contractor

1	Name and address of the dealer	Tvl.Simplex Infrastructures Limited, 48, Cass Major Road, Egmore, Chennai.
2	Registration Certificate Number	33110540224/2016-2017
3	Status	Public Limited Company
4	Date of filing of application by the dealer for issuance of this Certificate	06.06.2016

5	Authority by whom works contract was assigned to the dealer with name, designation and address	State Bank of India Officers' Association (Chennai Circle), 64, Rajaji Salai, Chennai - 600 001.
6	Details of works contract	
	(a) No. and date of contract	Letter of Award- SBIDA/UNITY ENCLAVE/CONS/LOA/01/2014-15 dated 25.06.2014.
	(b) Description of the Contract	Construction of Proposed 'Unity Enclave' Residential Township consisting 21 Towers, Club House, Commercial Building and Basements including finishes, MEP Works and External Development at Mambakkam, Chennai.
	(c) Duration of works contract (date of commencement and date fixed for completion of works contract)	Thirty three Months i.e. Form 25.06.2014 to 31.03.2017
	(d) Address of work site	Village Mambakkam, Mambakkam -Medavakkam Main Road, Chennai-600 127.
	(e) Value of Contract	Total Contract Value : Rs.550,88,54,637/- LESS: Value of Work executed Upto 31st March 2015:Rs.187,75,27,174/- Balance Value of Work to be Executed as on 01st April 2015 :Rs.362,91,27,363/- (Rupees Three Hundred Sixty Two Crores Ninety One Lakh Twenty seven Thousand three Hundred sixty three only)

I have examined the Contract/Purchase Bills/Returns filed in all deals and to the best of my knowledge and belief. I hereby certify that the Dealer has already paid the Tax relating to this Contract under Section 5 of the Tamil Nadu Value Added Tax Act 2006.

This Certificate is issued as contemplated in Clause (c) of the First Proviso to Sub-section (1) of Section 13 of the Tamil Nadu Value Added Tax Act, 2006.

This Certificate is valid till 31st March 2017 and is subject to revalidation thereafter.

Place : Chennai 600 031 Signature of the Assessing Officer,
Date: 24.06.2014
Name: V.RAJA

Designation: ASSISTANT COMMISIONER
(COMMERCIAL TAXES) (FAC),
EGMORE ASSESSMENT CIRCLE.

20. The third and last certificate dated 24.06.2016 is valid for the period 01.04.2016 to 31.03.2017. In column (e) setting out the value of contract, the Officer commences with total contract value, being a sum of Rs.550,88,54,637/- and reduces therefrom a sum of Rs.187,75,27,174/-, which is the total quantum of work that was executed by Simplex till 31.03.2015. He arrives at a balance of Rs.362,91,27,363/-, to which the Form S relates.

21. The impugned assessment and demand made upon the petitioner relates to the period 2016-17, wherein the Assessing Officer proceeds on the basis that no Form S has been received by the petitioner and hence all remittances made ought to have been subject to tax deduction at source. However, in the light of the three Forms as extracted above and explained in the preceding paragraphs, I am of the view that the Officer has entirely lost sight of the scheme of tax deduction under Section 13 as the three certificates issued by R2 would show that Simplex has the benefit of Form S certificates for the entirety of the contract value.

22. The order of assessment dated 28.05.2019 has been passed for the period 2016-17. The Officer refers to the appointment of R3 as a building contractor for the residential township called Unity Enclave comprising of 21 towers with 2100 residential flats at a total construction cost of Rs.547,88,09,797/-. The contract period spans 25.6.2014 to 31.03.2017. Reference is made to the surprise visit of the Enforcement officials in the premises of the petitioner. The officer, on the basis that Form S furnished by R3 to the petitioner is for a sum of Rs.187,75,27,174/-, brings to tax the entirety of the contract value of Rs.547,88,09,797/- at the rate of 5% raising a demand of Rs.27,39,40,490/-. In doing so, the computation is set out as under:

Turnover on contract	Rs.547,88,09,797.00
Turnover on Material purchases (Deemed Sales Value)	Rs. 6,43,50,978.00
Total and Taxable turnover	Rs.554,31,60,775.00

	Turnover	Rate of Tax	Tax due
Turnover covered Form S	Rs.187,75,27,174.00	5%	Rs.9,38,76,359.00
Turnover not covered payment details	Rs.360,12,82,623.00	5%	Rs.18,00,64,131.00
Deemed sales Value	Rs.643,50,978.00	14.5%	Rs.93,30,893.00
Total	Rs.554,31,60,775.00		Rs.28,32,71,383.00

Total Tax Due : Rs.28,32,71,383.00
Form S Filed : Rs. 9,38,76,359.00
Paid : Rs. Nil

: Rs.18,93,95,024.00

Penalty Due : Rs.93,30,893.00
Penalty Paid : Nil
Balance : Rs.93,30,893.00

The Bank account of the petitioner has been frozen to meet the above demand.

23. Simplex/R3 has averred in its counter dated 15.02.2020 that the entire liability had been discharged under Section 5 of the Act. At paragraph 3, R3 refers to its first application dated 28.07.2014 annexing detailed working sheets setting out the method of computation on estimated VAT liability under Section 5 of the Act. This application and the annexures came to be examined in detail along with the letter of award and the contract inter se the petitioner and R3 and it was only thereafter that R2 issued the certificate in Form S dated 28.08.2014. Thereafter, at paragraph 4 of the counter, R3 refers to its second application dated 13.03.2015 seeking the benefit of receipt of remittances without TDS for the period 2015-16. Upon consideration of the second application, R2, taking note of the quantum and value of contract and remittances upto 31.03.2015 issued Form S for the remainder of the contract value, valid till 31.03.2016. A third application was thereafter filed on 06.06.2016, which came to be considered by R2 and Form S issued for the remainder of the contract value valid till 31.03.2017.

24. R3 states that work under the contract continued even after 01.07.2017 after coming into force of Central Goods and Services Tax Act, 2017. Returns under Section 5 of the TNVAT Act have been filed till 30.06.2017 and no certificate in Form

has been filed for the period 01.04.2017 to 30.06.2017. There is a categorical assertion that R3 has discharged its VAT liability under Section 5 of the Act in the monthly returns filed by it for the period 2014-15 to 30.06.2017. R3 would also state that its returns have been accepted by R2. However, this acceptance is only deemed as on date, insofar as admittedly the returns have not been taken up for assessment and orders passed thereupon. The veracity or otherwise of the returns of R3 in respect of the contract in issue is still at large and in any event is not the subject matter of this Writ Petition.

25. As far as the petitioner is concerned, the order of assessment leading to the impugned order under Section 84 relates to the period 2016-17. R1 brings to tax the entire contract value in the hands of the petitioner as an assessee in default on a complete mis-appreciation of the scheme of Section 13 and ignoring the three certificates in Form S that have been furnished by the petitioner.

26. Initially R1 has filed a counter affidavit on behalf of herself as well as R2. The counter substantially proceeds on the question of maintainability of Writ Petition and apart from a general averment to the effect that the impugned order did not call for interference, the only other submission made is that the Form S furnished by the petitioner is only for a value of Rs.188.00 crores as against the total project cost of Rs.548.00 crores. This last averment is factually incorrect.

27. Another counter has been filed again on behalf of R1 and R2, but executed by R2, who is the Assessing Officer of Simplex. At paragraph Nos.5 to 10, R2 states as follows:

> 5. With regard to averments made in Para 24(i) to 24(iii) of the affidavit it is submitted that Form – 'S' certificate has been issued by the 2nd Respondent for the entire value of contract of Rs.550,66,54,537/- as per the provisions of Rule 9 (2) of TNVAT Rules 2007 under the TNVAT Act 2006 in reference TIN: 33110540224/2014-2015, dated 28.08.2014.
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> 6. With regard to averments made in Para 24(iv) of the affidavit, it is submitted that Form – 'S' Certificate dated 28.08.2014 is for the period from 25.06.2014 to 24.12.2016.
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> Form - 'S' Certificate dated 06.05.2015 is for the period from 25.06.2014 to 24.12.2016 for value of Rs.26,80,30,178/-.
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> Form – 'S' Certificate dated 24.06.2016 is for the period from 25.06.2014 to 31.03.2017 for value of Rs.187,75,27,174/-.

7. With regard to averments made in Para 24 (v) of the affidavit, it is submitted that the Value of the Form – 'S' issued is Rs.550 Crores awarded by SBIOA.

8. With regard to averments made in Para 24 (vi) to 24 (vii) of the affidavit, it is submitted that the contention of the petitioner is in order.

9. With regard to averments made in Para 25 of the affidavit, it is submitted that the contractor being 3rd Respondent (TIN : 33110540224) has filed monthly returns under TNVAT Act 2006 showing the transactions of works contract executed with payment of tax.

10. With regard to averments made in Para 26 of the affidavit, it is submitted that the dealers have filed monthly returns under TNVAT Act 2006 for the years from 2013-14, 2014-15, 2015-16 & 2016-2017.

This is thus the factual position to be noted as regards the returns filed by Simplex and the tax remitted with respect to the turnover for the contract in question.

28. The impugned order cannot, in my view be holistically appreciated without noticing the totality of facts involved, which also includes the order of assessment dated 28.05.2019. In the light of the three certificates in Form S dated 28.08.2014, 06.05.2015 and 24.06.2016, there is no justification whatsoever for R1 to have passed order of assessment dated 28.05.2019 for the period 2016-17 or the impugned order dated 23.01.2020.

29. The Income Tax Act, 1961 (in short 'IT Act') has provisions analogous to Section 13 of the TNVAT Act in Section 201(1) and (1A) thereof. These provisions have been inserted as a measure for advance collection of tax in the case of several classes of payers including contractors. Advance collection is to facilitate certainty as well as ease in tax payment as the remittance would be spread over a period. However, one of the exceptions for tax deduction is a situation where the payee has discharged the liability or has obtained the requisite certificate from its assessing officer for nil deduction.

30. The Central Board of Direct Taxes has issued a circular clarifying this position that has been taken note of by the Hon'ble Supreme Court in the case of Hindustan Cocacola Beverages V. CIT (293 ITR 226). After considering the scope of the provisions of TDS and those imposing penalty for non-deduction by the payer, the Hon'ble Supreme Court has held that in a case where the payee has discharged its liability in

full, there would remain no further burden upon the payer to deduct tax at source. The Income Tax Act contains the provisions of Section 197 analogous to Section 13(3) of the TNVAT Act wherein the payee can seek a certificate of 'nil' deduction/deduction at a lower or reduced rates. If this certificate were obtained by the payee and furnished to the payer, it would suffice to justify non-deduction/deduction at lower rate, as in the present case.

31. The relevant portion of the judgment of Hon'ble Supreme Court is extracted below:

> 10. Be that as it may, the circular No. 275/201/95- IT(B) dated 29.1.1997 issued by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualized under Section 201 (1) of the Income- tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under Section 201 (1A) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under Section 271C of the Income-tax Act."

This issue is answered in favour of the petitioner.

33. (iv) Whether the order dated 28.05.2019 has been passed under Section 13 or under Section 27 of the TNVAT Act?

Coming to the last issue, in regard to the form of the order itself, the original order passed dated 28.05.2019 does not contain reference to any statutory provision. This has given way to the question as to whether the order is one of assessment under Section 27 or an order of nil deduction under Section 13. According to the petitioner, it is an order under Section 13 amenable to revision under Section 54 of the TNVAT Act, whereas according to the revenue, Section 13 is not a charging provision or a provision that is amenable to the passing of a separate order. The effect of deduction or consequences of non-deduction are reflected in the computational methodology which forms part of assessment only. Thus, according to the revenue, it is an order under Section 27 of the Act.

33. My attention is also drawn to the decision of the learned single Judge dated 01.08.2019 in W.P.No.22634 of 2019 and the order passed in Writ Appeal dated 06.12.2019 in W.A.No.4073 of 2019. The learned single Judge in order dated 01.08.2019 has recorded the rival contentions in this regard,

specifically the submissions of the revenue to the effect that the order has been passed under Section 27 of the Act. This submission has however been noticed and appreciated in the context of whether an opportunity of hearing was mandatorily to be granted to the petitioner, and not as to what would be the appropriate provision under which such order could have been passed.

34. The following statutory provisions are relevant to decide this issue. Section 2(15) defines a 'dealer' as any person, who carries on the business of buying, selling, supplying or distributing goods directly or otherwise whether for cash, deferred payment or valuable consideration including nine (9) enumerated categories of persons, and reads as follows:

> (15) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes—
>
> (i) a local authority, company, Hindu undivided family, firm or other association of persons which carries on such business;
>
> (ii) a casual trader;
>
> (iii) a factor, a broker, a commission agent or arhati, a del credere agent or an auctioneer, or any other mercantile agent by whatever name called, and whether of the same description as hereinbefore or not, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal, or through whom the goods are bought, sold, supplied or distributed;
>
> (iv) every local branch of a firm or company situated outside the State;
>
> (v) a person engaged in the business of transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;
>
> (vi) a person engaged in the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(vii) a person engaged in the business of delivery of goods on hire-purchase or any system of payment by instalments;

(viii) a person engaged in the business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(ix) a person engaged in the business of supplying by way of, or as part of, any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

35. The petitioner before me is a trade union registered under the Trade Union Act, 1926 and undisputedly not registered as a dealer under the Act or satisfying the definition of a' dealer' under Section 2(15). The provisions of Section 20, dealing with assessment of tax, Section 21, relating to the requirement of a dealer who is liable to pay tax under the Act to file a return, Section 22 dealing with assessments and procedure thereof and Section 27 dealing with the assessment of a dealer in case of escaped turnover and wrong availment of ITC would not apply to the petitioner before me. Thus, there is no necessity for the petitioner to file a return as on date and consequently no requirement for an assessment. Order dated 28.05.2019 is thus not one that is passed under Section 27.

36. The remedial measures provided for in respect of various orders/proceedings under the Act are also different. Section 51 deals with an appeal to be filed before the first appellate authority by any person objecting to an order passed by the appropriate authority barring Deputy Commissioner (Assessment) under Sections 22, 24, 26, 27(1)(2)(3) and (4), 28, 29, 34 and 40(2). Section 52 deals with an appeal to be filed before the Appellate Joint Commissioner by any person objecting to an order passed by the Deputy Commissioner (assessment) under Sections 22, 24, 26, 27(1)(2)(3) and (4), 28, 29, 34 and 40(2). Section 54 is a residuary provision which provides for a revision by the Joint Commissioner of any order or proceeding recorded under the Act for which no appeal is provided for under Sections 51 or 52.

37. The term 'person' though not defined in the general definition section, has been defined in the Explanation to Section 13 to include the following entities for the purposes of the provision:

13. deduction of tax at source in works contract .--. (1) ....

Explanation.—For the purpose of this Section –

(a) the term ' person' shall include –

(i) the Central or a State Government;

(ii) a local authority;

(iii) a corporation or body established by or under a Central or State Act;

(iv) a company incorporated under the Companies Act, 1956 including a Central or State Government undertaking;

(v) a society including a co-operative society;

(vi) an educational institution; or

(vii) a trust; (b) the term "civil works contract" shall have the same meaning as in the Explanation to Section 6

38. On a holistic appreciation of the provisions as above, it appears clear that the Act contemplates two different kinds of orders. The first is an order of assessment as against which a statutory appeal would lie before the Appellate Deputy Commissioner or the Appellate Joint Commissioner under Sections 51 and 52 of the Act. These are assessments framed in the case of dealers, both registered (section 2(30) of the Act) and unregistered (Section 2(15) of the Act). The second class of orders have not been specifically enumerated but are amenable to revision under Section 54 of the Act that vests residuary powers of revision in the Joint Commissioner in respect of orders passed or proceedings recorded under the Act for which no appeal is provided.

39. This question can thus be answered by making reference to the status of a person/dealer in respect of which the order in question is passed. The term 'person' has been defined only for the purpose of Section 13 and not for the Act as a whole. It is wide enough to encompass a dealer as well as non-dealers. Thus, while a 'person' may include a 'dealer', 'dealer' is a more restricted term that need not encompass all 'persons'. Thus, while an 'assessment' may be made in the case of a person who is also a dealer as defined under the Act, there can be other orders or proceedings passed under the Act that may relate to those 'persons' who are not 'dealers'. The latter category of orders/proceedings would be amenable to revision under Section 54.

40. An assessment will contain a holistic computation of tax liability of a 'dealer' that would include giving credit to tax deducted at source or fastening liability under Section 13(4) where the assessee/dealer has not deducted tax at source as required. In such cases, issues relating to TDS would form

part of the total computation of tax liability and be reckoned for the purposes of determining final liability of tax.

41. However, in the case of a non-dealer, who has no liability to file a return of tax, the question of assessment does not arise. In such cases, the order will be restricted only to the consequences of non-deduction and would thus be passed under the provisions of Section 13(4) itself.

42. A Division Bench of this Court in MI Steel Processing India Pvt. Ltd. V. The Assistant Commissioner (CT), Kancheepuram (2016-VIL-60-MAD) considered a challenge to an order of assessment and consequential recovery. The assessee in that matter had preferred an appeal under Section 51 along with an application for stay. The appeal had been filed with the statutory pre-deposit. While hearing the appeal, the Appellate Authority dismissed the same on the sole ground that the issue involved therein related to tax deduction at source under Section 13 of the Act, which could not be the subject matter of assessment under Section 27 of the Act amenable to appeal under Section 51 of the Act. The appeal was dismissed as not maintainable.

43. A Writ Petition was filed by that assessee challenging the order of the Appellate Authority that was disposed by the learned single Judge directing the appeals papers to be returned to the petitioner and permitting the petitioner to file a revision as against the order of assessment. Since the learned single Judge had not directed the Appellate Authority to return the pre-deposit and the amount paid thereafter in compliance with the conditional order of stay passed by the Appellate Authority, a Writ Appeal was filed. The stand of the revenue in that case was to the effect that all challenges to issues relating to tax deduction at source under Section 13 would be amenable only to revision and not appeal. The Division Bench accepted the argument of the revenue holding at paragraph 13 as follows:

> '13. There is a clear finding in the order passed by the second respondent that the proceedings under Sections 22, 24, 26, 27, 28, 29, 34 and 40(2) alone are appealable under Section 51 of the TNVAT Act, 2006 and the challenge regarding wrong deduction of TDS and the deduction of TDS under Section 13 of the TNVAT Act 2006 cannot from part of the assessment under Section 27 of the Act and therefore the appeal is not entertainable. The decision was not on the merits of the subject matter but on the entertainability of the subject matter itself. This finding is clearly on the jurisdiction of the second respondent and when the second respondent held that there is no

jurisdiction to entertain the appeal itself, then contemporaneously the Appellate Authority should have ordered return of the amount paid under the orders of the Second respondent.’

A contrary stand is taken by the revenue in the matter before me now.

44. In conclusion and to summarize, while issues on tax deduction would form part of an order of assessment and the computation thereof, as applicable to assessees/dealers under Sections 22 to 27 and amenable to appeal under Section 51 and 52, issues of non-deduction in the case of a non-dealer/non-assessee under the provisions of the Act would form part of an order under Section 13(4) amenable to revision under Section 54. This issue is answered in favour of the petitioner. I may at this juncture point out that this issue has not been decided by the learned single Judge or by the Division Bench and hence there is no conflict by my having dealt with the same in this round of litigation.

45. In the facts and circumstances as discussed above in detail, the relief sought for by the petitioner is moulded, and both the impugned order dated 23.01.2020 under Section 84 of the TNVAT Act and order of assessment dated 28.05.2019 are quashed. The Writ Petition is allowed. No costs. Connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sl/vs

To

1 The Assistant Commissioner (ST),
Muthialpet Assessment Circle,
Room No.319, III Floor,
Integrated Commercial Taxes Office Complex,
Vepery, Chennai -600 003.

2 Assistant Commissioner of Commercial Taxes,
Egmore Assessment Circle,
No.88 V.R.Ramanathan Road,
Chetpet Chennai- 31.

+1cc to Special Govt Pleader(Taxes) SR.27138

W.P. No.2451 of 2020
and
WMP. No.2845 of 2020

VBA(CO)

CB(03/11/2020)