

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.01.2021

PRONOUNCED ON : 12.02.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANANAN

W.P.No.26011 of 2012
and M.P.No.1 of 2012

M/s.Larsen & Toubro Limited,
Represented by its Assistant
Manager, K.Pattabiraman ... Petitioner

vs

1.The Deputy Commissioner
of Commercial Taxes (CT)-II,
Large Tax Payers Unit,
Durga Towers, 5th Floor, Marshalls Road,
Egmore, Chennai 600 008.

2.Appellate Joint Commissioner (CT) (FAC)
Wavoo Complex, NSC Bose Road,
Chennai 600 001. Respondents

Prayer: Writ petition filed under Article 226 of the
Constitution of India praying for issuance of a writ of
Certiorarified Mandamus to call for the records comprised in the
impugned order in A.P.No.11 of 2011 dated 25.06.2012 on the file
of the second respondent, quash the same and consequently direct
the second respondent to hear the appeal and decide in
accordance with law.

For Petitioner : Mr.T.Shanmugam for
Mr.K.Magesh

For Respondents : Mr.R.Swarnavel
Government Advocate

O R D E R

The petitioner has challenged the impugned order dated
25.06.2012 passed by the 2nd respondent, Appellate Joint
Commissioner (CT) (FAC) in A.P.No.11/2011.

2. By the impugned order, the 2nd respondent has dismissed A.P.No.11/2011 against assessment order dated 30.08.2011 passed by the 1st respondent filed by the petitioner.

3. By these orders, benefit of Section 7C of the TNGST Act, 1959 has been denied to the Petitioner. That apart, amounts have been demanded towards freight and pumping charges. The issue relating to adjustment of tax deducted at source has been referred back to the 1st respondent to get the amount transferred to his office at an early date and to pass a rectification order allowing credit for the balance amount of unadjusted TDS running to the extent of Rs.40,13,050/-

4. The details of the amounts involved in the present writ petition as follows:

Sl.No.	Section	Particular	Tax Demanded
1	7-C of the TNGST Act, 1959	Denial of payment of Tax on compounding rate of 51 25,43,76,351.00 Rs.10,63,46,942/-	2,86,92,1
2	Rule 6-C (iii) of the TNGST Rules, 1959	Demand on freight and pumping charges of Rs.1,02,33,892/-	6,39, 61,825.00
3	Section 7-F (3) & (4) of the TNGST Act, 1959	Adjustment of TDS paid by the clients of the Petitioner to whom the petitioner had rendered work contract.	40, 13,041.00

5. According to the petitioner, it is engaged in works contract, manufacturing and trading in goods all over the country.

6. Against the said order, the petitioner had preferred an appeal for the earlier passed which culminated in a final order of this Court in Tax Case Revision in T.C.Nos.10 & 11 of 2013 wherein a Division Bench of this Court had allowed the appeal .

7. It is therefore submitted that the impugned order passed by the 2nd respondent Appellate Joint Commissioner (CT) (F AC) was in direct contravention of the said decision and that the observation of the Supreme Court in Union of India versus Kamalashi Finance 1992 (1) SCC 433 was attracted wherein the Honourable Supreme Court held that "The position now, therefore,

is that, if any order was passed by and Assistant Collector or Collector is adverse to interest of the revenue, the immediately higher administrative authority has the power to issue the matter satisfactorily resolved by taking up the issue to the appellate Collector or the appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for the assistant collector or the collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal,, as the case may be, even where he may have some reservation on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the revenue but the remedy was also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the collector so as to enable appropriate proceedings being taken to keep the interest of revenue life."

8. It is further submitted that the respondents erred in rejecting the petitioner's claim for adjustment of tax paid by the recipient of works contract on an erroneous premise that the entire composition was only in respect of works contract involving supply of ReadyMix Concrete (RMC) overlooking the contract.

9. It is the case of the petitioner that the supply of RMC to various persons involved not only sale but also works contract within the meaning of Section 2 a of the TNGST Act, 1959 and therefore the petitioner opted to pay tax as the "compounding rate" under Section 7C of the TNGST Act, 1959 which has been denied.

10. As far as the 1st issue is concerned, it is submitted that the issue is no longer res-integra and the issue is squarely covered by the decision of this Court in Thirumalai Ready Mix Concrete v. State of Puducherry, 2013 SCC OnLine Mad 3938 : (2014) 74 VST 247 wherein it was held as under:-

" 7. On the above narration regarding the nature of the activity of the assessee, it is clear that the Tribunal totally misdirected itself in its understanding of the principle of works contract. As is evidenced from the reading of terms of the agreement referred to in the order of the Tribunal, it is clear that the nature of works entrusted to the assessee is not supplying ready mix concrete mixture simpliciter; on the other hand, the assessee was to provide men and materials in laying concrete mixture on the area specified by the purchaser. The supply had to be done through its staff and that the assessee was responsible for quality of the concrete and the

laying also. Further in the event of any leakage arising therefrom in future, the responsibility was cast upon the assessee to compensate the same. When that being the case, we do not find any justifiable ground in the Tribunal's view that on the mere absence of the word "works contract" in the agreement, the transactions have to be treated as sale.

8. Thus, an going through the nature of the work executed and the agreement and the responsibility cast upon the assessee on the quality, we have no hesitation in accepting the plea of the assessee that the transaction is one of works contract and that the assessee is entitled to have the benefit of exemption as had been pointed out in Government order referred to in circular dated April 29, 2004, viz., G.O. Ms. No. 50/90/F6 dated December 10, 1990 ".

11. The learned counsel for the petitioner further submits that as per the decision of the Hon'ble Supreme Court in Larsen & Toubro Ltd. v. State of Karnataka, (2014) 1 SCC 708 : 2013 SCC OnLine SC 889 at page 746 for determining whether an activity amounts to sale simplicitor or work-contract, dominant intention of the contract is not be looked into. He refers to the following passages from the said decision of the Hon'ble Supreme Court which reads as under:-

"60. Whether the contract involved a dominant intention to transfer the property in goods, in our view, is not at all material. It is not necessary to ascertain what is the dominant intention of the contract. Even if the dominant intention of the contract is not to transfer the property in goods and rather it is the rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if it otherwise has elements of works contract. The view taken by a two-Judge Bench of this Court in Rainbow Colour Lab[Rainbow Colour Lab v.State of M.P., (2000) 2 SCC 385] that the division of the contract after the Forty-sixth Amendment can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer of property takes

place as an incident of contract of service is no longer good law, Rainbow Colour Lab[Rainbow Colour Lab v. State of M.P., (2000) 2 SCC 385] has been expressly overruled by a three-Judge Bench in Associated Cement [Associated Cement Companies Ltd.v.Commr. of Customs, (2001) 4 SCC 593] ."

12. He therefore submits that the impugned order upholding for denial of the option to pay tax at the compound rate of tax under Section 7C cannot be sustained.

13. That apart, the learned counsel for the petitioner has relied on the decision of the following cases:

i) Omar Salay Mohamed Sait vs. Commissioner of Income Tax, Madras, AIR 1959 SC 1238 : (1959) 37 ITR 151

ii) Assistant Commissioner, Commercial Tax Department, Works Contract vs. Shukla and Brothers, (2010) 4 SCC 785

iii) Bharat Sanchar Nigam Ltd., and another vs. Union of India and Others, (2006) 3 SCC 1

iv) State of Karnataka and Another vs. Bangalore Soft Drinks Pvt.Ltd. , (2000) 117 STC 413 (SC)

v) G.Veerappa Pillai, Proprietor, Sathi Vilas Bus Service, Porayar, Tanjore District, Madras vs. Raman and Raman Limited, Kumbakonam, Tanjore District and Three Others, 1952 SCR 583: AIR 1952 SC 192

vi) Shama Prashant Raje vs. Ganpatrao and Others , (2000) 7 SCC 522

vii) Assistant Commercial Taxes Officer vs. Kansai Nerolac Paints Limited, (2010) 6 SCC 756

viii) A.P.SRTC and Others vs. G.Srinivas Reddy and Others, (2006) 3 SCC 674

ix) Cholan Roadways Ltd., vs. G.Thirugnanasambandam, (2005) 3 SCC 241

x) Institute of Chartered Accountants of India vs. L.K.Ratna and Others, (1986) 4 SCC 537

xi) Arjun Khiamal Makhijani vs. Jamnadas C.Tuliani and others, (1989) 4 SCC 612

xii) Shri Sitaram Sugar Company Limited and Another vs. Union of India and Others, (1990) 3 SCC 223

xiii) Trambak Rubber Industries Ltd., vs. Nashik Workers Union and Others, (2003) 6 SCC 416

xiv) Shri Sohan Lal vs. Union of India and Another, 1957 SCR 738 : AIR 1957 SC 529

xv) Thansingh Nathmal and five Others vs. Superintendent of Taxes, Dhubri and Others, (1964) 6 SCR 654 : AIR 1964 SC : 1419 : (1964) 15 STC 468

xvi) Commissioner of Income Tax, Lucknow vs. U.P.Forest Corporation, (1998) 3 SCC 530

xvii) Larsen & Toubro Limited vs. State of Tamil Nadu Rep.by the Joint Commissioner, 2018 SCC Online Mad 12418

xviii) Commissioner of Income Tax, Lucknow vs. U.P.Forest Corporation, (1998) 3 SCC 530

xix) Larsen and Toubro Limited and another vs. State of Karnataka and another , (2014) 1 SCC 708
"

14. As far as the second issue is concerned, regarding the inclusion of freight and pumping charges, it is submitted that the issue is squarely covered by the decision of this Court rendered in Larsen & Toubro Limited v. State of Tamil Nadu Rep. by the Joint Commissioner , 2018 SCC OnLine Mad 12418 wherein, it held as follows:-

" 7. As pointed out earlier, the Tribunal has not given any reason to discredit the factual findings recorded by the first Appellate Authority. We find the order to be a well reasoned order. The first Appellate Authority has taken into consideration the contentions raised by the assessee; the documents produced by it and found that the goods have been delivered to the customers on ex-RMC plan basis and the subsequent activity of freight and pumping i.e., unloading charges to be construed as post sale services.

8. Further, the first Appellate Authority found that the sale price on ex-works as per invoice on record is being credited to sale account as per books of accounts and the other charges to freight and unloading charges as per the books of accounts. Reference was made to the decision in the case of State of Karnataka v. Bangalore Soft Drinks (P) Ltd. reported in (2000) 117 STC 413 and the decision of the Division Bench of this Court in Ram Oxygen Private Limited v. Joint Commissioner (SMR) of Commercial Taxes [(1999) 115 STC 629]. Further, the first Appellate Authority relied on

the decision of the Hon'ble Supreme Court in the case of Vinod Coal Syndicate reported in 73 STC 317, wherein, it was held that where the cost of freight was charged separately, that amount cannot be included in the taxable turnover of the assessee. Further, in STA No. 1028 of 2004 dated 28.02.2004 in the assessee's own case, the Sales Tax Appellate Tribunal, Bangalore, held that in the facts and circumstances of the case, it is fallacious to draw conclusion that the selling price is inclusive of freight and pumping charges which is contrary to facts of the transaction as supported by documents as well as the provisions of the Act. After rendering the above finding, the first Appellate Authority held that the tax levied in the assessment order on RMC pumping charges and freight charges is illegal and therefore, liable to be set aside. Unfortunately, the Tribunal did not even make an attempt to consider as to whether the finding rendered by the first Appellate Authority was correct or not. We disapprove the manner in which the Tribunal has decided the assessee's case."

15. He submits that the revenue has also not questioned the above decision before the Appellate Courts and therefore demand sustained by the 2nd respondent Appellate Joint Commissioner (CT) (FAC) in the impugned order dated 25.6.2012 as far as issue No.2 was unsustainable.

16. The learned counsel for the petitioner submitted that for the assessment years 1999-2000 and 2000-01 demands were confirmed for non production of evidence for claiming composition under Section 7C of the Tamil Nadu General Sales Tax Act, 1959. The claim for paying tax under the composition scheme under Section 7C of the Tamil Nadu General Sales Tax Act, 1959 was denied. It is submitted that the Sales Tax Appellate Tribunal had also dismissed the petitioner's appeal in STA.Nos.89/09 and 90/99.

17. I have considered the arguments advanced by the learned counsel for the petitioner and the respondents.

18. In my view, the present writ petition ought not to have been admitted in the 1st place as the petitioner had an alternate remedy before the Sales Tax Appellate Tribunal against the impugned order passed by the 2nd respondent Appellant Joint Commissioner.

19. Be that as it may, since the writ petition was admitted in the year 2012 and an interim injunction was ordered by restraining the Commercial Tax Department from proceeding further with the recovery proceedings pursuant to the impugned order of the 2nd respondent, it would be unfair to relegate the petitioner to an alternate remedy at this distant point of time. Further, one of the issue can be answered based on the law. Therefore, I take up the case and dispose this writ petition on the merits.

20. Therefore, before dealing the 1st issue, I shall proceed to answer the 2nd issue first. The issue relating to freight and pumping charges is covered in favour of the petitioner, in petitioner's own case in Larsen & Toubro Limited v.State of Tamil Nadu Rep. by the Joint Commissioner , 2018 SCC OnLine Mad 12418.

21. The learned Government Advocate for the respondents Mr.Swarnavel also confirms that the State has accepted the above decision and has not appealed against it.

22. Under these circumstances, the demand sustained for alleged violation of Rule 6C of TNGST Rules Act, 1959 regarding the inclusion of the freight and pumping charges into the taxable turnover are concerned is liable to be quashed. Therefore, to that extent the impugned order is quashed.

23. As far as the 3rd issue relating to Tax Deducted at Source (TDS) is concerned, there cannot be any grievance of the petitioner as the case has been remitted back to the 1st respondent to pass a speaking order after due verification. The 2nd respondent has clearly held that for administrative delay or deficiency in the mechanism of transfer of TDS credits to the petitioner's account, the petitioner cannot be made to suffer. Under these circumstances, the challenge to the aforesaid portion of the impugned order is without any merits.

24. Therefore, to that extent the impugned order dated 25.6.2012 passed by the 2nd respondent Joint Commissioner of Commercial Taxes (CT) (FAC) is to be sustained and does not call for any interference under Article 226 of the Constitution of India.

25. Now coming to 1st issue, it will be useful to refer to the reasoning given by the 2nd Respondent Joint Commissioner of Commercial Taxes (CT) (FAC) in order dated 25.6.2012. Same is reproduced below:-

15. The claim of the department on the issue is found to be factually and legally sustainable. The appellant did not engage and entertain themselves in the execution of any civil works contract'. They had, as records indicate, only supplied ready mix concrete to various parties who had themselves been carrying out the work of civil constructions. Supplies of materials to such parties engaged in the civil works at the rates fixed at per square metre basis or cubic metre basis but where the final settlement for the supplies of Ready Mix Concrete was made on actual quantity of Ready Mix Concrete used at site basis, at the rate pre-determined per cubic metre of Ready Mix Concrete, can TNGST Act and the appellants' claim for sales under Section 3(2) of the TNGST Act and the appellants' claim for sales under Section 7 C cannot operate. The activities of pumping, laying, curing etc., that would be normally carried out by the parties engaged in the civil construction works, even if awarded to the assessee to be executed, will not alter the basic character of the orders for supplies of Ready Mix Concrete are part and parcel of the orders for supplies of 'Ready Mix Concrete' as chattel, the incidental labour loses its significance in the claim of transactions and as a corollary the claim for works contract evaporates as per the ratio of the decisions of the Hon'ble Supreme Court in 119 STC 533 (Hindustan Shipyard Ltd.,) 140 STC 22 (Kone Elevators India) Ltd.

The decisions cited by the learned departmental representative support the stand of the assessing authority on the issue. The assessee having undertaken supplies of ready mix concrete at per cubic metre basis (both in case of outright sales and also in case of turnover reported under Section 7- C of the TNGST Act) and the supply being one not associated with any civil works undertaken by the appellants themselves, the labour employed by the appellant company for transporting or the labour employed by the appellant company for transporting or laying/spreading/curing activities at the sites belonging to the customers who ordered for such supplies having been incidental to and inseparable part of the

transactions of sales of Ready Mix Concrete for a fixed price, the comprehensive sale considerations received by the appellant at per square metre or cubic metre basis, the entire sale consideration is amendable to tax as the turnover of 'sale' of Ready Mix Concrete which is inclusive of the charges for delivery, on ex-customer's site basis. In these type of transactions the appellant would not be entitled to any deduction towards the labour employed by it, as the labour charges also form part of the comprehensive amounts charged for the supplies of Ready Mix Concrete, as the sale would get concluded only after the delivery of goods, at the customer's end.

17. Thus, finding no factual or legal merits behind the appellants' claim on this item of dispute, the assessment made at the higher rate of 11% and 12% single point respectively, on the disputed turnovers of Rs.10,24,98,121/- and Rs.1518,78,230/- is ordered to be upheld.

18. The issue under this item of dispute is thus decided in favour of the department and the assessee's agitation on this item of turnover thus fails.

26. It will be also useful to refer the few passages from the order of the 1st respondent Deputy Commissioner of Commercial Taxes (CT)-2 LTU in his order dated 30.8. 2011. Same is extracted below:-

"It is strange to know that the dealer have chosen Section 3B for payment of tax in respect of all other portions of the buildings and civil structures and when it comes for deemed sale of RMC for the purpose of laying of concrete for roof and pillars they have chosen to pay tax at 2% under compounding. In fact the work of ready mix concrete laying would not come under civil works contract at all, it is only a supply contract, the dealers, as per the purchase order received, they have supplied Ready Mix Concrete to the buyers premises through the specially designed lorry called Transit Mixers, in order to deliver the concrete from Transit Mixers (lorry) to the roof top, they use Pumping compressor for delivery at the desired spots of building area. Whether a contract is a contract for sale or a contract for performance of work and labour depends on the construction

of the contract in the light of the surrounding circumstances, the object of the transaction and the intention of the parties while entering into the contract. The intention of the parties in entering into the contract can be ascertained taking into consideration the transaction as a whole in its true perspective. If the passing of the property is ancillary to the performance of the work then it will not render the transaction a transaction of sale". Even in a contract purely for work or services, property in goods may pass to the other party."

Explanation Section 7C (4) of TNGST Act, 1959 which reads as follows:

Explanation:- For the purpose of this section "civil works contract" , means civil works of construction of new building, bridge, road, runway, dam or canal including any lining, tiling, painting or decorating which is an inherent part of the new construction; but shall not include any repair, maintenance, improvement or upgradation of such civil work by means of fixing and laying of all kinds of floor tiles, mosaic tiles, slabs, stones, marbles, glazed tiles, painting, polishing, partition, wall paneling, interior decoration, false ceiling, carpeting and extra fittings, or any manner of improvement on an existing structure.

Therefore, the claim of the learned Departmental Representative was that the assessee not having engaged themselves in any agreement for the carrying out of any civil works' as defined in the TNGST Act, the assessing authority's taxing the turnover involved in this dispute under Section 7 C of the TNGST Act cannot be held to be in violation of what is available in the Statute. As a consequence, the learned Departmental Representative would argue to sustain the assessment made on the impugned turnover falling under this item.

27. From a reading of the order dated 30.8.2011 of the 1st respondent as extracted above and the observation of the 2nd respondent on the same issue, it is to be noted that there are different kinds of transactions involved. Some are pure supply and therefore sale and some were "deemed sale" viz. "works contract" within the meaning of Section 2 (u) of Tamil Nadu General Sales Tax Act, 1959. When the petitioner ad-disguised sale as 'works contract'.

28. These questions of facts which to be ultimately distilled and discerned only by the Tribunal as the Tribunal is ultimate fact-finding authority. Therefore, it cannot be straight away assumed that the respondent have passed the respective orders in violation of the decision of the Hon'ble Supreme Court in Union of India versus Kamalashi Finance case refer to supra.

29. Since the question as to whether the transaction involved sale or "works contract" liable to tax under Section 3B or under Section 7C of the Tamil Nadu General Sales Tax Act, 1959 is a question of fact. It is to be determined only by the Authority in the hierarchy provided under the provisions of the aforesaid Act.

30. Therefore, no conclusion on facts can be arrived under Article 226 of the Constitution of India based on sample copies of invoices filed by the petitioner before this Court to convince the court to conclude that there was indeed "works contract" during the supply of ready mix concrete to its customers.

31. Therefore, issues left open to the petitioner to be agitated by the petitioner before the Appellate Tribunal and to convince the Appellate Tribunal on this accept and the applicability of the decision of the Court in Thirumalai Ready Mix Concrete v. State of Puducherry, 2013 SCC OnLine Mad 3938 : (2014) 74 VST 247 and the decision passed in its own case in STC Nos.89 & 90 of 1999.

32. I therefore partly allow the writ petition insofar as Issue No.2 relating to inclusion of pumping and freight charges into the turnover. As far as issue no.3 is concerned, the 1st respondent is directed to pass appropriate orders within a period of three months from the date of receipt of a copy of this order in terms of the impugned order dated 25.6.2012 of the 2nd respondent Appellate Joint Commissioner of Commercial Taxes (CT) (FAC).

33. Insofar as the 1st issues is concerned, liberty is given to the petitioner to file a statutory appeal within a period of 30 days from the date of receipt of a copy of this order subject to the compliance and statutory requirements for entertaining the appeal including mandatory pre-deposit of disputed tax amount at the time of filing such appeal. If such appeal is filed together with pre-deposit by the petitioner within the aforesaid period of 30 days, the appellate Tribunal shall number the appeal and take it up for final disposal on merits without reference to the limitation due to the pendency of the present writ petition from 21.9.2012.

34. In the event, the petitioner opts to file an appeal against the impugned order in terms of this order before the Sales Tax Appellate Tribunal, the 1st respondent shall file a report on the 3rd issue relating to adjustment of TDS paid by the petitioner's clients to whom the petitioner had billed as " works contract" before the said Tribunal to give a finality to the case. To the extent, the tax has been deducted at source and paid to the Government treasury, it shall be adjusted against total tax liability of the petitioner. In the event, no appeal is filed by the petitioner, the 1st respondent shall comply with the directions of the 2nd respondent in the impugned order insofar as the 3rd issue relating to adjustment of TDS is concerned and pass appropriate orders within a period of three months stipulated herein.

35. The writ petition stands partly allowed as above. No cost. Consequently, connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

kkd

To

1.The Deputy Commissioner
of Commercial Taxes (CT)-II,
Large Tax Payers Unit,
Durga Towers, 5th Floor, Marshalls Road,
Egmore, Chennai 600 008.

WEB COPY

2.Appellate Joint Commissioner (CT) (FAC)
Wavoo Complex, NSC Bose Road,
Chennai 600 001.

+1cc to the Special Government Pleader Sr.8914
+1cc to Mr.P.Purushothaman, Advocate Sr.8586

W.P.No.26011 of 2012
and M.P.No.1 of 2012

BS (CO)
srg 05/03/2021



WEB COPY