

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION**

APPELLATE SIDE

RESERVED ON: 22.03.2022

DELIVERED ON: 18.04.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

W.P.T.T. NO. 05 OF 2020

NARSIRAM DULARAM KULARIA

VERSUS

DEPUTY COMMISSIONER., CENTRAL AUDIT UNIT-II, SALT LAKE &

ORS.

Appearance:-

Mr. Vinay Shraff

Mr. Himangshu Kumar Ray

Ms. Priya Sarah Paul

.....For the Petitioners

Mr. Anirban Ray, Learned Government Pleader.

Mr. T.M. Siddiqui

Mr. N. Chatterjee

.....For the State Respondents

JUDGMENT***(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)***

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1. The petitioner is a registered dealer under the provisions of the West Bengal Value Added Tax Act, 2003 (the 'Act'), engaged in the business as reseller of furniture. The petitioner challenges the order passed by the learned West Bengal Taxation Tribunal (the 'Tribunal') in R.N. No. 1155 of 2018 dated 20.02.2020 and R.N. No. 1034 of 2019 dated 20.12.2017. The challenge to the order of the learned Tribunal is not in its entirety but only with regard to the finding of the Tribunal that the contract which was entered into by the petitioner with Tata Consultancy Services Ltd. (TCS) to be a works contract and liable for tax under the provisions of the Act. The petitioner also challenges the order of the learned Tribunal dated 20.02.2020 to the extent it is held that the works contract is zero rated under Section 21 A of the Act. The learned Tribunal had interpreted the nature of contract entered by the petitioner with TCS to be two separate contracts and should be considered according to the nature and purpose for which they have been entered into. This finding of the learned Tribunal has not been challenged by the petitioner. The petitioner also challenges the order passed by the learned Tribunal in a review application in R.W. 02 of 2020 to the extent that it holds if any agreement satisfies any condition of Section 2(57) of the Act, it should be termed as "works contract" even if there is payment towards labour charges as also the finding of the learned Tribunal that no grounds are made out to review the order passed by it. The facts which are necessary and relevant for disposal of the writ petition are as hereunder:

2. The case of the petitioner was selected by the Commissioner of Commercial Taxes under Section 46 read with Section 66 of the Act for the period 01.04.2016 to 31.03.2017 as the authority thought it fit and proper to assess the petitioner for the reason that Input Tax Credit (ITC) in excess of Rs. 5,00,000/- has been carried forward to the next financial year. The final assessment order was passed on 26.06.2019. The assessing officer after considering the nature of the business of the petitioner, proceeded to examine the contracts entered into by the petitioner with TCS. The assessing officer pointed out that the petitioner had received a purchase order dated 16.09.2013 from TCS to supply material for interior and related allied works at their establishment in Rajarhat, Kolkata and had examined all terms and conditions specified in the order and also the invoices. The Assessing Officer held that the order is actually a work order instead of a purchase order based on which the petitioner has raised three invoices, however, the petitioner failed to produce the prescribed form under Rule 26 O to certify that the taxable goods purchased from the petitioner have been used/ are intended to be used in the development of the Special Economic Zone (SEZ). The petitioner contended that the transactions with TCS are zero rated under Section 21 A read with Clause 4 in Schedule AA of the Act which states that sale by a dealer to a dealer located in SEZs and in terms of Section 21 A of the Act sale of goods between persons, whether dealer or not or organizations as specified in Column (2) of Schedule AA shall be zero rated as defined in Section 2(59) of the Act. The Assessing Officer held that if the transactions between the petitioner and TCS are “sale”, it will be zero rated and exemption tax. However, if it is a works contract, the transaction

is taxable under Section 14 of the Act. The Assessing Officer held that the petitioner has done works contract in the SEZs and the same cannot be treated as “zero rated”. Accordingly, the entire transaction was treated as works contract and tax liability was computed.

3. The petitioner filed an application under Section 8 of the West Bengal Taxation Tribunal Act before the West Bengal Taxation Tribunal (learned “Tribunal”) in R.N. 1155 of 2018 challenging the order dated 18.06.2018 which in fact, is the findings recorded by the officer prior to passing the final assessment order dated 26.06.2019. The petitioner filed R.N. No. 1034 of 2018 before the learned Tribunal challenging the final assessment order dated 26.06.2019 and also to declare the works contract to be zero rated under Section 21 of the Act. The learned Tribunal framed the following points for consideration which are as follows:

- 1) *Whether the works contract, as defined in Section 2(57) and levied tax by section 14 of the West Bengal VAT Act comes under the sale simpliciter on the analogy that works contract is a deemed sale.*
- 2) *Whether the consideration money of works order or simply works contract is exempted from tax in view of section 21 A of West Bengal VAT Act and schedule AA.*
- 3) *Whether those respective purchase orders and works order be taken as a sale or as a work order or the both orders should be dealt separately subject-wise, as mentioned in the subject column of those respective orders.*
- 4) *Whether the findings of respondent No. 1 of both the applications and the orders under challenge are tenable and substantial in law or whether it requires intervention from this Tribunal.*

4. The point Nos. 1 and 2 were answered against the petitioner and point Nos. 3 and 4 were considered and directions were issued by partly allowing the appeals filed by the petitioner, setting aside the orders dated 18.06.2018 and 26.06.2019 and remanding the matter to the Assessing Officer with direction to assess the tax liability in light with the discussion in body of the order passed by the learned Tribunal after affording sufficient opportunity to produce documents and give a fresh hearing to the petitioner without being influenced by any finding recorded by the learned Tribunal. The petitioner filed review case No. R.W. 2 of 2020 before the learned Tribunal contending that a pure labour contract is not liable for taxation under the Act and, therefore, the decision of the Learned Tribunal has to be reviewed. By order dated 14.10.2020, this review application was dismissed on the ground that there was no mistake which is apparent on the face of the order apart from rendering findings confirming the main order. Challenging these orders of the learned Tribunal, the petitioner is before us by way of this writ petition, praying for the reliefs as aforementioned.
5. Mr. Shraff, learned Advocate for the petitioner submitted that an installation contract without transfer of property in goods is not exigible to tax under the provisions of the Act as a works contract. It is submitted that the installation contract entered into by the petitioner with TCS, is a contract without transfer of property in goods and cannot fall within the purview of works contract liable to tax even if it satisfies any of the conditions in Section 2(57) of the Act. Referring to Article 366 (29A) of the Constitution, it is submitted that in terms of Clause B in the said Article, there must be transfer of property in goods involved in the execution of the

works contract to levy tax and this provision was inserted by the 46th Amendment to the Constitution to overcome the decision of the Hon'ble Supreme Court in ***State of Madras Versus Gannon Dunkerley & Co. (Madras) Ltd.***¹, which had held that composite contracts are not exigible to sales tax.

5.1 It is submitted that the Act provides for levy of tax on sale of goods in West Bengal and tax cannot be levied under the Act on an installation contract without transfer of property. Referring to Section 14(1) of the Act, it is submitted that the said provision provides that any transfer of property in goods involved in the execution of a works contract in the State of West Bengal, shall be deemed to be a sale of those goods by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The provision makes it abundantly clear that there must be transfer of property in goods in the execution of works contract to levy tax even if it satisfies any of the conditions in Section 2(57) of the Act. Reliance was placed on the decision of the Hon'ble Supreme Court in ***Larsen and Toubro Ltd. And Another Versus State of Karnataka and Another***², wherein it was held that for sustaining the levy of tax on goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled, namely,

- i) *There must be a contract;*
- ii) *The goods should have been involved in the execution of a works contract and*
- iii) *The property in those goods must be transferred to a third party either as goods or in some other form.*

¹ AIR 1958 SC 560

² (2014) 1 SCC 708

5.2 It is submitted that if the interpretation of the authority is to be accepted and the contract is to be treated as works contract then the petitioner is entitled to treat the transaction as zero rated transaction under Section 21 A of the Act. The learned Advocate referred to Section 2(39) of the Act which defines “sale”, and moved on to place the definition of “works contract” under Section 2(57) of the Act and submitted that the said provision should be read along with Section 14 and Section 18 of the Act and if all the provisions are conjointly read, it will show that a transaction of works contract will fall within the purview of the definition of sale as it is not included in the illustrative list of the inclusive part of the definition of “sale” as the inclusive part cannot override the main part of the definition of “sale”.

5.3 It is submitted that there is a separate charging section for works contract merely for the purpose of determination of the value of labour in the composite contract of supply of material and labour and any tax benefit which is available to a transaction of sale of goods, should also be available to a transaction of works contract.

5.4 It is further submitted that for the purposes of taxation a deemed sale cannot be justified from an ordinary sale. In support of such contention, reliance was placed on the decision of the High Court of Andhra Pradesh in ***ITC Classic finance and Services Versus Commissioner of Commercial Taxes***³, which decision was affirmed by the Hon’ble Supreme Court in the decision reported in ***119 STC 182***.

³ (1995) 97 STC 330 (A.P.)

5.5 Further, it is submitted that the department is not justified in unduly restricting the scope of a beneficial provision and this should be avoided. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in ***Union of India Versus Suksha International and Nutan Gems & Anr.***⁴.

5.6 It is submitted that when two interpretations are possible, the interpretation in favour of the tax payer should be adopted and in support of such contention reliance was placed on the decision of the Hon'ble Supreme Court in ***Sneh Enterprises Versus Commr. of Customs***⁵, and ***Commissioner of Income Tax, West Bengal II, Calcutta Versus Naga Hills Tea Co. Ltd.***⁶ Therefore, it is submitted that works contract is also a zero rated transaction under Order 21 A of the Act.

6. Mr. Anirban Ray, learned Government Pleader assisted by Mr. T.M. Siddiqui appearing for the respondent State referred to Section 2(39) of the Act which defines "sale" and points out that the ingredients of sale are (i) transfer of property in goods, (ii) in lieu of valuable consideration and (iii) the categories referred to in Clauses (a) to (e) in Section 2(39).

6.1 It is submitted that the definition section proceeds to state that such transfer, delivery or supply of any goods shall be deemed to be sale of those goods. By use of the word "deemed" of a legal fiction is created in Section 2(39) of the Act and is relatable to the five categories mentioned in Clauses (a) to (e) in Section 2(39). It is submitted that if the definition of "sale" as defined under Section 2(39) is compared with the definition of "works

⁴ 1989 (39) ELT 503(SC)

⁵ (2006) 7 SCC 714

⁶ AIR 1973 SC 2524

contract” under Section 2(57), it is seen that there is no such deeming provision.

6.2 It is submitted that Section 14 of the Act commences with a non-obstante clause and states that transfer of property in goods involved in the execution of works contract shall be deemed to be a sale. Therefore, the deeming provision creates a legal fiction and in construing the scope of such fiction, it is proper and necessary to assume all those facts on which alone fiction can operate and for this purpose, the limits within which and the purpose for which the legislature has created a legal fiction is to be determined. Further it is submitted that by insertion of Clause 29 A in Article 366 of the Constitution, a legal fiction has been created and even while doing so, it was not declared the contract to be “sale” but only for the purpose of levying tax, works contract was included.

6.3 It is further submitted that Section 2(39) of the Act merely defines sale and five categories have been enumerated in Clauses (a) to (e) which are deemed to be sale of goods and this inclusive definition and deeming provision are used to denote that the transactions mentioned in Clauses (a) to (e) fictionally come within the definition of a simple sale and accordingly those transactions are to be treated on par with “simple sale” as defined in the first part of Section 2(39).

6.4 It is reiterated that the deeming provision has intentionally not been used in Section 2 (57) of the Act and in Section 14(1) transfer of property in goods involved in the execution of works contract shall be deemed to be sale of those goods. The deeming provision contained in Section 14(1) is only to bring the transaction exigible to tax. In the instant case, there is no dispute

that the purchaser of the goods and the first party of the works contract are identical and they fall within the definition in Section 2(39) of the Act.

6.5 It is submitted that Section 21A of the Act commences with a non-obstante clause and states that notwithstanding anything contained in Section 16 or 16A, sale of goods between persons, whether dealer or not or organizations as specified in column 2 Schedule AA shall be zero rated as defined in Section 2(59) of the Act. It is submitted that in all the three places, there is no indication that the word “sale” used therein to include a “deemed sale” which is enumerated in Section 14 or it covers Section 2(58) of the Act.

6.6 Further it is submitted that the non-obstante clause in Section 21 A is only with regard to Section 16 and 16 A of the Act which are charging sections with regard to the levy of tax on sales and levy of tax on sales by casual dealers respectively. On the other hand, with regard to the works contract the charging section relatable to Section 2(57) and Section 14 is Section 18 which deals with levy of tax on taxable contractual transfer price.

6.7 It is submitted that when the transaction is a works contract, the question of extending the exemption as mentioned in Section 21 A does not arise as to be entitled to the benefit it must be a simple “sale” or a “deemed sale” as defined under Section 2(39) of the Act. Reliance was placed on the decision of the Hon’ble Supreme Court in **Commissioner of Customs (Import), Mumbai Versus Dilip Kumar & Company & Ors.**⁷, for the proposition that any exemption or incentive or concession extended in a taxation statute should be strictly construed and if there is any ambiguity,

⁷ (2018) 9 SCC

the interpretation should be in favour of the revenue. Reliance was placed on the decision in **Larsen and Toubro Limited** to explain the scope of the 46th Amendment to the Constitution.

7. We have elaborately heard the Learned Advocate for the parties and carefully perused the materials placed on record.

7.1 The entire case of the petitioner rests upon the interpretation of the various provisions of the Act. To put the case of the petitioner in simple terms is that the nature of transaction done by the petitioner was held to be a works contract and deemed to be a sale. If the works contract is deemed to be a sale, then it should fall within the definition of sale as defined under Section 2(39) of the Act and if it is held to be a sale, the same having been affected to SEZs, has to be treated as zero rated in terms of Section 21 A of the Act as the nature of activity done by the petitioner under the said contract falls within Serial No. 04 in Schedule AA to the Act.

7.2 The petitioner's further case is that the installation contract is a contract which does not involve any supply of material and even if it is to be treated as a works contract under Section 2(57) of the Act, the transaction is not exigible to tax as it is purely a labour contract. Though elaborate submissions were made by Mr. Shraff with regard to the effect of the 46th Amendment to the Constitution of India and object of insertion of Clause 29A in Article 366 of the Constitution, in our considered view we need not travel thus far as we are required to interpret a few provisions of the Act to arrive at a decision.

7.3 The West Bengal Value Added Tax Act is an Act to levy tax on sale of goods in West Bengal on the basis of value added to such goods at each stage of sale of such goods and on purchases of certain goods in West Bengal in specified circumstances and to provide for matters connected therein or incidental thereto. Dealer has been defined under Section 2(11) to mean a person who carries on business of selling or purchasing of goods in West Bengal or any person making sales under Section 14 of the Act. It is not in dispute that the petitioner is a registered dealer under the provisions of the Act. Section 2(39) defines “sale” to mean any transfer of property in goods for cash, deferred payment or other valuable consideration, and includes 5 categories of transactions which are enumerated in Clauses (a) to (e) in the said definition and such transfer, delivery or supply of any goods, shall be deemed to be sale of those goods by the person making the transfer, delivery, or supply and the purchase of those goods by the person to whom such transfer, delivery or supply is made, but does not include a mortgage, hypothecation, charge or pledge.

7.4 Section 2(57) defines “works contract” to mean any agreement for carrying out for cash, deferred payment or other valuable consideration. The contract entered into by the petitioner with TCS is brought under Clause (d) of Section 2(57). Section 2(59) of the Act defines “zero rated sale” to mean a sale of any goods on which no tax is chargeable but credit for Input Tax related to that sale is admissible. Section 14 deals with liability to pay tax on transfer of property in goods involved in the execution of works contract.

Sub-Section (1) of Section 14 commences with a non-obstante clause and states that notwithstanding anything contained elsewhere in the Act, any transfer of property in goods, involved in the execution of works contract in West Bengal shall be deemed to be a sale of those goods by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. Section 15 deals with liability of a casual dealer to pay tax. Section 16 deals with levy of tax on sales and Section 16 A deals with levy of tax on sales by casual dealer and Section 17 deals with levy of tax on turnover of purchases and Section 17 A deals with levy of tax on purchases by casual dealers. Section 18 deals with levy of tax on taxable contractual transfer price and these are all the charging sections in respect of the sales referred therein.

7.5 Section 21A deals with zero rated transaction. Sub-Section (1) states that notwithstanding anything contained in Section 16 or 16 A (charging sections), sale of goods between person whether dealer or not or organization as specified in Column 2 of Schedule AA shall be zero rated as defined under Section 2(59). Schedule AA lists out 4 categories of sales of goods, which shall be zero rated. The petitioner seeks to bring his transaction under Serial No. 04 of Schedule AA. The petitioner's case largely rests upon the definition of "sale" as defined under Section 2(39) of the Act. For easy reference the relevant portion of the provision is quoted hereunder:

Section 2(39)

"Sale" means any transfer of property in goods for cash, deferred payment or other valuable consideration, and includes:-

- (a) Any transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration,*
- (b) Any delivery of goods on hire-purchase or any system of payment by installments,*
- (c) Any 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,*
- (d) Any supply, 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,*
- (e) Any supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration,*

Any such transfer, delivery, or supply of any goods shall be deemed to be a sale of those goods by the person or unincorporated association or body of persons making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery, or supply is made, but does not include a mortgage, hypothecation, charge or pledge.

7.6 On a plain reading of the above provisions shows, that “a sale” under the provisions of the Act would mean any transfer of property of goods for cash, deferred payment or other valuable consideration. We are not expected to add, substitute or delete any words from the statutory provision. Thus,

reading the provision as such will clearly show “a sale” as defined under Section 2(39) is a sale “simpliciter”. The petitioner’s case is that the definition of “sale” is an inclusive definition and a works contract is deemed to be sale and would also fall within the definition of sale and the definition should not be restricted. This argument is by relying on the decision in the case of **Larsen and Toubro** which explains object of insertion of Clause 39A in Article 366 of the Constitution.

7.7 Thus, we have to consider as to whether by including Clauses (a) to (e) in Section 2(39) the provision becomes inclusive and wide interpretation has to be given and a “deemed sale” also should be treated as a “sale” under Section 2(39) and by doing so if the deemed sale is effected in SEZs should it be treated as “zero rated”.

7.8 It may be true that Section 2(39) uses the expression “includes”. But what has been brought within the inclusive definition of sales or the types of transactions enumerated in Clauses (a) to (e) above. This becomes clear on reading the provision further i.e. after Clause (e) which uses the words “and such”. By use of the words “and such” would mean that such of the transfers, delivery of goods, transfer of right to use goods, supply or service or supply of goods, as mentioned in Clauses (a) to (e) alone can be treated to be the inclusive part of the definition of “sale” as defined under Section 2(39) of the Act. It is those 5 categories of transactions having been held to be deemed to be a sale and therefore, the question of giving an expansive

meaning to the definition of “sale” merely because the word “deemed” is used is an incorrect manner of interpretation of the provision.

7.9 We have pointed out about the definition of “works contract” as defined under Section 2(57) and definition of “zero rated” sale as defined under Section 2(59) of the Act. The liability to pay tax in respect of a works contract is under Section 14 of the Act and Sub-Section (1) of Section 14 commences with a non-obstante clause stating that notwithstanding anything contained elsewhere in the Act, any transfer of property in goods whether as goods or in some other form involved in the execution of works contract in West Bengal shall be deemed to be a sale of those goods by the person making a transfer and the purchaser of those goods by the person to whom such transfer is made. Sub-Section (2) of Section 14 makes the dealer liable to pay tax under Section 15 of the Act which is a liability of a casual dealer to pay tax whereas the charging section for a sale “simpliciter” as defined under Section 2(39) are Section 16 and 16A of the Act. One more important aspect is that in Section 2(59) defines zero rated sale and Section 21A deals with zero rated sales and in Schedule AA which categories of sales of goods which are to be treated as “zero rated”. There is a conspicuous omission to include “deemed sale” which is found in Section 14 of the Act. Therefore, the benefit of the transaction to be treated as zero rated is mandatorily required to be a sale “simpliciter” to fall within the five categories enumerated in the definition of “sale” as defined under Section 2(39) of the Act.

7.10 If the interpretation of Mr. Shraff is to be accepted, we would be adding words to Section 2 (39) which is impermissible. Therefore, the contention that even if a transaction would fall within the definition of Section 2(57) and held to be a works contract yet it should be construed to be a sale is an interpretation which is impermissible. The purpose of bringing transaction which are works contract exigible to tax the deeming provision was inserted. A deemed sale cannot be interpreted to be a sale “simpliciter” unless the definition of “sale” in that particular statute provides for. Therefore, to contend that merely because a deemed sale is not included in the illustrative list it cannot be taken out of the purview of the definition of “sale” is an argument which is unacceptable.

7.11 We have assigned reasons as to how Clauses (a) to (e) in Section 2(39) has to be read and merely because the word “includes” has been used in Section 2(39) it does not become an inclusive definition to be given widest meaning but the inclusive definition has to be given a restricted meaning by restricting it to the categories of transactions in Clauses (a) to (e) as such. Thus, the argument that the beneficial provision has not been extended to the petitioner is unacceptable and the decision in the case of **ITC Classic Finance** is clearly distinguishable on facts and there is no hyper-technical interpretation adopted by the respondent and the respondent department and the findings of the tribunal on Point Nos. 1 and 2 which are framed for consideration is sustainable.

8. For all the above reasons, the petitioner has not been made out any grounds to interfere with the order of the tribunal.
9. In the result the writ petition fails and is dismissed. No costs.

(T.S. SIVAGNANAM, J.)

I agree

(HIRANMAY BHATTACHARYYA, J.)



(P.A. - PRAMITA/SACHIN)