IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.04.2024

CORAM :

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE J.SATHYA NARAYANA PRASAD

W.P.No.11126 of 2005

Larson & Toubro Limited,
No.10, Club Road,
Chennai-600 002. .. Petitioner

Vs

1.The Assistant Commissioner (CT),
Zone XI,
No.621, Anna Salai,
'Sire Mansion',
Chennai-600 006.

2.The State of Tamil Nadu,
rep. by the Secretary to Government,
Department of Commercial Taxes
and Religious Endowments,
Fort St. George,
Chennai-600 009. .. Respondents

Prayer : Petition filed under Article 226 of the Constitution of India seeking issuance of a writ of declaration declaring that the proviso to Section 3-B(2)(d) of the Tamil Nadu General Sales Tax Act, 1959 as *ultra vires* Article 366(29-A)(b) and beyond legislative competence of the State and Sl.No.54 List II of the Seventh Schedule to the Constitution of India and unenforceable and the resultant levy and collection of sales tax from the petitioner as unreasonable and violative of Article 265 and arbitrary, repugnant to Article 14 of the Constitution of India.

For the Petitioner	:	Mr.N.Prasad
For the Respondents	:	Mr.Haja Nazirudeen Addl. Advocate-General Mr.M.Venkateswaran Spl. Govt. Pleader (Taxes) assisted by Mr.P.Haribabu Government Advocate

ORDER

(Order of the court was made by the Hon'ble Chief Justice)

We have heard Mr.N.Prasad, learned counsel for the petitioner; Mr.Haja Nazirudeen, learned Additional Advocate-General and Mr.M.Venkateswaran, learned Special Government Pleader (Taxes), assisted by Mr.P.Haribabu, learned Government Advocate for the respondents.

2. The petitioner is challenging part of proviso to Section 3-B(2) of the Tamil Nadu General Sales Tax Act, 1959.

3. The petitioner is a contractor. It had assigned the work to a sub-contractor. Reliance is placed on Article 366(29-A) of the Constitution of India, which states that tax on the sale or purchase of goods includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The petitioner had admittedly sub-contracted it to another person and that person to whom the work was assigned is a registered dealer. Under proviso to Section 3-B(2), no deduction shall be allowed unless the dealer claiming deduction produces proof that the sub-contractor is a registered dealer liable to pay tax under this Act and that the turnover of such amount is included in the return filed by such sub-contractor.

4. The second clause of the proviso that "*the turnover of such amounts is included in the return filed by such sub-contractor*" is the subject matter of challenge.

5. Reliance is placed on the judgment of the Apex Court in the case of *Larsen & Toubro Ltd. v. Additional Deputy Commissioner of Commercial Taxes, reported in (2016) 96 VST 512 (SC)* to contend that while calculating the turnover for the purpose of payment of turnover tax, payments made to sub-contractor are not be included. In the said case, reliance is placed on the earlier judgment of the Apex Court in the case of *Builders Association of India v. Union of India, reported in (1989) 73 STC 370 (SC)*.

6. Learned counsel for the petitioner submits that the Appellate Authority has also arrived at a conclusion that the sub-contractor is a registered dealer liable to pay the tax under

the Act. In view of that, as the sub-contractor is liable to pay the tax, only because the turnover of such amount is not included in the return filed by the sub-contractor, the petitioner cannot be made liable.

7. Learned Additional Advocate-General relies on the judgment of the Apex Court in the case of *S.A.A.Ispahani Trust, 15, Nungambakkam High Road, Chennai-34 v. The Income Tax officer, T.D.S. Ward II (2), Chennai-34, reported in 2013 SCC OnLine Mad 1260* and submits that the liability of the contractor to pay the tax would still subsist, if the sub-contractor does not pay the tax. According to him, the said judgment is followed by the learned Single Judge of this Court in W.P.Nos.22212, 22215 and 22216 of 2019, dated 29.07.2019 (*M/s.Sulochana Cotton Spinning Mills (P) Limited, rep. by S.Krishna Kumar, Managing Director, Palladam Road, Tirupur v. The Assistant Commissioner (CT), Tirupur (South) Assessment Circle, Tirupur*).

8. Learned Additional Advocate-General submits that there would be a distinction between the total turnover and the taxable turnover. Unless it is shown that the sub-contractor has shown the amount in his turnover, the contractor cannot be absolved of his liability to pay the tax.

9. We have considered the submissions and perused the materials on record.

10. Taxable turnover is defined under Section 2(p) of the Tamil Nadu General Sales Tax Act. “Taxable turnover” means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed. Section 2(q) defines “total turnover” to mean the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is

liable to tax.

11. Under Article 366(29A)(b) of the Constitution of India, once the work is assigned by the contractor, the only transfer of property in goods is by the sub-contractor who is a registered dealer.

12. Once the work is assigned by the contractor (petitioner herein) to its sub-contractor, the petitioner ceases to execute the works contract in the sense contemplated by Article 366(29A)(b) of the Constitution of India because the property passes by accretion and there is no property in goods with the contractor which is capable of a re-transfer, whether as goods or in some other form.

13. The sub-contractor has to be a registered dealer. In the present case, the authority has concluded that the sub-contractor is a registered dealer. In view of that, when the

work is already assigned to its sub-contractor, which is registered, the sub-contractor is liable to pay the tax under the Act and it is the responsibility of the sub-contractor to include the same in his return.

14. The Apex Court, in the case of *Larson & Toubro Limited* (supra), has considered the *pari materia* provision under the Karnataka Sales Tax Act, 1957 and observed as under:

> *"18.What is significant is that total amount paid or payable to the dealer as a consideration for "transfer of property in goods", which is involved in execution of the works contract, is to be treated as "total turnover". This Rule, thus, specifically restricts the total turnover in respect of those goods, alone, where the property has been transferred. Thus, transfer of property in goods, becomes necessary event and unless there is a transfer of property, the amount paid is not to be included in the total turnover. The amount paid to the sub-contractor is not for*

transfer of property in goods. When matter is examined from this angle, the ratio laid down by this court in the Andhra Pradesh judgment clearly applies inasmuch as in that case also the court noticed that section 4(7) of the Andhra Pradesh Act indicated that the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works. The court held that the value of the goods which constitutes the measure for the levy of tax is the value of goods at the time of the incorporation of the goods in the works. The court further found that same was the position contained in rule 17(1)(a) of the Andhra Pradesh Value Added tax Rules, 2005."

15. The question framed by the Apex Court in the said case is as under:

"for calculating the turnover for the purpose of payment of turnover tax under section 6B of the Karnataka Act, whether payments made to sub-

contractor are to be included while calculating the total turnover?"

16. The Apex Court concluded that payments made to the sub-contractor are not to be included while calculating the total turnover of the contractor.

17. Section 7-F of the Tamil Nadu General Sales Tax Act was introduced in the year 1999 and the said provision casts duty upon the contractor to deduct TDS at 2% of the total amount payable to such dealer.

18. Today the impugned provision is not in force as the same has been substituted subsequently by the VAT and now by the GST.

19. In view of the authoritative pronouncement of the Apex Court in the case of *Larson & Toubro Limited* (supra),

proviso to Section 3-B(2) to the extent "*and that the turnover of such amounts is included in the return filed by such sub-contractor*" is read down as "*not to apply to the contractor who has assigned the work to a sub-contractor who is a registered dealer*". It will be open for the Revenue to collect the tax from the sub-contractor, if the same has not been paid by the sub-contractor in respect of the works assigned by the petitioner.

20. The writ petition is allowed in the above terms. There shall be no order as to costs. Consequently, W.P.M.P.No.12120 of 2005 is closed.

(S.V.G., CJ.) (J.S.N.P., J.)

23.04.2024

Index : Yes/No
Neutral Citation : Yes/No
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