
(2011) 11 AP CK 0144

In the Andhra Pradesh High Court

Case No : Writ Petition No. 29045 of 2011

Flowmore Limited and Another

APPELLANT

Vs

Deputy Commercial Tax Officer

RESPONDENT

Date of Decision : 16-11-2011

Acts Referred:

Andhra Pradesh Value Added Tax Act, 2005 — Section 13(2)(a), 17, 2(10), 4, 45
Special Economic Zones Act, 2005 — Section 26, 50, 51

Citation : (2013) 57 VST 84

Hon'ble Judges : V.V.S. Rao, J; Sanjay Kumar, J

Bench : Division Bench

Advocate : M.V.J.K. Kumar, for the Appellant; A.V.A. Siva Karthikeya, Special Counsel for Commercial Taxes, for the Respondent

Final Decision : Allowed

Judgement

V.V.S. Rao, J.—A short but interesting question would arise in this writ petition as to whether a seller of goods to any unit located in a Special Economic Zone (SEZ) should be a registered dealer to be entitled to the benefit u/s 7 of the Andhra Pradesh Value Added Tax Act, 2005 ("the VAT Act") read with Schedule I, item 59 thereof. This issue would arise in the background facts as noticed hereinbelow. The first petitioner is a company registered in Gurgaon in the State of Haryana having marketing offices at Chennai and Bengaluru. They are engaged in the manufacture of pumps for various segments such as power, water supply, generation, etc. The second petitioner also is a company engaged in the business of manufacture and export of aluminium. They set up a co-generating power plant at SEZ, Visakhapatnam. The second petitioner placed a purchase order on July 21, 2010 on the first petitioner for design, manufacture, supply and erection of pumping equipment on turnkey basis valued at Rs. 5,42,50,000 at their facility in the SEZ. So as to execute the contract on turnkey, the first petitioner placed an order for manufacture and supply of specified and specially designed embedded parts on M/s. Triveni Engineering and Industries Limited (TEIL), Faridabad. As instructed by the first petitioner, TEIL dispatched the goods directly

by lorry No. HR-74-7304 from Faridabad, Haryana, to Visakhapatnam, Andhra Pradesh.

2. The sole respondent (Deputy Commercial Tax Officer, Kovvur (DCTO)) checked the vehicle on October 15, 2011 at 9 a.m. The driver of the vehicle produced the tax invoice dated September 30, 2011 of TEIL issued in favour of the first petitioner and advance way-bill in Form 600 of the second petitioner along with LR No. 291 dated September 30, 2011 of HBR Logistics, Faridabad. On the premise that the first petitioner, which is an unregistered dealer, effected sale of embedded parts to a dealer at Visakhapatnam without payment of tax, the DCTO detained the vehicle and the six embedded parts, duly advising the driver to furnish security for an amount of Rs. 4,21,080, which is equal to two times the tax due, by way of demand draft/bank guarantee in favour of the Commercial Tax Officer, Nidadavolu. Accordingly, the DCTO issued notice of detaining goods at check-post in form 610 in accordance with rule 56(1) (a) of the Andhra Pradesh Value Added Tax Rules, 2005 ("the VAT Rules").

3. In this writ petition filed assailing the notice of detention of goods, the petitioners would contend that the first petitioner effected sale to the second petitioner, which is a dealer in a SEZ and therefore, the goods stand exempted from payment of value added tax (VAT) u/s 7 read with Schedule I, item 59 of the VAT Act. It is their further contention that when six number of embedded parts dispatched for use in the project of the second petitioner are exempted from VAT, the detention of goods is illegal and is not permissible u/s 45(3) of the VAT Act.

4. At the stage of preliminary hearing itself, the DCTO has filed his counter-affidavit. He would submit that on verification from the records it is noticed that the goods were sold by TEIL to the first petitioner; there are discrepancies in the value of the goods in the invoice and way-bill; registration certificate of the first petitioner was cancelled on February 28, 2010 as it has shown nil turnover continuously for fourteen months; and the first petitioner without registration was doing business in the State of Andhra Pradesh and therefore, the notice in Form 610 was issued proposing to detain the goods. The DCTO, however, did not dispute that the first petitioner was transporting the goods to the second petitioner which is a SEZ unit. Lastly, it is submitted by the DCTO that the first petitioner is not a registered dealer and due to this deficiency, the impugned notice of detention was issued.

5. The counsel for the petitioners, besides reiterating the main contention pleaded in the writ affidavit, would further submit that the Development Commissioner issued a certificate dated February 22, 2011 extending the exemptions in respect of customs duty, Central excise duty, Central sales tax, VAT and exemptions/refund of service tax for the procurements made and services received for execution of the works, in favour of the first petitioner which is the contractor appointed by the second petitioner. He also relies on sections 26 and 50 of the Special Economic Zones Act, 2005 ("the SEZ Act"), and

rule 27 of the Special Economic Zones Rules, 2006 ("the SEZ Rules").

6. The Special Counsel for Commercial Taxes made the following contentions. To be able to avail of the exemption u/s 7 or 7A of the VAT Act, a seller and purchaser must be registered u/s 17 of the VAT Act. The first petitioner is not registered and therefore, the benefit u/s 7 or 7A of the VAT Act cannot be extended. The exemption granted by the Development Commissioner u/s 26 of the SEZ Act in favour of the first petitioner was in relation to the transactions of the first petitioner at their Chennai office and therefore, the same cannot be pressed into service for availing of exemption under the VAT Act. The detention of goods u/s 45 of the VAT Act is justified as the sales invoice itself would show that TEIL consigned the goods to the first petitioner which is not a SEZ unit.

Point for consideration

7. As defined in section 2(10) of the VAT Act, a dealer means any person who carries on the business of buying, selling, supplying or distributing goods or delivering goods on hire purchase or on any system of payment by instalments, and includes various other persons. Section 17 of the VAT Act provides for registration of dealers and section 4 of the VAT Act, which is a charging section, requires every registered dealer or a dealer liable to be registered under the VAT Act to pay VAT on every sale of goods. Reading the various provisions together, it is clear to our minds that every dealer, whether or not registered, is liable to pay VAT on every sale of goods effected by him. The registered dealer, however, has certain benefits. For instance, u/s 13(2) (a) and (b) of the VAT Act and rule 20(1) of the VAT Rules, he can claim input-tax credit while paying VAT on the sale of goods.

8. That takes us to sections 7 and 7A and items 59 and 59A of Schedule I of the VAT Act, which we quote hereunder:

7. Exemptions.--The goods listed in Schedule I to the Act shall be exempt from tax under the Act.

7A. Exemption of tax on sale of goods for certain purposes to an unit located in any special economic zone.--Notwithstanding anything contained in this Act, no tax under this Act shall be payable by any dealer in respect of sale of any goods made by such dealer to a registered dealer for the purpose of setting up operation, maintenance, manufacture, trading, production, processing, assembling, repairing, reconditioning, re-engineering, packaging or for use as packing material or packing accessories in an unit located in any special economic zone or for development, operation and maintenance of special economic zone by the developer of the special economic zone, if such registered dealer has been authorized to establish such unit or to develop, operate and maintain such special economic zone by the authority specified by the Central Government in this behalf.

59. Sale of goods to any unit located in SEZ.

59A. All goods sold to units, operator, developer, co-developer and contractors engaged by them for use in processing area of the respective special economic zone except the goods listed in rule 20(2)(a) of the Andhra Pradesh Value Added Tax Rules, 2005.

9. A brief analysis of the above provisions would reveal the following. The goods listed in Schedule I shall be exempted from VAT. The sale of goods to any unit located in a SEZ irrespective of the fact whether they are goods listed in Schedule I per se under item 59 stands exempted from VAT. Section 7A of the VAT Act however speaks of exemption of tax on sale of goods for certain purposes to any unit in a SEZ and is slightly different. Under the said provision, the sale of goods by a dealer to a registered dealer in a SEZ for the purpose of setting up operation, maintenance, manufacture, trading, production, processing, etc., is exempted from payment of VAT. When the Legislature was careful enough to say that sale by a dealer to a registered dealer in a SEZ, it is not permissible to read the same as being a sale by a registered dealer to a registered dealer in a SEZ. That in our considered opinion would result in taking away the benefit conferred by section 7A of the VAT Act itself. Further, if section 7A of the VAT Act is interpreted as suggested by the special counsel, it would render itself repugnant to section 26 of the SEZ Act, which exempts a SEZ unit from excise, customs, service tax and levy of taxes on the sale or purchase of goods if such goods are meant to carry on the authorized operations by a developer or entrepreneur. We may also, in this context, mention rule 27 of the SEZ Rules which empowers the Development Commissioner, Ministry of Commerce and Industry, Government of India, to certify the contractors and the SEZ unit which are eligible for exemption from payment of various duties and taxes, including VAT. Above all, section 51 of the SEZ Act gives overriding effect to the SEZ Act over all other laws in India. Therefore, if section 7A of the VAT Act is construed as exempting the sales effected by a registered dealer alone to another registered dealer in SEZ, it would render the very provision ineffective. We therefore cannot subscribe to such a construction. We however hasten to add that section 7A of the VAT Act read with entry 59A of Schedule I of the VAT Act restricts exemption in respect of goods sold to units, operator, developer, co-developer and contractors engaged by them for use in processing area of the respective SEZ except the goods listed in rule 20(2) (a) of the VAT Rules. As already noticed supra, section 7 of the VAT Act read with entry 59 of Schedule I thereof exempts sale of goods to any unit located in a SEZ and it need not be necessarily to those purchasers who find mention in item 59A of Schedule I. There is no dispute that the first petitioner was given a purchase order for designing, procuring, supplying and erecting pumping equipment for the second petitioner and therefore, the six number of embedded parts which were intercepted by the DCTO stand exempted from the VAT. Section 45 of the VAT Act deals with establishment of check posts and section 45(3) thereof empowers the officer in charge of such check post to detain the goods only when tax is not paid on the sale or purchase of goods carried. To attract section 45(3) of the VAT Act,

it should be first shown that the goods checked at the check-post were liable to VAT. If the goods are not liable for tax u/s 7 or 7A of the VAT Act, the question of detaining the vehicle or the goods would not arise.

10. The special counsel relies on the sales invoice in support of his contention that the goods were dispatched by TEIL in favour of the first petitioner which is not a SEZ unit. We are afraid the submission is misconceived. A plain reading of the sales invoice would show that though the first petitioner is shown as the consignee, the consignment was sent on account of the second petitioner. Further, indisputably, the sales invoice contains the TIN number which was assigned to the second petitioner and this itself would belie any submission that the goods were dispatched by the TEIL in favour of the first petitioner. We may also refer to the two documents which also do not support the Special Counsel. The first one, the certificate issued by the Development Commissioner on February 22, 2011 to M/s. Flowmore Limited. This would clearly show that the first petitioner is a contractor appointed by the second petitioner for their works at the SEZ. The other document is the letter addressed by the second petitioner on October 22, 2011 to the DCTO, Kovvur, confirming that they have awarded the contract to the first petitioner for erecting pump equipment and that in terms of rule 27(1) of the SEZ Rules, the contractors appointed by the units are eligible for exemption of payment of VAT, Central sales tax, Customs duty/excise duty. The submission that the Development Commissioner's certificate would apply only to the Chennai office of M/s. Flowmore Limited is also not well-founded. A perusal of the said certificate would not lend any support as the certificate was given to the first petitioner in connection with the execution of the contract of erecting pump equipment for the second petitioner.

11. So as to non-suit the petitioners, a plea is raised that the petitioners have the alternative remedy of responding to the notice itself. As the question of jurisdiction is raised in the writ petition, in the facts of this case, we ignore the plea of alternative remedy. In the result, for the above reasons, the writ petition is allowed and the notice of detention issued by the respondent is set aside. As directed by this court, if the petitioners have paid an amount of Rs. 5,00,000 (rupees five lakhs only) by way of a bank draft to the respondent, the same shall be returned forthwith, and if the goods are not released, they shall be released forthwith. There shall be no order as to costs.