(2012) 06 AP CK 0080

In the Andhra Pradesh High Court

Case No : Writ Petition No''s. 16662, 17660 and 18092 of 2012

HCL Technologies Limited — APPELLANT

Vs

Commercial Tax Officer and Another — RESPONDENT

Date of Decision : 21-06-2012

Acts Referred:
Central Sales Tax Act, 1956 — Section 3, 5, 5(1), 5(3), 6
Constitution of India, 1950 — Article 246(1), 286, 286(2)

Citation : (2013) 62 VST 224

Hon'ble Judges : V.V.S. Rao, J;G. Krishna Mohan Reddy, J

Bench : Division Bench

Advocate : J.V. Rao, B. Srinivas and Challa Gunaranjan, for the Appellant; P. Balaji Varma, Special Standing Counsel for Commercial Tax, for the Respondent

Final Decision : Disposed Off

Judgement

V.V.S. Rao, J.—The three writ petitions are filed by information and technology software companies which export the software. They are aggrieved by the assessment orders for 2008-2009 passed by the Commercial Tax Officer, Madhapur Circle, under the Central Sales Tax Act, 1956 ("the CST Act"). We will take the facts from W.P. No. 16662 of 2012, as the factual background in the other two matters is the same. The petitioner, M/s. HCL Technologies Limited, is an incorporated entity in the business of development and export of IT software. They are dealers under the Andhra Pradesh Value Added Tax Act, 2005, and the CST Act, on the rolls of the Commercial Tax Officer (CTO). For the assessment year 2008-2009, the petitioner filed returns under the CST Act disclosing the total direct export sales of Rs. 1,03,36,66,486. They claimed exemption on the export sales and concessional rate of tax at two per cent/three percent on the inter-State sales. The CTO, however, did not accept the returns and issued a show-cause notice proposing to levy CST on the total turnover which included direct export sales as well. According to the CTO, the petitioner failed to produce proof of exports/exemption. It appears, the CTO was under the impression that the petitioner should produce H forms as per rule 12(10) of the Central Sales Tax

(Registration and Turnover) Rules, 1957 ('''"the Rules"). The petitioner contends that the show-cause notice was not issued, and therefore, they could not file objections. Be that as it is, by impugned order dated March 31, 2012, the CTO subjected the entire turnover to four percent CST and demanded Rs. 4,13,46,659. This order is assailed in the writ petition.

2. The learned senior counsel appearing for the petitioner in W.P. No. 18092 of 2012, Sri C. Kodandaram, submits that the export sale of goods is not exigible to CST; the question of a dealer producing H forms would arise only when the sale is effected in the course of export of goods u/s 5(3) of the CST Act, and that the CTO committed jurisdictional error in subjecting direct export sales turnover to CST ignoring section 5(1) of the CST Act. These contentions are refuted by the Special Counsel for Commercial Taxes. He would submit that at the time of assessments it is always competent to the CTO to ask for proof of export sales.

3. As a first step, before noticing the charging section in the CST Act and how it is subjected to section 5, we may briefly indicate the position of taxes on exports and imports as contemplated under the Constitution. Exports and imports are taxable under the law made by the Parliament under article 246(1) of the Constitution read with entry 83 and all applicable entries of Union List (List I) in the Seventh Schedule to the Constitution. The State Legislature has no power to levy duties or taxes on exports and imports, although the State has power to impose taxes on sale or purchase of goods under entry 54 of the State List. But, article 286 restricts the State''s power to impose tax on inter-State trade or commerce. This power is with the Union List. Under article 286(2), the Parliament is empowered to formulate principles for determining when a sale or purchase can be said to have taken place during inter-State trade or commerce and/or in the course of import or export of goods out of territory of India.

4. The CST Act is a legislation to formulate such principles which in section 3 describes an inter-State trade or commerce. The CST Act is not an Act in pith and substance levying taxes and duties on exports and imports. Therefore, all the export sales are not exigible under the CST Act. As per charging section 6 of the CST Act, every dealer effecting sales of goods in the course of inter-State trade or commerce shall be liable to pay the tax under the CST Act. The proviso to section 6(1) of the CST Act, however, exempts the sale of goods in the course of export of those goods out of territory of India. The proviso specifically refers to the sale of goods in accordance with the provisions of section 5(3) of the CST Act. Therefore, it is necessary to quote section 5 of the CST Act, which reads as under:

5. When is a sale or purchase of goods said to take place in the course of import or export.--(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with the agreement or order for or in relation to such export.

5. A plain reading of the provision would show that if the sale of goods is by way of export out of territory of India, it is not exigible the moment the transfer of documents of title to the goods is complete, i.e., after the goods crossed the customs frontiers of India. In addition to this, as per section 5(3) of the CST Act, the last sale or purchase of any goods preceding the sale or purchase occasioning the export of goods out of the territory of India shall be deemed to be export sale, if such sale took place for the purpose of complying with the agreement or order with relation to such export. Rule 12(10) of the Rules requires a dealer to produce before the assessing officer a certificate in form H duly filled and signed by the exporter along with the evidence of export of such goods. It only takes care of intermediate transactions and section 5(3) of the CST Act read with rule 12(10) of the Rules does not deal with direct export sale to a buyer outside the country, which is taken care by section 5(1) of the CST Act. Rule 12(10)(a) of the Rules reads as under:

Prescription of goods for certain purposes.--(a) A dealer may in support of his claim that he is not liable to pay tax under this Act in respect of any sale of goods on the ground that the sale of such goods is a sale in the course of export of these goods out of the territory of India within the meaning of sub-section (3) of section 5, furnish to the prescribed authority a certificate in form H duly filled and signed by the exporter along with the evidence of export of such goods.

6. Therefore, when the export sales are not exigible under the CST Act, requiring to produce H forms which is relevant in the context of situation u/s 5(3) would be unauthorised. Any assessment under such wrong premise would also be unauthorised by law. Be it reiterated that export sale is not in the course of inter-State trade or commerce and levy of tax thereon is unsustainable.

7. In all matters, the CTO misdirected himself and passed the assessment orders. A misdirection in law is a jurisdictional error, and therefore, the impugned assessment orders cannot be sustained. They are liable to be set aside. In State of A.P. v. Evershine Granites Ltd. [1987] 5 APSTJ 163 a Division Bench of this court dismissed a tax revision case, being TRC No. 92 of 1987, on June 8, 1987 affirming the order dated April 1, 1986 in T.A. No. 745 of 1985 of the Sales Tax Appellate Tribunal. Dealing with the similar question, therein a reference was

made to the following passage from an earlier order in T.A. No. 337 of 1985, dated December 16, 1985, with which we are in respectful agreement.

A perusal of the assessment files discloses that the assessing authority was under the impression that the transactions in question are sales preceding the export out of India and therefore in order to apply section 5(3) it was incumbent on the assessee to produce the purchase order or the agreement. This assumption is wholly incorrect. Sub-section (3) of section 5 comes into play only in respect of sales or purchases preceding the export of goods out of the territory of India, which is not the case here. The present one is a clear case of the direct export of granites by the assessee to foreign buyers. The transaction itself had occasioned the export and as there was no intermediate transaction, the application of section 5(3) was totally misconceived. Where there is single sale which itself occasions export of goods out of India it falls within the ambit of sub-section (1) of section 5. This is the unexceptionable legal position. The point is therefore answered in favour of the assessee and against the Department.

(Emphasis supplied)

8. Accordingly, the impugned assessment orders, being AAO No. AO 24717, dated March 31, 2012, in W.P. No. 16662 of 2012, AAO No. AO 24729, dated March 31, 2012 in W.P. No. 17660 of 2012, and AAO No. AO 18534, dated March 29, 2012 in W.P. No. 18092 of 2012 are set aside. It shall, however, be open to the CTO, Madhapur Circle, to issue notice to the petitioners as to the material required in proof of direct export sales and then undertake assessment in accordance with law. The writ petitions as also the W.P.M.Ps. shall stand disposed of in terms as above. There shall be no order as to costs.