

(2009) 06 MAD CK 0249

In the Madras High Court

Case No : Tax Case (Appeal) No. 2014 of 2006

K. Farook Mohammed

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 11-06-2009

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12(3)

Citation : (2010) 28 VST 121

Hon'ble Judges : F.M. Ibrahim Kalifulla, J;B. Rajendran, J

Bench : Division Bench

Advocate : K. Soundara Rajan, for the Appellant; Haja Nazruddin, Special Government Pleader (Taxes), for the Respondent

Final Decision : Dismissed

Judgement

B. Rajendran, J.—The assessee has preferred these appeals as against the order passed by the Joint Commissioner (CT) in suo motu revision in T1/10433/95 (SMR Nos. 152 and 151 of 1997) dated September 26, 1997 for the assessment years 1985-86 and 1986-87.

2. The assessee is a contractor and he has reported a total turnover for the years 1985-86 and 1986-87. Based on the records produced, the assessing officer had levied tax taking into account the railway contract for supply and doing contract work in respect of removal and filling of the ballasts (jelly) and in view of the fact that the assessee had not chosen to disclose the contract entered into the railways for the supply and working of the ballasts in the railway line, a penalty was also imposed at 11/2 times the tax of the undisclosed sales u/s 12(3) of the Tamil Nadu General Sales Tax Act. Aggrieved against such assessment, the assessee preferred an appeal before the Appellate Assistant Commissioner in both the cases.

3. The appellate authority taking into consideration the letter issued by the Divisional Railway Manager dated October 19, 1994 in letter No. T/W.148/Genl/

WA II concluded that the contract which was allotted to the assessee is not one which included supply of materials, but only is of works contract. They heavily relied upon one letter issued by the railway authorities much belatedly after the contract period, namely, in the year 1994. Based on this letter, the first appellate authority has set aside the order of the assessing authority cancelling both the tax liability as well the penalty. The Department, pursuant to the order of the first appellate authority suo motu called for explanation and sent a show-cause notice to the assessee contemplating action for the undisclosed income in respect of the contract including the supply of materials to the railways. The assessee had given a reply based upon the letter issued by the divisional office and would contend that the contract was not in the nature of supplying of materials, but only would include labour contract and there was never any supply of materials as assessed by the original authority. Based on the reply, the Joint Commissioner examined in detail and conferred an opportunity to the assessee through his chartered accountant to report the matter and by way of a suo motu revision taking into consideration the terms of the contract between the assessee and the railway authorities came to a conclusion that the contract which was involved is inclusive of supply of materials and there was an involvement of supply of materials in this contract.

4. On this finding, the authority came to a final conclusion that the assessee is liable not only to pay tax, but also is to be levied penalty. But giving concession reduced only the penalty from 11/2 times to 50 per cent which is the mandatory minimum required penalty as contemplated as the law then existed u/s 12(3) of the Act. Aggrieved against this order of the suo motu revision made by the Joint Commissioner III, the assessee came forward with the present appeals. An attempt was made by the assessee herein to clearly point out that the railway authorities had given a letter which would read as follows:

The abovesaid work was purely related to dumping work, (i.e.), labour work. Hence the question of reimbursement of sales tax does not arise in this case. The collection of stone ballast was not contemplated on the above agreement for the year 1985-86.

The agreement mentioned in your letter cited above is not correct. This should be correctly read as TPJ 72/84, instead of TPJ 572/84.

5. The only contention raised by him was that when a Governmental organisation, namely, railway would categorically indicate by virtue of this letter that there was no supply involved and what was the work awarded was only the labour contract, the finding of the suo motu enquiry is not legally sustainable.

6. At this juncture, the original agreement between the Southern Railway and the assessee which was produced before the court was perused by us and the following three clauses in the original agreement between the Southern Railway and the assessee would be relevant and important to decide the issue in this case, because the main issue is only with regard to whether the supply of

material was made under the contract or only the labour work was given to the assessee/appellant herein. The following three clauses are relevant.

7. Both in the agreements for the years 1985-86 and 1986-87, though the clauses numbering is different, the clauses are identical which read as follows:

1. In the first clause, in the very contract itself, the assessee has agreed as per clause V "It is hereby agreed and declared that all the provisions of the said specifications, conditions of contract which have been carefully read and understood by the contractor, and printed Schedule of rates including the general instructions contained in pages 8 and 9 thereof, shall be as binding upon the contractor and upon the railway administration as if the same had been repeated herein and shall be read as part of these presents".

As per this clause the petitioner is bound by the general instructions contained in the tender.

8. The second clause for consideration is in the general instructions which form part and parcel of the agreement Clause 20:

In case of tenders for collection and supply of ballast stone metal of not less than 14 cubic decimeter in quantity should be submitted along with the tender as sample to show the quality for the approval of the engineer before accepting tender. The samples should be sent in three sealed glass jars from each depot.

which would clearly indicate and stipulate that the contractor is bound to supply materials and he was expected to show or produce the quality of material to be supplied by giving any specific quantity before the tender.

9. The next clause is clause 23, which reads as follows:

The tenderer has to make his own arrangements for obtaining ballast from outside the Railway limits and necessary seigniorage wages, etc., if any will be borne by him. The ballast shall be erected on railway land as directed by the engineer's representatives, which clause also would indicate that in the contract as agreed to between the parties, a specific recital has been made to show that the tenderer or the contractor has to make his own arrangements for obtaining ballast and also to pay the seigniorage fee to the Government for removal of ballast" which clearly establishes beyond any reasonable doubt that the contractor at the time of entering into the contract has specifically agreed to for the supply of materials also.

10. Above all these things, we were also able to see in the contract the very description of work which would also categorically include removal of existing stone ballast from the running track and dumping and also putting back clean ballast into the track and levelling the track including boring and tidying of stone ballast which will categorically show beyond any reasonable doubt that the work allotted to them was to remove old ballast and fill in new ballast which will necessarily mean that the new ballast should come only from the tenderer or the

contractor for filling up. In fact, in the suo motu assessment, the authority has rightly come to the conclusion that the reading of the clauses in the agreement would mean and include only that of supply as well as work in respect of the contract which has been entered into between the railway and the assessee.

11. Apart from this, from the original assessment order itself we were able to see from the books of accounts as produced by the assessee that the assessee has purchased jelly to the tune of Rs. 36,200. If the contract is only for a works contract, there will be no necessity for the assessee to purchase jelly. This will also clearly indicate that the purchase of jelly was made for the purpose of supplying it to the railways and thereafter to complete the work. These three factual aspects coupled with the agreement entered into by the assessee clearly would indicate that the nature of contract is nothing but supply of material also. Therefore, the reliance placed by the first appellate court and the appellant herein on the letter issued by the railway authorities much belatedly in respect of the contract that it would only denote the works contract cannot be accepted and this has been rightly done by the suo motu authority during the suo motu order.

12. The letter issued by the authority relied upon by the appellant cannot be accepted as a material fact and it will not have any sanctity as against the original agreement or the tender contract as entered into between the railway authority and the assessee. The Joint Commissioner III (SMR) of Commercial Taxes, had given a specific finding that it is an undisputed fact that jelly was supplied for carrying out various types of works whether it is renewal of track or track sleeper renewal.

13. Apart from that, he has also given a finding that the extracts taken from Southern Railway had clearly indicated that the dealer had supplied jelly worth Rs. 2,24,518 to the Railway Department during the relevant year and that the assessee sold condemned articles for Rs. 7,000. Such findings of fact have been clearly extracted by the authorities below. We are not able in any way, to assail the factual findings coupled with the clauses found in the agreement. We do not find any valid reason to interfere with the orders of the authority below as the reasonings are well-founded. Hence, the appeal filed by the assessee is dismissed.

14. Apart from this, the appellant is not able to produce any records before us to establish any question of law for interference at this stage. Hence we do not find any reason to interfere with the order of the appellate authority. Accordingly these appeals fail and the same are dismissed. No costs.