(1998) 02 GAU CK 0043

In the Gauhati High Court

Case No : Civil Rule No. 571 of 1997

Live Tone APPELLANT

Vs

State of Tripura and Another RESPONDENT

Date of Decision : 13-02-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Tripura Sales Tax Act, 1976 — Section 2, 21(1), 22, 3, 3A

Citation : (1998) 1 GLT 355

Hon'ble Judges : P.K. Sarkar, J

Bench : Single Bench

Advocate : S. Deb and S.C. Saha, for the Appellant; A. Chakraborty, A.G., U.B. Saha, A. Ghosh and P.K. Paul, for the Respondent

Judgement

P.K. Sarkar, J.—M/s. Live Tone through its proprietor Shri Shyamal Kumar Banik has filed the present writ petition for cancel ling the impugned orders dated 26.8.1997 passed in Revision Case No. 5/CH-V/97 and 23.9.1997 passed in Revision/Misc. Case No. 5/CH-V/97 by the Commissioner of Taxes, Government of Tripura, Agartala, Annexure - B & D respectively and also prayed for a direction not to give effect to the aforesaid orders.

2. The Petitioner is a registered dealer under the Tripura Sales Tax Act, 1976 and carrying on business in the purchase and developing and printing of photographs etc. The Petitioner firm maintains the books of accounts and has furnished Sales Tax return showing turn over as ''Nil'' for the assessment years 1988-89 to 1994-95. The Superintendent of Taxes, Charge-V, Government of Tripura issued notice for production of books of accounts and records for the aforesaid assessment years and accordingly, the Petitioner firm produced the books of accounts for verification and examination by the Superintendent of Taxes. After examination of the books of accounts, the Superintendent of Taxes accepted the return of the Petitioner firm and no tax was imposed on the Petitioner firm. The order passed by the Superintendent of Taxes dated 20.9.95 has been annexed

with the petition as Annexure-A. Thereafter the Petitioner received an order on 26.8.1997 passed by the Commissioner of Taxes wherein the Commissioner of Taxes reopened the assessment by registering a Revision Case u/s 21(1) of the Tripura Sales Tax Act, 1976. The Commissioner of Taxes while re-opening the Revision Case formed an opinion that the Superintendent of Taxes committed an error in accepting the return of the Petitioner firm as the business of the Petitioner firm falls under the works contract. Accordingly, the Commissioner of Taxes directed the Petitioner to produce all books of accounts and also for personal hearing. The Petitioner filed an application before the Commissioner of Taxes stating that the business of the Petitioner firm do not fall under works contract and consequently the Petitioner filed a petition to the Commissioner of Taxes seeking adjournment of hearing on the ground that the Petitioner will file a writ petition before the High Court for interpretation of the statutory provisions of the Tripura Sales Tax Act. The Commissioner of Taxes by his order dated 23.9.97, Annexure-D granted adjournment, but he observed that if the Petitioner is aggrieved by any order of the Commissioner of Taxes, he may move the higher authority including the Hon''ble High Court. Having felt aggrieved by the said order of the Commissioner of Taxes, the Petitioner firm has filed the present writ petition.

3. A counter-affidavit has been filed on behalf of Respondents Nos. 1 and 2, that is the State of Tripura and Commissioner of Taxes. But the counter-affidavit has been signed on behalf of Government of Tripura and not by the Commissioner of Taxes, Respondent No. 2. Therefore, I am of the view that though it has been stated in the counter-affidavit that the reply is on behalf of Respondents Nos. 1 and 2, the counter-affidavit can be treated as a counter-affidavit on behalf of State Respondent only. The Commissioner of Taxes, Respondent No. 2, neither appeared in the case in his capacity as Commissioner of Taxes nor he has filed any counter-affidavit.

4. In the counter-affidavit of the State Respondent it has been stated that the business of die Petitioner firm falls under works contract and the Petitioner firm is liable to pay sales tax u/s 3(a) of the Tripura Sales Tax Act, 1976. For better understanding of the controversy raised in the petition it is necessary to examine the order passed by the Commissioner of Taxes at Annexure-B. The order runs as follows:

"ORDER"

26.8.1997. 1. WHEREAS it has come to the knowledge of the undersigned that an assessment order was passed on 20.9.1995 by the Assessing Authority, the Superintendent of Taxes, Charge-V, Agartala for assessment years 1988-89 to 1994-95 in respect of the business of M/s. Live Tone, Sakuntala Road, Agartala having Registration No. SDR/ST 2396/89;

AND

2. WHEREAS it has been found that the Assessee has been found in eligible for

payment of Sales Tax on the basis of the 2 (two) judgments shown by the Assessee at the time of assessment i.e. the State of Tamilnadu v. Anandam Viswanathan 1989 73 STC SC and the Studio Sen & Sen v. the State of Tripura 1990 76 STC GAU.

AND

3. WHEREAS both the judgments relate to the period of assessment prior to the 46th Amendment of the Constitution and subsequent amendments to TST Act;

AND

4. WHEREAS the period assessed is after the 46th amendment of the Constitution and subsequent amendments of TST Act by which the photographic work comes under the works contract. The Hon''ble Gauhati High Court in his judgment in Studio Sen & Sen v. the State of Tripura has quoted, " it may, however, be apposite to mention here that after the 46th amendment of the Constitution the Act has been amended and by the Tripura Sales Tax (3rd amendment) Act, 1984, a new Section, namely, Section 3A has been inserted to provide for imposition of Tax on transfer of property in goods involved in the execution of works contract. However, as the case in hand relates to the periods prior to the coming into force of the said amendment, it is not necessary to go into the effects of the same. (173-76 STC).";

AND

5. WHEREAS, I am of the opinion that the assessment was made erroneously and the case is fit for being taken up for revision u/s 21(1) of the TST Act in the interest of the revenue.

6. You are hereby given an opportunity to present your case on 9.9.1997 at 12.00 A.M. A copy of the assessment order is also being enclosed for your ready reference.

7. Call for the case records and issue notices to the Ld. Assessing Authority also to remain present at the time of hearing.

Sd/- (S.K. Rakesh), Commissioner of Taxes.

5. Mr. S. Deb, learned senior counsel appearing on behalf of the Petitioner argued that the Commissioner of Taxes by his order dated 26.8.97, Annexure-B has already taken a decision that the photography work comes under works contract and therefore, the Petitioner firm is liable to pay sales tax, Mr. Deb, however, submitted that even though by the latter part of the aforesaid order, Annexure - B, the Commissioner of Taxes has given an opportunity to the Petitioner to present his case and also to submit the books of accounts, the Commissioner of Taxes has already taken a decision that the Petitioner firm is liable to pay sales tax and therefore, there remains only a formality to hear the Petitioner. But according to the decision taken by the Commissioner of Taxes in his aforesaid order dated 26.8.1997 (Annexure-B), he will impose sales Tax on the Petitioner

firm and on the basis of that he is liable to pay sales tax u/s 3 A of the Tripura Sales Tax Act. Mr. Deb consequently submitted that since the Commissioner of Taxes has already taken a decision that the business of the Petitioner firm falls under works contract, there is no meaning to conduct the case before the Commissioner of Taxes because the Commissioner of Taxes has already taken a decision that the Petitioner firm is liable to pay sales tax. Accordingly, the Petitioner has filed an objection against the order of the Commissioner of Taxes dated 26.8.97. But even after filing of the objection petition the Commissioner of Taxes did not drop the Revision petition, consequently the Petitioner sought for time for seeking an interpretation from the Hon''ble Gauhati High Court. learned Counsel further submitted that the Commissioner of Taxes by his order dated 23.9.97, Annexure-D allowed the adjournment, but rejected the prayer of moving the High Court on the ground that if the Petitioner is aggrieved by any order of the Commissioner of Taxes, he can file appropriate petition before the High Court.

6. Mr. Deb, learned senior counsel for the Petitioner relying on the decision reported in (1977) S.T.C. (39) 237 (The Assistant Sales Tax Officer and Ors. v. B.C. Kame) submitted that when a photographer undertakes to take a photograph, develop the negative, or do other photographic work and thereafter supply the prints to his client, he cannot be said to enter into a contract for sale of goods. The contract on the contrary is for use of skill and labour by the photographer to bring about a desired result. The occupation of a photographer, except in so far as he sells the goods purchased by him, is essentially one of skill and labour. Therefore, sales tax is not payable by a photographer, when the photographer takes photographs or does other photographic work and thereafter supplies the photographic prints to his client or customer.

7. Mr. Deb also relied on a decision reported in (1993) S.T.C. (89) 307, Annexure - E, (Studio Kamalalaya and Anr. v. Commercial Tax Officer and Ors.) and submitted that in a works contract there will be at least two parties, the contractee and the contractor. The contractee is the person, who is the owner of the immovable or movable property with reference to which the works have to be executed. Therefore, "any goods" stated in Section 2(o) (iv) of the Tripura Sales Tax Act means any movable property of a person other than the contractor with reference to which a works contract should be executed. If there is no such goods, there is no question of execution of a works contract. Mr. Deb further submitted that in a works contract the basic work which is the subject matter of the works contract should belong to a person other than the contractor. In the instant case no such goods belongs to the customer and all the materials essentially belongs to the Petitioner firm and therefore, the works of the photographer in printing, developing or beautifying the photograph from negative can not be instituted a works contract.

8. Mr. Deb further argued that the Government has filed a counter-affidavit in the present case and the stand of the Government is that the works of a

photographer falls under works contract as defined in Section 2(0) (iv) of the Tripura Sales Tax Act and therefore, liable to pay sales tax u/s 3A of the Tripura Sales Tax Act Mr. Deb, learned senior counsel consequently submitted that since the Govt. has taken a stand by filing the counter - affidavit that the Petitioner firm is liable to pay sales tax u/s 3 A of the Tripura Sales Tax Act, the Commissioner of Taxes can not go beyond the stand of the Government and he will ultimately assess sales tax on the Petitioner firm even though the Petitioner firm is not liable to pay sales tax u/s 3(a) of the Tripura Sales Tax Act. Mr. Deb consequently submitted that the order of the Commissioner of Taxes to reassess sales tax of the Petitioner firm in pursuance of his order dated 26.8.1997, Annexure-B should be quashed.

9. Before going to the merits of the case it is necessary to examine whether the Petitioner has any cause of action at this stage to file the present writ petition. It appears that the Superintendent of Taxes as the Assessing Authority has accepted the turn over of the Petitioner firm as ''nil'' on the ground that the photography works do not fall within the works contract and therefore, the Petitioner is not liable to pay sales tax. The Commissioner of Taxes by his order dated 26.8.1997, Annexure-B suo-moto started a revision case u/s 21(1) of the Tripura Sales Tax Act, 1976 and issued a notice to the Petitioner firm to present its case on 9.9.1997 at 12.00 A.M. After receipt of the order the Petitioner filed an objection before the Commissioner of Taxes stating that the business of the Petitioner firm does not fall under works contract and therefore, he is not liable to pay sales tax. On the basis of the objection filed by the Petitioner firm the Commissioner of Taxes proceeded with the hearing of the case, but the Petitioner filed an application for adjournment on the ground that the case involves complicated questions of law and the Petitioner wants a decision from the Hon''ble Gauhati High Court. The Commissioner of Taxes by his order dated 23.9.97, Annexure-D, allowed the adjournment, but he rejected the prayer of the Petitioner to move the High Court as the Commissioner of Taxes is of the view that if the Petitioner is aggrieved by the order of the Commissioner of Taxes, he will have the opportunity to move the appropriate Court.

10. After going through the orders passed by the Commissioner of Taxes dated 26.8.97 and 23.9.97, Annexures-B and D respectively, two questions arise for decision, namely, (a) whether the Commissioner of Taxes has already taken a decision that the Petitioner firm is liable to pay sales Tax u/s 3(a) of the Tripura Sales Tax Act and (b) whether a statutory authority can be prevented to exercise his statutory power.

11. On a perusal of the order of the Commissioner of Taxis dated 26.8.97, Annexure -B, it appears mat the aforesaid order contains two parts, one is preamble which contains paragraphs 1 to 4 of the said order and the second part is the order of the Commissioner of Taxes.

12. Sub-section (1) of Section 21 of the Tripura Sales Tax Act, 1976 runs as follows:

21(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by any person appointed under Sub-section (1) of Section 4 to assist him, is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the dealer an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such orders thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

On a plain reading of the aforesaid provision it appears that before starting any revision case the Commissioner of Taxes is required to be satisfied that the order passed by any person appointed under Sub-section (1) of Section 4 of the Tripura Sales Tax Act is erroneous and it is prejudicial to the interest of the revenue. Consequently I am of the view that before starting a revision case the Commissioner of Taxes is required to form an opinion that the order passed by the Superintendent of Taxes is erroneous and prejudicial to the interest of the revenue. In the instant case the Superintendent of Taxes accepted the ''nil'' return of the Petitioner firm on the ground that the Petitioner firm is not liable to pay sales tax u/s 3 A of the Tripura Sales Tax Act. The Commissioner of Taxes is of the opinion that the Petitioner firm may be liable to pay sales tax u/s 3 A of the Tripura Sales Tax Act and if such tax is not paid this will prejudicially affect the revenue of the State. Consequently in the second part of the order dated 26.8.97, Annexure-B, from paragraphs 5 to 7, it has been stated by the Commissioner of Taxes that he is of the opinion that the assessments was made erroneously and consequently he has given an opportunity to the Petitioner to present his case.

13. After going through the order dated 26.8.97, Annexure-B, I am of the view that for re-opening the assessment of sales tax of the Petitioner firm in the revision case, the Commissioner of Taxes has formed an opinion that the Petitioner firm may be liable to pay sales tax u/s 3 A of the Tripura Sales Tax Act and this is not his final decision that the Petitioner firm is liable to pay sales tax. Before opening a revision case the Commissioner of Taxes is to be satisfied and he can only be satisfied if he forms certain opinion that the order passed by the Superintendent of Taxes is erroneous. In the instant case I am also of the view that the Commissioner of Taxes has only formed an opinion which he has expressed in the preamble of his order in paragraphs 1 to 4 and this is not his final decision that the Petitioner firm is liable to pay sales tax u/s 3 A of the Tripura Sales Tax Act. Further, I am of the view that paragraphs 5 to 7 of the order dated 26.8.97, Annexure-B is the order of the Commissioner of Taxes for re-opening the assessment of the Petitioner firm in the revision case and he has given an opportunity to the Petitioner firm to present his case and also to produce the books of accounts to him. In pursuance of the order dated 26.8.97, Annexure-B, the Commissioner of Taxes has not yet assessed the sales tax or imposed any tax on the Petitioner form and before that stage reached the Petitioner has filed the present writ petition.

14. It appears that the Tripura Sales Tax Act, 1976 empowers the Commissioner of Taxes to call for and examine the records of any proceeding if he considers that any order passed by any person appointed under Sub-section (1) of Section 4 of the said Act is erroneous. The Commissioner of Taxes is of the opinion that the Superintendent of Taxes has made an error in accepting the ''nil'' return of the Petitioner firm and therefore, he has started a revision application for re-assessment of taxes of the Petitioner firm forming an opinion that the Petitioner firm may be liable to pay sales tax u/s 3 A of the Tripura Sales Tax Act. The forming of an opinion is not the decision of the Commissioner of Taxes. I can not accept the argument of Mr. Deb, learned senior counsel appearing on behalf of the Petitioner that the Commissioner of Taxes has already taken a decision that the Petitioner firm is liable to pay sales tax u/s 3 A (works contract) of the Tripura Sales Tax Act. On a plain reading of the order of the Commissioner of Taxes at Annexure-B, I am clearly of the view that the Commissioner of Taxes has only formed an opinion that the Petitioner firm may be liable to pay sales tax u/s 3A of the Tripura Sales Tax Act, but this can not be termed as a decision of the Commissioner of Taxes that the Petitioner firm is liable to pay sales tax u/s 3A of the Tripura Sales Tax Act. There is a difference between opinion and a decision. In the present case the Commissioner of Taxes has only formed an opinion which he can always change if the correct legal position is explained to him. The Commissioner of Taxes has given an opportunity to the Petitioner to present his case, but instead of presenting the case before the Commissioner of Taxes the Petitioner firm has filed the present writ petition. Tripura Sales Tax Act, 1976 has given power to the Commissioner of Taxes to re-open an assessment in a revision case u/s 21 (1) of the Tripura Sales Tax Act. The Petitioner has not allowed the Commissioner of Taxes to decide his case on merit and before any decision by the Commissioner of Taxes, the Petitioner has filed the present writ petition.

15. Mr. U.B. Saha, learned Govt. Advocate appearing on behalf of the State Respondent submitted that the Tripura Sales Tax Act, 1976 provides for a complete machinery to challenge an order of assessment and the order passed under the Act can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. Learned Govt. Advocate further submitted that it is now well recognised that where a right or liability creates by a statute which gives a special remedy for enforcing it, the remedy provided by the statute only must be availed of. It is argued by Mr. Sana, learned Govt. Advocate that the Commissioner of Taxes has not yet assessed any tax on the Petitioner firm and even if any tax is assessed and the Petitioner is aggrieved by the order of the Commissioner, then the Petitioner has a remedy by filing an appeal to the Tribunal u/s 22 of the Tripura Sales Tax Act. Learned Govt. Advocate also submitted that if the Petitioner is aggrieved by the order of the Tribunal then he may come before the High Court on any question of law. Mr. Saha consequently submitted that the Petitioner has no reason to file the present writ petition before any assessment order is passed by the Commissioner of

Taxes and therefore, the present writ petition should be rejected.

16. There is sufficient force in the submission of Mr. Saha, learned Govt. Advocate. In the case reported in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, it has been decided by the Apex Court that where a statute creates a right or liability which gives a remedy for enforcing it, the remedy provided by that statute only must be availed of. In the instant case the Commissioner of Taxes has formed an opinion that the Petitioner firm may be liable to pay sales Tax u/s 3A of the Tripura Sales Tax Act, but he has not yet taken any final decision and has not made any assessment of tax of the Petitioner firm. It further appears that rules of natural justice has also not violated by the Commissioner of Taxes. As it appears from the order, Annexure-B that the Commissioner of Taxes has given an opportunity to the Petitioner firm to present its case before him started u/s 21(1) of the Tripura Sales Tax Act. Merely because the Commissioner of Taxes refused to grant further adjournment and merely ? because he has formed an opinion, it can not be said that he acted without jurisdiction or in "Violation of natural justice. The question whether another adjournment should be granted or not, is in the discretion of the Commissioner of Taxes and whether a firm is liable to pay sales tax u/s 3A of the Tripura Sales Tax Act is clearly within the jurisdiction of the Commissioner of Taxes. If the Petitioner is aggrieved by the order of the Commissioner of Taxes he can properly agitate the matter in an appeal u/s 22 of the Tripura, Sales Tax Act before the Tribunal. Even though the State Government has taken a stand that the Petitioner firm is liable to pay sales tax u/s 3A of the Tripura Sales Tax Act, the Commissioner of Taxes is not bound to accept the stand of the Government as he will decide the case independently according to his best judgment. Since the revision petition is still pending before the Commissioner of Taxes and since he has not given any decision in the revision case whether the Petitioner is liable to pay sales tax, I am of the view that no decision should be given by me on the merits of the case whether the Petitioner firm is liable to pay sales tax u/s 3A of the Tripura-Sales Tax Act or not as that may influence the mind of the Commissioner of Taxes.

17. Consequently I am not inclined to give any decision whether in the present case the Petitioner firm is liable to pay sales tax u/s 3A of the Tripura Sales Tax Act and this matter is kept open for decision by the Commissioner of Taxes. Since the Tripura Sales Tax Act, 1976 provides for adequate authorities against the wrongful acts complained of, I am of the view that the Petitioner can move the prescribed authorities if he is aggrieved by the order of the Commissioner of Taxes. Tripura Sales Tax Act, 1976 provides for a complete machinery to challenge an order of assessment and I am of the view that if any party is aggrieved by any order, he can challenge the same by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. Since the revision petition is still pending before the Commissioner of Taxes, the Petitioner is at liberty to present his case before the Commissioner of Taxes and I hope and trust that the Commissioner of Taxes will decide in his wisdom whether the

Petitioner firm is liable to pay skies tax or not under the Tripura Sales Tax Act.

18. Having regard to the facts and circumstances stated above, I am of the view that the petition must fail and accordingly, it is dismissed. But under the facts and circumstances, I make no order as to costs.