(2000) 12 GAU CK 0025

In the Gauhati High Court

Case No : Writ Petition (C) No. 111 of 2000

Live Tone APPELLANT

Vs

State of Tripura and Others RESPONDENT

Date of Decision : 22-12-2000

Acts Referred:

Constitution of India, 1950 — Article 366
Tripura Sales Tax (Amendment) Act, 1994 — Section 2
Tripura Sales Tax Act, 1976 — Section 2, 3A, 5A(1)

Citation : (2001) 1 GLT 290

Hon'ble Judges : B.B. Deb, J

Bench : Single Bench

Advocate : Mr. S.C. Saha, for the Appellant; Mr. U.B. Saha, Mr. A. Ghosh and Mr. J. Majumder, for the Respondent

Final Decision : Dismissed

Judgement

1. The writ petitioner M/s Live Tone is a photographic firm owned by sole proprietor, Shri Shyamal Kumar Banik having his place of business at Bidur Karta Chowmuhani, Agartala, West Tripura. In this petition, the assessment order passed by the respondent Superintendent of Taxes dated 26.8.1997, the order dated 23.9.1997 passed by the Commissioner of Taxes being the appellate authority and the order dated 20.3.1998, passed by the Tripura Sales Tax Tribunal have been put under challenge under Article 226 of the Constitution of India, seeking a writ of certiorari for quashing/cancelling the aforesaid impugned orders of assessment of Sales Tax. By the aforesaid orders, the taxing authority under the Tripura Sales Tax Act held that the works done by the petitioner in taking snaps of photograph, washing the negatives and printing out the photographs is covered by the term "works contract" and as such the same is taxable under the Tripua Sales Tax Act. The petitioner challenged the aforesaid orders solely on the ground that the petitioner per formed/per forms artistic activities having applied his intellectual artistic skills and by his works in taking snaps of photographs and/or washing negatives and/or printing out finished

photographs of any individual or group of persons are nothing but "rendering service" and not "works contract" and as such the said works of rendering service undertaken by the petitioner is not subject to payment of any tax under the Tripura Sales Tax Act. but having mis-interpreted/mis-construed the related provisions of the Tripua Sales Tax Act, the respondents passed the impugned orders imposing tax to be paid by the petitioner.

2. The respondents filed joint counter-affidavit. Having taken the stand that the works done by the photographer in the aforesaid case is covered by the term "works contract" as defined u/s 2(o)(iv) of the Tripura Sales Tax Act, 1976 read with section 3A of the said Act of 1976 as amended upto date. Section 3A runs as follows:-

"3A. Tax on the transfer of property in goods involved in the execution of works contract - Notwithstanding anything contained elsewhere in this Act, any transfer of property in goods (whether as goods or in some other form) involved in the execution of a works-contract shall be deemed to be a sale of those goods by the person making the transfer and shall liable lo be taxed at the rate specified in column 3 of the Schedule :-

Provided that in respect of any such transfer only so much value of the goods involved in the works-contract which has actually been paid to the dealer during the period, shall be taken into account for determining the turnover for that period.

Explanation :- For the purpose of this section "property in goods" shall mean the aggregate of the goods for which amounts have been received or receivable by a dealer during such period as valuable consideration, whether or not such amount has been separately shown in the works contract. The amount is received or receivable shall include the value of such goods purchased, manufactured, processed, or procured otherwise by the dealer. and the cost of freight or delivery as may be incurred by such dealer for carrying such goods to the place where these are used in execution of such works contract, but shall not include such portion of the aforesaid amounts as may be prescribed."

The relevant sub-clause of clause (o) of section 2 of the Tripura Sales Tax Act. 1976 is re-produced below: -

"2(o) "Works contract" means any agreement for carrying out for Cash or deferred payment or other valuable consideration -

(iv) the altering, ornamenting, finishing, improving or otherwise processing or adopting of any goods."

3. Mr. S.C. Saha, the learned counsel for the petitioner referred a citation reported in (1977) 39 STC 237 (The Assistant Sales Tax Officer and others v. B.C. Kame). In that case, the Hon''ble Supreme Court interpreted the nature of works done by a photographer in the context of the Madhya Pradesh General Sales Tax Act, 1958. The judgment was rendered on 14.12.1976. The Hon''ble

Supreme Court held 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. What he renders is his skill and labour to bring out a desired result of finished photograph. The Hon''ble Supreme Court held that though the work done by the photographer is a contractual work, but not a works contract and as such is not a sale as defined under Madhya Pradesh Sales Tax Act.

4. Mr. Saha, the learned counsel for the petitioner having referred the reported case in Bavens v. Union of India and others (1995) 97 STC 161 submits that the Hon''ble Kerala High Court in the aforesaid case held that where a photographer takes a photograph of his customer, develops the negative and supplies positive prints in the desired size to the customer, the photographer uses his own camera and his own film and applies his skill and there is no accretion to goods or property or the nucleus of a property which originally belonged to the customer and as such it cannot be termed as "woks contract". It is further held in the said case that the photograph has no marketable value. What is expected from the photographer is his service, artistic skill and talent and as such the work underwater by a photographer is not a works contract, but at best can be held to be a service contract. The learned counsel also referred a decision of the Hon''ble Supreme Court rendered in the case of Deputy Commissioner of Sales Tax (Law). Board of Revenue (Taxes), Ernakulam v. PIO Food Packers (1980) 46 STC 63 . In that case, the Hon''ble Supreme Court interpreted the term "manufacturing" with reference to Kerala General Sales Tax Act and the said case was decided on 9.5.1980. In interpreting section 5A(1)(a) of the said Act, the Hon''ble Apex Court held that there is several criteria for determining whether a commodity is consumed in the manufacture of another. Commonly manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extend of processing may vary from one case to another and there may be several stages of processing and a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the print where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture cane be said to take place and that is called manufactured commodity. The learned counsel for the petitioner very vehemently argued that the work undertaken by his client is not works contract as has been finally decided by the Hon''ble Apex Court in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], . In that decided case, the Hon''ble Supreme Court had taken into consideration the 46th amendment of the Constitution (1982) in which the definition of "sale" for the purpose of imposing taxes on sale or purchase of goods had got a radical change. Under the aforesaid amended provision the "sale" for the purpose of "tax on sale or purchase of goods" is defined in the amended clause 29A of Article 366 of the Constitution. Among others the sub-clause (b) of the aforesaid clausal 29A

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, but the "works contract" itself is not defined in the aforesaid clause under Article 366 of the Constitution of India.

5. Mr. U.B. Saha, the learned senior Govt. Advocate brought my attention to the provisions inserted udder section 2(o)(iv) of the Tripura Sales Tax Act by way of 4th amendment in 1994. As quoted above, the altering ornamenting, finishing, improving or otherwise processing or adopting of any goods is included within the fold of the term "works contract" and the learned senior Govt. Advocate continues to submit that since the aforesaid provision of section 2(o) of Tripura Sales Tax Act has not been put under challenge being ultra vires of the Constitution by the petitioner in the present writ petition, there is no scope to escape the liability by the petitioner from payment of sales tax for the photographic works undertaken by the petitioner in taking snaps, washing the negative film, developing the negative to convert in a printed finished photograph and then to deliver to his customer in exchange of price/cost. The learned senior Govt, Advocate further submits that in taking snap through camera by the petitioner undoubtedly he applies his artistic skill, but thereafter the petitioner used to wash the negative, develop the negative impossible upon the blank print paper and in this way the petitioner used to produce finished product that is printed photograph to be delivered to his customer in exchange of money and thus it is the works contract within the meaning of section 2(o)(iv) of the Tripua Sales Tax Act and as such it is taxable. In this way the learned senior Govt. Advocate took pain to distinguish the ratio of M/s. Rainbow''s case (supra).

6. Mr. Sana, the learned counsel for the petitioner having referred (1983) 54 STC 382 (The Court Press Job Branch, Salem v. The State of Tamil Nadu) submits that the work of printing on papers is not a sale nor works contract. In that case the Hon''ble Madras High Court held that where the assessee, a printing press, itself supplied paper and did printing work thereon and charged separately for paper and for printing work, and the disputed turnover substantially represented turnover related to printing works for certain customers, the finished work produced by printing had no commercial market value.

7. Mr. Saha, the learned senior Govt. Advocate also relied upon the aforesaid citation and submits that in the aforesaid case the Hon''ble Madras High Court held that such finished printed works might not have any commercial market value for the common people, but the transaction had a market value for the particular customer who placed order for printing and thus the Hon''ble Madras High Court held according to the learned senior Govt. Advocate, it not be a "sale", but a "works contract".

8. I have perused the Judgment. The Hon''ble Madras High Court said that printing works done by a press on the papers according to the order placed by the customer had no marketable value to the common customer, but had commercial value to the person who placed the order and such transaction was

not a sale, but only a works contract and as such the Hon''ble Madras High Court held - the same is not taxable. That judgment was delivered on 9.2.1983 arising out of assessment order passed for the year 1973-74. At the relevant time (1973-74) the amended provision of the definition clause (29) under Article 266 of the Constitution of India was not in existence and the works contract has been brought under the purview of sale for the purpose of taxation only by way of amendment of the Constitution in 1982. The aforesaid citation does not help the petitioner rather it strengthens the stand taken by the Government.

9. The learned senior Govt. Advocate placed reliance in the case of M/s. Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh, and continues to submit that no strait jacket formula could be laid down to determine whether a transaction is a sale or works contract. The intention of the parties is to be ascertained on over all reading of the several terms and conditions of the contract.

10. In Rainbow''s case (supra) the Hon''ble Supreme Court had the occasion to interpret section 2(n) of the Madhya Pradesh General Sales Tax Act. u/s 2(n) of Madhya Pradesh General Sales Tax Act after amendment contemplates that in view of the constitutional amendment "property transferred in its original or modified or changed form in execution of a works contract is taxable", but the works contract has not been defined under the Madhya Pradesh General Sales Tax Act. But the case in hand is governed by the Tripua Sales Tax Act which itself defined what is "works contract" u/s 2(o). In absence of specific definition of the"works contract" in Madhya Pradesh General Sales Tax Act, the Hon''ble Supreme Court rightly held that the photographers taking photograph and developing and printing the same have not executed a works contract and as such the same was not a taxable sale. Had the definition akin to clause (o) of section 2 of the Tripura Sales Tax Act been there before the Hon''ble Supreme Court, the interpretation given by the Hon''ble Supreme Court would have been otherwise. In the aforesaid definition of Tripura Sales Tax Act, the "altering" ornamenting "finishing" "improving" or otherwise "processing" or "adopting" of any goods under a contract between the dealer and customer is defined as "works contract". In photographic works undoubtedly the photographer having applied his artistic skill is to alter the blank negative by way of taking snap and thereafter the negative is to put under process with the aid of chemical materials for washing the negative and thereafter the washed negative is to put again under process having imposed/ impressed on a blank printing paper in order to get printed photograph and thereafter situation may require to give some photographic touch with artistic skill on the said photograph and as such the original goods viz. blank negative has to undergo a change by way of altering and processing and the washed out negative again put under the process for making out finished product of photograph. So, the process of applied by a photographer in printing out a finished photograph is undoubtedly covered by the term "works contract" as has been defined u/s 2(o) of Tripura Sales Tax Act and as such is taxable. In view of the definition of "works contract" referred above,

the decision of the Hon''ble Supreme Court in Rainbow''s case (supra) is distinguishable and has no direct application in the case in hand.

11. u/s 3A of Tripura Sales Tax Act, value of the goods in property as much as its transfer in execution of works contract, is taxable not the other works incidental to passing of property in goods. A photographer uses the blank negative for taking snap of his customer and also uses blank printed paper for developing and printing out finished photograph and as such in execution of the aforesaid works contract the value of the property in blank negative and/or blank printing paper is/are transferred to the customer after execution of the altering, developing and processing of the original goods to bring out the finished photograph and as such the entire price demanded by the photographer and realised form the customer cannot be the value of the works contract. But in the present case, as the petitioner has not splitted the total price/cost he realised showing break up of the price/cost of blank negative and/or blank printing paper and the charge for his artistic skill separately and thus the Sales Tax authorities, respondents herein have left with no other alternative but to impose tax on the total sale price. In case the assessee showed the break up of the price/cost of the goods used in execution of the works contract that is the film/printing paper used in printing out finished photograph is/are separately charged, then the Sales Tax authorities can only realise the cost of the said goods and not the amount charged for rendering artistic skill by the photographer. In the present case, both the terms "works contract" and "service contract" are applicable. So far the transfer of property in goods (negative/printing paper) is concerned, in printing out the finished photograph is a works contract, but the rendering of service having applied the artistic skill by the photographer is a service contract and as such though former part is taxable under Tripura Sales Tax Act, the latter part is not covered by the definition "works contract".

12. Under the aforesaid legal position, the decision of the Hon''ble Supreme Court rendered in M/s. Rainbow''s case (supra) is distinguishable and not applicable in the present transaction in view of the term "works contract" defined u/s 2(o) of the Tripua Sales Tax Act.

13. Under the aforesaid discussion and analysis I am of the view that the property in goods (blank negative film and blank printing paper) transferred in printing out the finished product (finished photograph) in works contract and as such taxable in view of related provisions of Tripura Sales Tax Act. The impugned orders passed by the Sales Tax authorities suffer from no illegality or infirmity so long the definition clause u/s 2(o) of the Tripura Sales Tax Act remains in force.

14. The petition is accordingly dismissed. Interim order, if any, stands vacated.

15. Before parting with. I like to endorse the mark of appreciation for the assistance rendered by the learned counsel for the parties.

