
(2010) 01 MAD CK 0027

In the Madras High Court

Case No : Tax Case (Revision) No. 2004 of 2006

Mohan Offset Printers

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 22-01-2010

Acts Referred:

Constitution of India, 1950 — Article 366
Tamil Nadu General Sales Tax Act, 1959 — Section 2, 3B
Transfer of Property Act, 1882 — Section 6

Citation : (2010) 01 MAD CK 0027

Hon'ble Judges : P.P.S. Janarthana Raja, J;D. Murugesan, J

Bench : Division Bench

Advocate : V. Sundareswaran, for the Appellant; Haja Naziruddin, Special Government Pleader (T), for the Respondent

Final Decision : Dismissed

Judgement

D. Murugesan, J.—The above tax case revision was admitted on the following substantial questions of law:

1. Whether the Appellate Tribunal was justified in overlooking the jurisdictional point raised by the petitioner that there is no transfer of property in goods"" as defined u/s 2(u) in the form of ""ink"" in the printing contract undertaken by the petitioner for the imposition of sales tax on the deemed sale as defined u/s 2(u) of the TNGST Act, 1959?
2. Whether the Appellate Tribunal was justified in not deleting the turnover in relation to the consumables such as oil and labour charges incurred towards the grinding charges which does not involve any transfer of property in goods?
3. Whether the Appellate Tribunal was correct in not appreciating the law that the addition towards the gross profit is unwarranted since the same

is included in the cost price of the goods which are transferred or involved in the execution of works contract?

2. The tax case revision arises under the following circumstances as per the version of the petitioner. The revision petitioner (hereinafter referred to

as ""the assessee"") is basically Offset Printers and doing the job work of printing and supplying labels, cartons and drappers for notebooks. The

assessee prints and supplies the materials as per the specification, design and general layout of the customers with their name and address

predominantly printed. The printed items cannot be sold to any other person in the market. According to the assessee, it undertakes the job only

on work contract basis. The customers used to supply papers. The assessee used to purchase pigments, linseed oil and chemicals from dealers

both locally and outside the State against "C" forms and manufactures printing ink. When the ink is used for printing the materials on work contract

basis, such ink is consumable one and no transfer of property is effected. In the circumstances, the provisions of Section 3B of the Tamil Nadu

General Sales Tax Act, 1959 (for short, ""the TNGST Act"") are not applicable, as it applies for levy of tax only on transfer in the goods involved in

the execution of works contract. On the above ground, the assessee reported a total and taxable turnover of Rs. 8,54,197/- and Nil respectively in

the Form A1 returns filed for the assessment year 1993-94.

3. According to the assessing officer, the accounts of the assessee were called for and checked. It revealed the coolie printing charges collected as

per accounts at Rs. 8,54,197.20. Though the papers are supplied by the customers while they place orders, the assessee manufactures printing ink

by purchasing the necessary raw materials and that such printing ink is used in the job work of printing. Therefore, a new commodity of printing ink

emerges out and such printing ink had not suffered tax at earlier stage. When the printing ink is used, it amounts to transfer of property and the

printing ink is visible and tangible even after printing and accordingly the printing ink is liable to sales tax at 8%. With the said finding, the assessing

officer levied the tax.

4. The said order was carried in appeal before the Appellate Assistant Commissioner (CT). The Appellate Assistant Commissioner concurred with

the finding of the assessing officer as to the liability for tax in respect of printing

ink, but remanded the matter to the assessing officer, as the assessing officer did not ascertain the value of ink transferred in the execution of works contract. Hence he held that the assessment made u/s 3-B cannot be sustained. This order was again taken on appeal by the assessee before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Madurai and the Tribunal confirmed the order of the appellate authority. These proceedings have given rise to the present revision case.

5. The core question is as to whether in the given facts and circumstances of the case, printing ink could be construed to be a consumable one or not and whether such printing ink when used for execution of works contract to printing materials would amount to transfer of property in goods in terms of Sections 2(j) and 2(u) of the TNGST Act and consequently as to whether Section 3-B is attracted?

6. We have heard Mr. V. Sundareswaran, learned Counsel appearing for the assessee and Mr. Haja Naziruddin, learned Special Government Pleader(Taxes) for the revenue.

7. According to the learned Counsel for the assessee, there is no transfer of property of ink in the process of printing, as the assessee only prints labels, cartons and notebook wrappers, where the plants, animals, flowers etc., are alone embossed. He would further submit that unless and until there is a transfer of property in goods as defined u/s 2(j) of the TNGST Act, the assessing officer has no power to levy or collect tax on the transaction.

8. On the other hand, the learned Special Government Pleader would submit that the assessee used to purchase pigments and linseed oil against "C" forms and manufactures printing ink to be used in the execution of job printing. Such printing ink used in the job work had not suffered tax at earlier stage. As the printing is involved in the execution of job printing, it amounts to transfer of property in goods. Hence the invocation of Section 3-B of the TNGST Act is justified.

9. We have carefully given our anxious consideration to the rival submissions. Clause (29A) was inserted to Article 366 of the Constitution of India by Section 4 of the Constitution (Forty-sixth Amendment) Act, 1982. The relevant clause which could be made applicable to the facts of the present case is as follows:

Article 366(29A)(b): 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.

The above amendment was necessitated in view of certain judicial pronouncements by the Apex Court. In *The State of Madras Vs. Gannon*

Dunkerley and Co., (Madras) Ltd., the Apex Court held that "a works contract was an indivisible contract and the turnover of the goods used in

the execution of the works contract could not therefore become exigible to sales tax." The amendment was introduced much after the above

judgment of the Apex Court.

10. The object behind the introduction of Sub-clause (b) of Clause (29A) was considered by the Apex Court in the judgment in *Builders*

Association of India v. Union of India (1989) 73 STC 370, where the Apex Court had observed as follows:

...It is true that in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, this Court held that a works contract was an indivisible

contract and the turnover of the goods used in the execution of the works contract could not, therefore, become exigible to sales tax. It was in

order to overcome the effect of the said decision Parliament amended Article 366 by introducing Sub-clause (b) of Clause (29A). Sub-clause (b)

of Clause (29A) states that "tax on the sale or purchase of goods", includes among other things a tax on the transfer of property in the goods

(whether as goods or in some other form) involved in the execution of a works contract. It does not say that a tax on the sale or purchase of goods

included a tax on the amount paid for the execution of a works contract. It refers to 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. The emphasis is on the transfer of property in goods (whether as goods or in

some other form). The latter part of Clause (29A) of Article 366 of the Constitution makes the position very clear. While referring to the transfer,

delivery or supply of any goods that takes place as per Sub-clauses (a) to (f) of Clause (29A), the latter part of Clause (29A) says that "such

transfer, delivery or supply of any goods" shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a

purchase of those goods by the person to whom such transfer, delivery or supply

is made. Hence, a transfer of property in goods under Sub-clause (b) of Clause (29A) is deemed to be a sale of the goods involved in the execution of works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in Clause (29A) of Article 366 of the Constitution is, therefore, to enlarge the scope of "tax on sale or purchase of goods", wherever, it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in Sub-clauses (a) to (f), thereof, wherever, such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression "tax on sale or purchase of goods" in entry 54 of the State List, therefore, 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 also. The tax leviable by virtue of Sub-clause (b) of Clause (29A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution.

11. The above judgments were referred to by the Division Bench of the Bombay High Court in Commissioner of Sales Tax Vs. Hari and Company, and the Division Bench held that the object of insertion of Clause (29A) in Article 366 is in order to create a legal fiction of transfer of goods within the works contract, that is in order to levy a tax on the goods involved in the execution of the works contract. The Bombay High Court also observed that the amendment allows the bifurcation of composite contract in order to tax an incident of sale by way of transfer of property within its execution.

12. In this context, we may also refer to the judgment of the Apex Court in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, , where the Apex Court has held as follows:

...The Forty-sixth Amendment was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract.

13. The 46th amendment to the Constitution of India came into force with effect from 2nd February, 1983 by insertion of Clause (29A) in Article

366. That amendment was necessitated, as there was no provision subjecting to tax the sale of goods involved in the execution of works contract

such as roads, buildings, etc., unless the agreements between the parties provide otherwise. By virtue of the above Constitutional amendment, the

States were also empowered to levy tax on the sale of goods involved in the execution of all works contract, whether such sale of goods involved

in the execution of all works or not and whether the goods retained in their original identity after the work was executed or has been merged,

integrated or become part and parcel of the works, etc. Hence a legal fiction is created in respect of transfer of goods within the works contract in

order to levy a tax on the goods involved in the execution of the works contract.

14. Keeping the above pronouncements in mind, the facts of the present case must be considered. The definition of property in Section 6 of the

Transfer of Property Act is wide and includes not a mere transfer of movable property, but would cover a separable form of property as well. The

Apex Court in *Tata Consultancy Services etc. Vs. State of Andhra Pradesh*, for the purpose of levy of sales tax on computer software, has held

as follows:

A "goods" may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its

utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software

whether customised or non-customised satisfies these attributes, the same would be goods.

15. The learned Counsel for the petitioner-assessee has contended that when once the printing ink is used in the execution of works contract, it

would lose the character as a "good" and thereafter cannot be called within the definition of "goods" u/s 2(j) of the TNGST Act. In our opinion,

the said submission cannot be accepted. The undisputed facts are that the assessee accepts the job of works contract for supply of printed

materials like carton, labels and the customers supply only papers. The assessee engages coolies for the printing works. By the above act of the

assessee, the job of works contract is not completed unless the actual printing is

undertaken. For the purpose of printing, the printing ink must be used. It is also not in dispute that the customers are not supplying printing ink and the assessee is also not buying the printing ink making the same liable for tax. The assessee buys the raw materials like pigments, linseed oil and chemicals and manufactures the printing ink. These raw materials are purchased under "C" forms. By using all these raw materials, a new product, namely, printing ink emerges and that new product had not suffered any tax. Only when this printing ink is used on the material papers supplied by the customers and the actual printing is undertaken, the works contract is completed.

16. The question is, therefore, whether the printing ink is a consumable one and whether such usage of printing ink on the material papers would amount to transfer of property in goods? The printing ink by itself is a property. To be precise, it is a property as defined u/s 6 and it can be sold in open market. It will not lose its character as a property when it is used for printing. When the printing ink is transferred on the papers, it is tangible and without which the works contract cannot be completed. By virtue of Sub-clause (b) of Clause (29A) of Article 366 of the Constitution, a deeming transfer of property can be presumed resulting in printing ink used on printing materials, which is liable to be taxed u/s 3-B of the TNGST Act. In that context, the printing ink cannot be considered to be one of consumable.

17. The learned Counsel for the assessee relied upon a judgment of the Apex Court in Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd., and contended that in the execution of contract for work some materials are used and when property in the goods so used passes to the other party, the contractor undertaking the work will not necessarily be deemed on that account to sell the materials. That judgment is not applicable to the facts of the present case, as it was rendered prior to the introduction of Clause (29A) in Article 366. He would also rely upon another judgment of the Apex Court in Xerox Modicorp Ltd., v. State of Karnataka (2005) 5 RC 389 to contend as to what is a consumable. That was a case where the Apex Court was considering the case of a dealer entering into maintenance agreement to supply materials like spare parts, toners and developers which were put into the xerox machine. Such toners and

developers can be referred to the term "consumables", as they are used in the execution of works contract so that nothing is left before the property in goods could pass to the buyer. In our opinion, the said judgment is not applicable to the present case, as the toners and developers are used in the course of maintenance of the xerox machine and no transfer of property is effected. Moreover, they had suffered tax already.

18. The learned Counsel also relied upon yet another judgment of the Apex Court in *Imagic Creative Pvt. Ltd. Vs. The Commissioner of*

Commercial Taxes and Others, . That was a case where the Apex Court was considering the composite contract for advertisement services by

creating original concept and design advertisement material for its clients and design brochures, namely, reports etc., and held that they are not

works contract. However, in the present case, the printing ink, even after execution of the printing, is visible and tangible. As has been held by the

Apex Court in *Tata Consultancy Services case (supra)*, even in cases of intangible goods as well, as the printing ink that is used in the execution of

works contract is tangible and is not a consumable, the necessary conclusion would be that by such use of printing ink, the goods are transferred in

job contract and therefore is liable to be taxed u/s 3-B of the TNGST Act. The conditions for admitting deduction u/s 3-B of the TNGST Act

basically are (i) that the contractor should have purchased the goods from a registered dealer liable to pay tax under the Act and (ii) that the goods

should have been used in the execution of the works in the same form in which they were purchased. In this case, though the assessee had

purchased raw materials locally and from other States, those raw materials had not suffered any tax. That apart, after the printing ink is

manufactured by the assessee, as it is used on printing materials it does not amount to sale and the goods are not subjected to tax. Equally the raw

materials purchased by the assessee are not used as such in the execution of the works contract, but the raw materials undergo a different form,

namely, printing ink which alone is used in the execution of the works. In that view, the levy of tax u/s 3-B cannot be found fault with. Accordingly,

the tax revision case stands dismissed and the issue is answered in favour of the revenue, but against the assessee.