
(2013) 03 MAD CK 0044
In the Madras High Court
Case No : T.C. (R) No's. 10 and 11 of 2010

M/s. Anand Cine Services

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 01-03-2013

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12(1), 12(2), 12(3), 2(n)(iv), 3A

Citation : (2013) 03 MAD CK 0044

Hon'ble Judges : R. Banumathi, J;K. Ravichandra Baabu, J

Bench : Division Bench

Advocate : K.J. Chandran, for the Appellant; R. Sivaraman, Spl. Govt. Pleader, for the Respondent

Judgement

R. Banumathi, J.—Whether hiring of cinematographic equipments would amount to "transfer of right to use the goods" for cash, exigible to

sales tax u/s 3-A of the Tamil Nadu General Sales Tax Act, (in short, TNGST Act) is the common question falling for consideration in these

revisions and all the revisions shall stand disposed of by this common order. The Tax Case revisions in T.C. (R) Nos. 10 to 13 of 2010 were

admitted on the following common substantial questions of law:

(i) Whether the ingredients of Section 3-A of the TNGST Act, 1959, are satisfied on the facts and circumstances of the case, to fasten liability to

sales tax on deemed sales?

(ii) Whether the Tribunal is justified in upholding the penalty, when the question of liability to tax itself is a debatable issue?

(iii) Whether in the absence of a dishonest intention to evade payment of sales tax, the penalty imposed can be upheld by the Tribunal?

The Tax Case in T.C. (R) No. 38 of 2010 is admitted on the following substantial

questions of law:

1. Whether ingredients of Section 3-A of the TNGST Act, 1959, are satisfied, on the facts and circumstances of the case, to fasten liability to sales

tax on deemed sales?

2. In the light of the decision of the Supreme Court of India reported in 16 STC 240, whether the Tribunal is right in holding that in the absence of

written agreement, the case of the petitioner cannot be accepted?

3. Whether the conclusion of the Tribunal that only the Cameraman/ Assistant Cameraman will operate the camera and other cinematograph

equipments is in the nature of a special pleading, not borne out on the basis of the materials on record?

4. Whether the Tribunal is justified in upholding the penalty, when the question of liability to tax itself is a debatable issue?

5. Whether, in the absence of a dishonest intention to evade payment of sales tax, the penalty imposed can be upheld by the Tribunal?

2. Brief facts:- The assessee(s) were engaged in hiring out the cinematographic equipments and they have not registered themselves as dealers both

under TNGST Act, 1959 and Central Sales Tax Act, 1956. On introduction of new Section 3-A of TNGST Act by enactment of Act 28 of 1993,

hiring out Cinematographic and photographic equipment, etc., are exigible to tax u/s 3-A Levy of tax on right to use any goods. When the places

of business of the assessee(s) were inspected by the Enforcement Wing Officials on 27.3.1996, some incriminating materials were recovered

showing that the assessee(s) hired out cinematographic instruments and equipments to various producers and collected hire charges and they had

not returned them for assessment. Hence the Enforcement Wing Officers issued summons to the petitioners/assessee(s) to produce the accounts,

but the assessee(s) did not respond. The Assessing Officer served pre-assessment notice(s) calling for objections to the said proposals and the

petitioner(s) - assessee(s) in T.C. (R) Nos. 10 to 13 of 2010 filed petitions before Tamil Nadu Taxation Special Tribunal challenging the validity of

Section 3-A, which treated ""transfer of right to use"" as a ""deemed sale"". The same was dismissed, which was challenged by the assessee(s) in Writ

Petition No. 18315 of 1997. Finally, the constitutional validity of Section 3A of TNGST Act was upheld. Thereafter, as per the directions of Tamil

Nadu Taxation Special Tribunal, the petitioner(s)/ assessee(s) responded to the pre-assessment notice issued by the Assessing Officer by filing

their objections. After affording opportunity to the assessee(s), the assessing officer rejected the objections of the assessee(s) and assessed the

respective turnovers to tax for assessment years 1994-95 and 1995-96 and consequently levied surcharge, additional surcharge and additional

sales tax in addition to imposing penalty u/s 12(3) of TNGST Act. The assessee in T.C. (R) No. 38 of 2010 had not filed objections to the

proposed assessment and as such Assessing Officer determined the final and taxable turnover by order dated 23.06.1997.

3. Aggrieved, the assessee(s) preferred appeals before the first Appellate Authority and the Appellate Assistant Commissioner dismissed the

appeals holding that ""the available records clearly showed that the customers had possession of goods in question freely without any inhibition from

the assessee(s'') side and the Assessing Officer rightly held that the transaction in question is exigible to tax u/s 3-A of TNGST Act.

4. Being aggrieved by the Order of the Appellate Authority, the petitioners/ assessee(s) preferred appeals before the Tamil Nadu Sales Tax

Appellate Tribunal. In separate judgments, Tribunal dismissed all the appeals holding that the assessee(s'') hired cinematographic equipments to

film producers, who used them in the shooting spot and skilled persons were employed by the Producers and it is a clear case of ""transfer of right

to use the goods"". The Tribunal further held that there is no basis for the contention of the assessee(s'') that the cameras would be operated by

hirers' own men and held that it is a clear case of ""transfer of right to use goods"" falling under Category of ""deemed sale"", assessable to tax u/s 3-

A.

5. Challenging the Orders of the Tribunal, the learned counsel for the assessee(s) Mr. K.J. Chandran contended that Section 3-A contemplates

right to use"" and all the hired equipments are controlled and operated by the assessee(s) and there is no transfer of right to use the equipments

falling within the purview of Section 3-A of the Act. Placing reliance upon a decision of the Supreme Court in State of Andhra Pradesh and

Another Vs. Rashtriya Ispat Nigam Ltd., , learned counsel contended that there is no effective transfer of the equipments and the equipments

continued to be in effective control of the assessee(s) and the fact that hirer uses the equipments does not militate against the assessee(s")

possession and control of the equipments and the Appellate Authority and while so the Tribunal erred in finding that the hiring out cinematographic

equipments is exigible to sales tax.

6. Per contra, Mr. R. Sivaraman, Special Government Pleader (Taxes) contended that the right to use cinematographic equipments is transferred

to the hirer, who has full right to use the equipments and the possession and effective control of the equipments is with the hirer of the equipment

and the original authority, the appellate authority and the Tribunal have concurrently recorded factual finding that the transaction is ""transfer of right

to use the equipments"" and no question of law is involved in these revisions.

7. We have considered the submissions made by the learned counsel appearing on either side and also the Order of the authorities and the

Tribunal.

8. Test of Effective Control and possession:-

The term Right to Use Goods has not been defined in the Service tax law or the various Vat laws in India. However, generally it has been

understood to be transfer of right to use goods by way of lease, license, bailment, exchange etc. Transfer of right to use the goods for cash,

deferred payment or valuable consideration is considered as ""deemed sales"" under Clause (d) of Article 399(29A) of Constitution of India and

consequently under Tamil Nadu General Sales Tax Act/VAT Act and CST Act. As per Section 2(n)(iv), ""sale"" includes a transfer of the right to

use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

9. Prior to unamended Section 3-A:- Section 3-A contained description of goods, which were exigible to tax on the right to use any goods. Sl.

No. 2 in the "Description of goods" to unamended Section 3-A related to ""Cinematographic and photographic equipment, apparatus and

appliances including studio equipments, cameras, projectors, enlargers, lenses and parts and accessories thereof.

10. Prior to amendment of TNGST Act by Act No. 25 of 1993, the Cinematographic and photographic equipments transfer of right to use

cinematographic and photographic equipments were exempted G.O. (P) 366 C T

& R.E. dated 17-4-1986, as per which right to use any goods is exigible to sales tax u/s 3-A. Section 3-A of TNGST Act was substituted from 12.3.1993 by Act No. 25 of 1993. The phrase ""transfer of right to use any goods"" in Section 3-A of the Act is of great significance to impose tax on it as ""deemed sales"".

11. The thrust is on the transfer of right to use the goods. It is important to understand that in transfer of right to use goods all the rights except the ownership rights are transferred by the transferor to the transferee so as to enable him to use the goods at his own will to the exclusion of the transferor. The Supreme court in *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, held as under:

To constitute a transaction for the transfer of right to use goods, the transaction must have the following attributes:

- a. There must be goods available for delivery;
- b. There must be consensus ad idem as to the identity of goods;
- c. The transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;
- d. For the period during which the transferee has such legal right, it has to be for the exclusion to the transferor this is the necessary concomitant of the plain language of the statute viz. a transfer of the right to use and not merely a licence to use the goods;
- e. Having transferred the right to use goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

12. The Supreme court in *20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra*, at held as under:-

(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) in cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be

effected by the delivery of goods. In such cases the taxable event would be on the delivery of goods.

The important attribute constituting Transfer of right to use goods as deemed sales is that there should be transfer of effective control and

possession of the goods. If the owner retains effective control over the equipment, it is not a transfer of right to use. A mere contract of hiring,

without transfer of control, may be a contract of bailment and not a contract for transfer of right to use goods.

13. Transfer of right to use the goods implies that full control is vested with the transferee to have the right to use the goods to the exclusion of

others including the owner of goods. The essential difference between the transfer of right to use goods as deemed sales and service is transfer of

effective control and possession of the goods and where such effective control and possession of the goods is transferred, while allowing another

person to use the goods is a question of fact and is to be decided based on the terms of the contract and other material facts. The attributes like the

intention of the parties, mode of use and several other surrounding and relevant aspects have to be considered to come to the conclusion whether

or not under a particular contract, there is transfer of right to use any goods. Whether there is transfer of the right to use the goods or not is

essentially a question of fact, which has to be determined in each case, having regard to the terms of the agreement. The transfer of effective

control and possession of the goods in such cases plays a vital role in determining whether it is a deemed sale or service.

14. In the present case, the assessee(s) hired different cinematographic equipments mounted on vehicles to the customers, who were film

producers and Directors along with their staff. The equipments are extensively used in film shooting. Even though the petitioners contend that the

assessee(s) had effective control of leased equipments, the authorities have recorded factual finding that shooting of the film taken by the

Cameraman employed by the Producers freely without any disturbance from the assessee(s) side to shoot better films and the equipments are

leased out are mainly sophisticated cameras. To ensure high quality and good performance, the cameras have to be used in proper angle with

proper light effect. Actual taking of photo shoots can only be done by a cameraman employed by the producer. Factually, in the film industry,

camera man, staff, producers or Directors are free to handle the instruments so as to arrive perfection in their ventures. Considering the nature of

the purpose for which the equipments were hired, the Appellate Authority and the Tribunal rightly rejected the contention of the assessee(s) that

the control of the leased equipments were not handed over to the customers/producers/Directors.

15. The assessee(s) have not produced documents/ agreements to substantiate their plea that even after hiring out equipments the assessee(s)

retained effective control. The original authority extensively referred to the contention of the assessee(s) and recorded only brief reasoning and

arrived at the conclusion that the transaction is "transfer of right to use goods" falling within the purview of Section 3-A, but the reasonings are

brief. We are of the view that recording of only brief reasonings cannot vitiate the assessment order. The Appellate Assistant Commissioner

elaborately referred to the contention of the assessee. The Appellate Authority has recorded clear finding that there was no evidence to put forth

for the handling of cameras and other equipments by the assessee(s) themselves. The Assessing Officer as well as the Appellate Authority and the

Tribunal concurrently held that there is sufficient evidence to believe that the handling of goods such as cameras, transformers, etc., was by the

Producers/Directors alone so as to get light effect and quality films.

16. Learned counsel for petitioner assessee(s) placed reliance upon a decision of Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam

Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, , wherein the Andhra Pradesh High Court was considering the question about

the scope of transaction u/s 5 of A.P. General Sales Tax Act, 1957 and the hire charges collected by a person on supply of machinery for

execution of his work to the contractor. To contend that the hirer was not free to make use of the equipments, the learned counsel for the

assessee(s) placed reliance upon the observations in the said decision. It was further submitted that the said judgment of the Andhra Pradesh High

Court has been confirmed by the Hon"ble supreme Court in State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., .

17. The decision of Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, relied upon by the learned counsel

for the assessee(s) is not helpful to the assessee(s). In the said case, the Court was considering the question as to whether supply of machinery for

purposes of execution of work would amount to transfer of right to use in favour of the contractor. The assessee therein has undertaken to supply machinery to the contractor for the use and for purposes of being used, in execution of the contract work and the assessee therein and received charges for the same. However, there is restriction that the machinery should not be shifted to another work and under those circumstances, it was held that the effective control of the machinery continued to be with the Rashtriya Ispat Nigam Ltd. In the said case, which has been confirmed by the Honourable Supreme court, it has been laid down that whether there is transfer of right to use or not is a question of fact which is to be determined in each case having regard to the terms of contract under which there is said to be transfer of right to use and the said decision is not helpful to the assessee(s) in the present case; more so, when the assessee(s) have not produced the documents/agreements for hiring out the equipments.

18. Transfer of right to use the goods-Exigible to sales tax:- To further elaborate on the substantial questions of law it is apt to refer to few decisions. In Aggarwal Brothers Vs. State of Haryana and Another, giving shuttering on hire was considered by the Supreme Court. In the said decision, the Hon''ble Supreme Court held that if the goods, namely, shuttering are supplied to the builders for a specified period for the purpose of construction at a consideration; the transferee is in effective control of the shuttering during the period it remains in his possession (i.e., during the construction) and therefore, it falls within the definition of the extended definition of sale and exigible to sales tax.

19. In Harbans Lal and Another Vs. State of Haryana, the Punjab and Haryana High Court held that the transfer of various items such as chairs, tables and crockery would also fall within the meaning of transfer of the right to use. It was further held that ""delivery of possession of the goods to the transferee by the transferor is one of the essential ingredients where the transferee is put in effective and general control of the goods as distinguished from a mere custody or licence to use the same. Whether there is transfer of the right to use the goods or not is essentially a question of fact which has to be determined in each case having regard to the terms of the contract.

20. Transfer of right to use the goods-Not exigible to sales tax:- In State Bank of India and Others Vs. State of Andhra Pradesh, , hire charges

recovered by Bank on Bank lockers is consolidated charge for use of locker and other services. Lockers embedded in floor are not ""goods"" and

no delivery of lockers was given, which constitutes mere licence. It was held that hire charges collected by banks are not liable to sales tax. If

lockers are not ""goods"", service tax cannot be charged under the category of supply of tangible goods category.

21. In (1990) 77 STC 470 in respect of a case of construction of pandals etc., on orders placed by customers, wherein erection and dismantling

after specified period was carried out by decorator and therefore customer has no right to use materials used in erection and as such there is no

transfer of materials and no sale of goods and as such not exigible to sales tax.

22. In HLS Asia Ltd. Vs. State of Assam and Others, , Gauhati High Court has considered the case of appellant entering into agreement with OIL

for wire-line logging and perforation activities in oil fields utilising its high tech equipment and the equipment, tools and machinery are to be

operated by technically qualified personnel of appellant and realisation of rental charges is by appellant. On facts, it was held that OIL had absolute

authority in use of equipment and right to use equipment stood transferred to OIL, Gauhati High Court held that transaction involved lease and

hence taxable under Sales Tax.

23. Whether a transaction is a transfer of right to use goods or a service is essentially a question of fact, which has to be determined in each case,

having regard to the terms of the contract. As pointed out earlier, in the present case, the assessee(s) have not produced any document/agreement

to show that the assessee(s) retained possession and control over the Cinematographic equipments leased out. In the absence of any material

evidence, we find no sufficient reasons to upset the concurrent findings recorded by the authorities and the Tribunal and questions of law 1 and 2

are answered accordingly.

24. Penalty:- Challenging the levy of penalty, the learned counsel for petitioners/ assessee(s) contended that as per the decision of the Supreme

Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, only when there is dishonest intention on the part of the dealer with intention to

evade payment of sales tax, penalty can be imposed and merely because there is a provision for technical breaches of law it is not open to the authorities to levy penalty.

25. The learned counsel for assessee(s) further submitted that prior to substitution of new Section 3-A by amendment Act No. 25 of 1993,

Cinematographic and Photographic equipments were exempted from levy of tax under right to use goods and therefore the assessee(s) cannot be penalised for not filing returns and therefore penalty is not leviable.

26. u/s 12(2) of the TNGST Act, if no return is submitted by the dealer under sub-section (1) within the prescribed period, or if the return

submitted by him appears to the assessing authority to be incomplete or incorrect, the assessing authority shall, after making such enquiry, as it may

consider necessary, assess the dealer to the best of his judgment. u/s 12(3), in addition to the tax assessed under sub-section (2) or by a separate

order direct the dealer to pay by way of penalty. Thus, levy of penalty under TNGST Act is consequential to the assessment order u/s 12(2).

27. In the present case, the assessment order was made based upon the registers seized from the premises of the assessee(s), which were

inspected on 27.3.1996. Even though the Department contends that the assessee(s) have not maintained proper accounts, the assessment was

made based on various registers. In Appollo Saline Pharmaceuticals (P) Ltd. Vs. Commercial Tax Officer (FAC) and Others, this Court held

where the assessment was based on return and accounts, penalty is not leviable. In the said case, in respect of the assessments, which were made

by way of best judgment assessment, in which penalty had been levied, accepting the contention of the assessee(s), this Court held that the

assessments were made on the basis of the accounts and not based on any other material and therefore the assessment has to be regarded as

assessment made u/s 12(1) to which penal provision of Section 12(3) are not attracted and the levy of penalty for those assessment years was set

aside. Applying the ratio of the said decision, in the present case, even though the assessee(s) have not maintained the accounts, the assessment

was made based on the registers seized from the premises of the assessee(s) and therefore the penalty cannot be levied. The penalty levied on the

assessee(s) are not sustainable and levy of penalty is set aside. For the fore-

going reasons, the substantial questions of law Nos. 1 and 2 in T.C.

(R) Nos. 10 to 13 and 38 of 2010 and question of law No. 3 in T.C. (R) No. 38 of 2010 are answered against the Assessee(s) and in favour of

the revenue. The 3rd question of law raised in T.C. (R) Nos. 10 to 13 and question of law Nos. 4 and 5 raised in T.C. (R) Nos. 38 of 2010, in

respect of penalty, are answered in favour of the assessee(s) and the appeals are partly allowed.