
(2013) 10 AP CK 0041

In the Andhra Pradesh High Court

Case No : Writ Petition No. 35628 of 2012

M/s. Jaiprakash Associates Limited

APPELLANT

Vs

The Superintending Engineer, I and CAD Department and
Others

RESPONDENT

Date of Decision : 11-10-2013

Acts Referred:

Citation : (2014) 2 ALD 394 : (2014) 1 ALT 691 : (2014) 58 APSTJ 184 : (2014) 201 ECR 159 : (2014) 67 VST 172

Hon'ble Judges : G. Rohini, J;Challa Kodanda Ram, J

Bench : Division Bench

Advocate : Bhaskar Reddy Vemireddy, for the Appellant; P. Bala Ji Varma, SPL SC for CT, for the Respondent

Judgement

Challa Kodanda Ram, J.—The petitioner, a public listed company, engaged in the business of executing civil, mechanical and other infrastructure works, filed the writ petition for issuance of a writ, more particularly a writ of mandamus declaring the action of the respondents in collecting tax at source from the monthly work bills due to the petitioner at the rate of 2.8 % instead of 0.36% as illegal, arbitrary and without jurisdiction and consequently seeks a direction to the respondents to collect the tax at the rate of 0.36% and return the excess amount recovered. As per the averments in the writ affidavit, the 5th respondent issued a notice inviting tenders from the eligible contractors for execution of work viz., Investigation, design and execution of Tunnel-1 and Tunnel-2 including Head regulator at the entrance portal of Tunnel-1 of Srisailem Left Bank Canal Tunnel Scheme of Alimineti Madhava Reddy Project (A.M.R.P.) from Neelam Sanjeeva Reddy Sagar Project Reservoir (Srisailem Reservoir) in Mahaboob Nagar and Nalgonda Districts of Andhra Pradesh, India, and the bidder shall quote for the entire scope of work including O&M for two years. Petitioner emerged as successful bidder and a contract agreement bearing No. 54SE/2005-2006 was entered into on 25.08.2005 between the petitioner and the 1st respondent, the executing authority. The lump sum amount agreed to be paid

for entire contract work was specified as Rs. 1,925 crores. In terms of the contract agreement and also in terms of the Andhra Pradesh Value Added Tax Act and Rules, 2005 (in short "A.P. VAT Act and Rules"), the petitioner is liable to pay Value Added Tax (in short "VAT") and the 2nd respondent department is entitled to deduct VAT as Tax Deduction at Source (in short "TDS") and deposit the same to the credit of 6th respondent i.e. Commercial Tax Officer, Basheerbag, Hyderabad. Petitioner having estimated the quantum of work involved, where the petitioner is required to utilize the goods in execution of works contract, had applied in Form 501-C to the 6th respondent, u/s 22 of the Andhra Pradesh Value Added Tax Act, 2005 (in short "A.P. VAT Act") read with Rule 18 of the Andhra Pradesh Value Added Tax Rules, 2005 (in short "A.P. VAT Rules") for issuance of a certificate, and the 6th respondent in turn had passed an order in Form 501-D on 15.03.2007, specifying tax to be deducted as TDS @ 2% on the 18% of the gross value, which comes to about Rs. 346.77 Crores. Tax @ 2% or at 0.36% of the gross value of the bill was being deducted from the petitioner's bills and payments were made accordingly upto March, 2012. However, from April, 2012 onwards TDS is being deducted at the rate of 4% on 70% of the work i.e. at the rate of 2.8% of the gross value ignoring the form 501-D issued by the 6th Respondent. Petitioner was informed that the excess deductions are being made on account of the instructions issued by the 3rd respondent vide their letter dated 11.05.2012. Petitioner had written several letters clarifying legal position, but in spite of the same respondent Nos. 2 and 3 continued to deduct tax at the rate of 2.8% from the gross payments. Further, even assuming without conceding, the 2nd respondent may deduct TDS on account of VAT, in view of Section 22, Section 57 and Rule 18 of the A.P. VAT Act and Rules, they are mandatorily required to deposit the same with the 6th respondent, they cannot keep the said amount. The 6th respondent in turn would make necessary adjustments while completing the assessment proceedings. As a matter of fact, the petitioner pleads the action of the respondent Nos. 2 and 3 in deducting higher amounts and not depositing the same in the account of 6th respondent as contrary to the A.P. VAT Act and Rules and thus the Writ Petition.

2. Separate counter affidavits have been filed on behalf of the respondent Nos. 2 and 3. So far as 2nd respondent is concerned, in its counter had practically put the entire burden on 3rd respondent and in no uncertain terms had stated that it is solely on account of the objections raised by the 3rd respondent and on their instructions TDS is being deducted at the rate of 2.8% from the running bills since April, 2012. A reference was made to Clause 105-1 of contract agreement. Along with the counter affidavit, the correspondence exchanged between the 2nd and 3rd respondents was also placed on record.

3. In the counter affidavit filed on behalf of the 3rd respondent sworn by Pay and Accounts Officer, Works and Projects, Nalgonda, it was averred that Clause 105-1 of the contract agreement provides for deduction of tax on account of sales tax (VAT) at 4% (presently 5%) and reference was made to Section 22(3-A) of A.P. VAT Act. It was further averred that whatever may be the position prior to

24.09.2008, but with effect from 24.09.2008 on account of insertion of Sub-Section 3-A in Section 22 of A.P. VAT Act, wherever sales tax VAT is included in the estimated value of the work, the same is liable to be deducted as TDS. It was asserted that in the case of contract in issue, the contract value was estimated at Rs. 2,259 crores and tenders were called for the work with an Internal Bench Mark (IBM) value of Rs. 2,132 crores, which includes a sum of Rs. 56.77 crores towards VAT @ 2.8% value of work items.

4. A detailed reply affidavit along with supporting documents was filed by the petitioner denying various contentions of the respondents.

5. Heard Sri V. Bhaskar Reddy, learned counsel for the petitioner, Sri B. Soma Shekar, learned Government Pleader for Finance and Planning Department, and the learned Government Pleader for Irrigation Department, representing the 2nd respondent and Sri P. Balaji Varma, learned Special Government Pleader for Commercial Taxes.

6. Sri V. Bhaskar Reddy, learned counsel for the petitioner would contend that either before submitting their tender document or after submitting the tender document, the department never notified or indicated the estimated value, and in fact the very nature of the tender was EPC contract and the bidders were required to quote their prices and as a matter of fact the NIT had not specified the estimated value. He would further submit that the contention of the 3rd respondent that the intending bidders were put on notice of the estimated value of the work and the Internal Benchmark Value (IBM value) was uploaded before submission of the bids in the website, is denied. He would contend that either at the time of NIT or before submitting the tender document, the department never notified or communicated the estimated value and the very nature of EPC in such the contractor is required to quote a lump sum price. He points out that the documents relied on by the 3rd respondent are all the documents of the year 2006 and bearing dates ranging from 01.03.2006 to 25.03.2006. He would also submit, by drawing the attention to the various rates quoted by the qualified bidders ranging from Rs. 1,925 crores to Rs. 5,229 crores, that if the bidders were aware of the estimated value, the rates quoted would not have been as quoted by the bidders on account of four bids with amount exceeding 5% of the estimated value are liable to be rejected summarily. He would submit the very fact that the bidders had submitted their bids ranging from Rs. 1,925 crores to Rs. 5,229 crores would go to show that the bidders were never notified of any estimated value or the IBM value. He would further submit that the very contents of the invitation to the tender and the nature of work involved in which the contractor was required to survey, investigate the subsoil, exploration and fix adjustment by preparation of designs and further drill the tunnel and carryout the other connected works would go to show that it is the sole responsibility of the bidder to deliver the final result and the contractor is required to quote a lump sum price for the same. He would further submit that Section 22(3-A) of the A.P. VAT Act, came to be inserted only with effect from 24.09.2008 by Act 28

of 2008, and has no application to petitioner's contract agreement and he would submit that it is Section 22(3) of the A.P. VAT Act, which is the relevant provision. He would also submit that respondents having not raised any objection with the 6th respondent about the authorization issued in Form 501-D in exercise of 6th respondent's power under Rule 18(1)(f) of the VAT Rules, cannot deduct higher amount as TDS and keep the same without making it over to 6th respondent. He would point out, such retention of TDS amount deducted is in violation of Sections 22 and 57 and Rule 18 of the A.P. VAT Act and the Rules.

7. The learned Government Pleader Sri Balaji Varma appearing for the Commercial Tax Department would submit that the certificate issued by the 6th respondent is in order and the same has been issued after scrutinizing the material placed before the Commercial Tax Department. He would submit that there is a difference in language of Rule 18(2) and 18(3) of the A.P. VAT Rules, and the petitioner's case would squarely fall u/s 22(3) read with Rule 18(2) of the A.P. VAT Act and Rules.

8. The learned counsel appearing on behalf of the 3rd respondent would mainly rely on Section 22(3-A) of the A.P. VAT Act, and the Technical Sanction Abstract signed by the Chief-Engineer on 25.03.2006 and four sheet document i.e. "Report accompanying the Estimate for the work of Investigation, Design and Execution of Tunnels. 1 & 2 including Head Regulator at the entrance portal of Tunnel 1 of Srisailam Left Bank Canal Tunnel Scheme of AMR Project".

9. In the light of the pleadings and contentions of the respective parties and in the facts of this case, the crucial aspect that is required to be decided, is the applicability or inapplicability of the Section 22(3-A) of the A.P. VAT Act with corresponding Rules. As per the record, the notice inviting tender is dated 10.01.2005. In the notice inviting the tender as against the column Estimated Contract Value "not applicable" has been written. In other words, there was no estimated contract value notified as on the date of notice inviting the tender, and 29.03.2005 was the last date for submission of the tender and 16.04.2005 was the date of price bid opening. As per the document made available by the 3rd respondent, it is only by G.O.Ms. 147, dated 11.08.2005, Government had accorded administrative approval for an amount of Rs. 2,813 crores. As per the documents under the head "Report accompanying the Estimate for the work of Investigation, Design and Execution of Tunnels 1&2 including Head Regulator at the entrance portal of Tunnel-1 of Srisailam Left Bank Canal Tunnel Scheme of AMR Project at page No. 2 in third para it is recorded as "While inviting EPC tenders, the Departmental Estimate value was not notified to the agencies and they were expected to do preliminary investigation, design etc., and quote the tender value. After receipt of the tenders, the value of work arrived based on the SS Rates of the relevant year i.e. 2004-2005 and quotations obtained from M/s. NHPC Limited and M/s. Konkan Railway, viz., the Internal Bench Mark Value (IBM) approved by the committee was uploaded in the Website before opening the Price Bid. Based on the Administrative Approval, the IBM value for this work

was arrived as Rs. 2,132 Crores," which would clearly go to show that the tenderers were not put on notice about the estimated value and the same came into existence after the tenderers submitting their respective tenders. In other words, there was no way tenderers knowing the estimated value and the components of the estimated value prior to opening of the tenders.

10. As on the date of execution of contract i.e. 25.08.2005, The Andhra Pradesh General Sales Tax Act, 1957 (in short "APGST Act") came to be repealed, and in the place of APGST Act, A.P. VAT Act need to be read into. As on the date of contract, Sections 22(3) and 22(4) are the relevant provisions dealing with the TDS, which reads as under:

Section 22(3): In the case of a dealer executing works contract for Government or local authority a tax at the rate of 4% shall be deducted from the amount payable to him and such contractee deducting tax at source shall remit such amount in the manner as may be prescribed.

Section 22(4) In case of a dealer executing works contract for Central Government or a Company or a statutory body or an undertaking or an institution other than contract or for any other dealer or a firm where the value of the contract exceeds Rs. 10,00,000/- (Rupees Ten lakhs only), a tax at the rate of four percent (4%) shall be deducted from the amount payable to him and such contractee deducting tax at source shall remit such amount in the manner as may be prescribed.

11. Thereafter Section 22(3A) and (3B) of the VAT Act came to be added by an Act 28 of 2008 dated 24.09.2008 w.e.f. 24.09.2008, which reads as under:

22(3-A) Notwithstanding any thing contained in subsection (3), in the case of a dealer, executing works contract for Government or Local Authority, wherever tax at the rate of 15% is added separately to the estimated value of the contract, such tax shall be collected by the contractee and remitted in the manner as may be prescribed.

22(3B) Every Film Processing Laboratory by whatever name it is called shall collect tax at source at the rates as may be prescribed for this purpose, from the film producers opting for payment of tax under sub-section (8A) of section 4 and remit the tax so collected on the immediate next working day from the date of such collection in the manner as may be prescribed.

12. The corresponding Rule is 18 of the A.P. VAT Rules (upto 01.09.2006) which reads as under;

Rule 18. Tax deduction at source:- (1)(a) Where a works contract is awarded to a VAT dealer by any contractee other than Government or local authority, the tax shall be deducted from the payment made to the contractor at the rate of four percent of the amount paid or payable to the contractor at the time of each payment as specified in sub-section (4) of Section 22;

(b) The contractee shall complete Form VAT 501A supplied by the contractor indicating the TIN, the amount of tax deducted and details of the related contract. The Contractor, VAT dealer shall send the Form VAT 501A to the authority prescribed together with proof of payment within fifteen days from the date of each payment made to the contractor.

13. By G.O.Ms. No. 88, dated 27.01.2007, Rule 18 was substituted with effect from 01.09.2006, which reads as under:

Rule 18. Tax deduction at source:- (1) (a) The tax deduction at source shall be in general at the rate of either 4% or 2% as prescribed in sub-clause (i) or (ii) respectively of clause (b) below and it shall be based on adoption of 70% of the total consideration payable for the execution of works contract as taxable turnover unless an application has been made by the dealer to the Assistant Commissioner of Commercial Tax Officer concerned for specific quantification or provisional assessment to determine the correct amount of taxable turnover for a specific contract or agreement.

(b) The rate of tax for the purpose of tax deduction at source shall be as prescribed below:-

(bb) The contractee shall complete form VAT 501A supplied by the contractor indicating the TIN, the amount of tax deducted and details of the related contract. The Contractor, VAT dealer shall submit the Form VAT 501A to the authority prescribed along with the return in Form VAT 200.

NOTE: Sub-sections (1)(c)(d)(e) of Section 18 are intentionally omitted as not relevant for the purpose of this case.

(f) the application to be made for quantification or provisional assessment to determine the taxable turnover shall be in Form 501C and the order to be passed by Assistant Commissioner or the Commercial Tax Officer concerned shall be in Form 501D. The order shall be deemed to have been passed by accepting the claim at the end of sixty days from the date of receipt of Form 501C.

14. Further, Rule 18(3A) and (3B) were added by G.O.Ms. No. 503, dated 08.05.2009 with effect from 01.05.2009, which reads as under:

(3)(a) Where tax is collectable at source as per subsection (3A) of Section 22 of the Act, tax @4% on the total value of the contract shall be collected and remitted by the contractee within fifteen days from the date of each payment made to the contractor.

(b) Where tax, collected at source as above, is in excess of the liability of the contractor, who have not opted for payment of tax by way of composition, such amount of tax, collected in excess of the liability shall be deemed to have been payable by the contractor and shall be liable to be forfeited.

15. In the agreement, clause 105, is the relevant clause dealing with the sales tax aspect which reads as under:

105. Sales Tax:

105.1 Sales Tax during the currency of the contract deduction towards Andhra Pradesh Sales Tax u/s 5H of APGST Act, 57 according to which tax @ 4% has to be deducted at source, while making payments to the contractor.

As per Act 22 of 1955 the connected rules 17(1) has been amended and substituted as follows:

The tax to be deducted at source u/s 5H shall be at the rate prescribed below:

105.2 The contractor should produce a valid Sales Tax Clearance Certificate before the payment of the final bill, otherwise payment to the contractor will be withheld.

105.3 The tax structure under clause 105 is liable for revision as per the orders of the Government issued from time to time and in such case, the sales tax will be deducted at source at the revised rates only while making payment to the contractor duly modifying the provision made in the estimate according to revised rates of sales tax.

105.4 Excess recovery due to revision in sales tax rates as per orders of Government from time to time will be reimbursed.

16. Section 5H of the APGST Act was in pari materia with Section 22 of the A.P. VAT. Likewise, Rule 18 of A.P. VAT Act corresponds to the Rule 17-I of the APGST Rules and in pari materia to Rule 18 of A.P. VAT Rules.

17. In the case on hand, as revealed from the record, petitioner approached the 3rd respondent u/s 22(3) read with 18(1)(f) of the A.P. VAT Act and Rules and filed Form 501-C on 15.03.2007 for the quantification of taxable turnover for the purpose of tax deduction at source. In the application in Column No. 6, the petitioner had shown Rs. 6,420 lacs as taxable turnover (3.34% of the value of the contract). A detailed working sheet was also furnished. On scrutiny of the same, the 6th respondent granted approval in Form 501-D modifying the taxable turnover as Rs. 34,677 lacs (@ 18.01%) and thereafter issued certificate for TDS at 18% on every bill payable @ 2%. Petitioner was paid bills up till end of March, 2012 by making deduction at 0.36% (2% of 18%) as VAT TDS. At no point of time, there was any objection raised either by the 2nd or 3rd respondents with the 6th respondent and the Form 501-D issued by the 6th respondent continues to be valid.

18. We are unable to accept the argument of the learned counsel for the 3rd respondent that the 6th respondent is incompetent to decide the quantum of goods that are likely to be incorporated in the execution of the work as we find that the 6th respondent has been statutorily entrusted with the function of making an estimate for the purpose of Section 22(3) read with Rule 18(1)(f) of the A.P. VAT Act and Rules. As a matter of fact, the 6th respondent had in fact undertaken such exercise is evident from the fact that the claim of the petitioner

as set out in Form 501-C was not accepted and the approval in Form 501-D is in much variance. Further, on overall appreciation of the material on record and in particular the notice inviting tender which would reveal, the respondent not having notified estimated contract value, we have no hesitation in accepting the contention of the petitioner that at no point of time the bidders were put on notice either of the estimated value of the contract or about the components which were included in the said estimate. In the absence of item wise works to be executed being specified in the contract and where a contractor was required to quote a lump sum amount, it is left to the choice of the contractor to be assessed under A.P. VAT Act either u/s 4(7)(a) or (7)(b) of the A.P. VAT Act.

19. In the present case, the petitioner had exercised the option to pay VAT u/s 4(7)(b) of A.P. VAT Act and made an application u/s 22(3) read with Rule 18(1) (f) of A.P. VAT Act and Rules for quantification of the taxable turnover, which was accepted by the 6th respondent. We should bear in mind that the function of respondent Nos. 2 and 3 is only to make deduction from the running bills of the tax component in terms of the applicable provisions of the A.P. VAT Act and make over the same to the Commercial Tax Department. The tax amount, which was deduced by the 2nd respondent to be made over to 6th respondent, is available for and on behalf of the petitioner assessee subject to the adjustments to be made in final assessment proceedings in terms of Section 22 read with Rule 18 of the A.P. VAT Act and Rules. Further, the language of Section 22(3-A) leaves no manner of doubt that after arriving at the total estimated value of the contract a tax component at the rate of 4% should have been added "separately". In the present case, on the material available on record, we are unable to accept the contention that 4% of tax was added separately to the estimated value, inasmuch as, there was no estimated value as on the date of the petitioner's participating in the tender. A close reading of Section 22(3-A) of the A.P. VAT Act along with Rule 18(3-A) and (3-B) of the A.P. VAT Rules, would leave no manner of doubt in the cases where 4% tax has been separately added to the estimated value, the same is liable to be deducted at the time of making payment in the running bills, which amount is not liable to be adjusted to the account of the contractor. Even if there is an excess recovery, the same is liable to be forfeited in favour of the Government. We may also add that in the cases of works of the nature, wherein the contractor is required to bringing the design, drawing, technologies, expertise and deliver the final resultant project as per the contract, it is fully left to the choice of the contractor to plan their affairs and decide the material components, which are required to be incorporated. In the execution of works. In such circumstances, it may not be practicable in all cases to come to a conclusion that the department estimated cost, as in fact has taken Into consideration of all the material goods, components which are likely to be incorporated in the execution of the works.

20. In the light of the discussion above, on appreciation of the material on record, we find that the petitioner's case squarely fall u/s 22(3) of the A.P. VAT Act and the excess amounts deducted by the 2nd respondent is contrary to the

scheme of the Act and unauthorized and hence required to be returned to the petitioner. As a matter of fact, the unauthorized deduction and retention of the monies without making it over to the Tax Department is contrary u/s 57(1) of the A.P. VAT Act. Therefore, the respondents are directed to refund the excess amount to the petitioner within four weeks from the date of receipt of this order. In the result, the writ petition is allowed. No costs. Miscellaneous petitions pending in this writ petition, if any, shall stand closed.