

(2012) 03 AP CK 0007

In the Andhra Pradesh High Court

Case No : Tax Revision Case No. 70 and 144 of 2010

M/s. KEC International Limited

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 16-03-2012

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 13, 14(4), 15, 20(1), 22(1)
Andhra Pradesh General Sales Tax Rules, 1957 — Rule 6B, 6B(2)

Citation : (2012) 53 VST 373

Hon'ble Judges : V.V.S. Rao, J;Sanjay Kumar, J

Bench : Division Bench

Advocate : K. Raji Reddy, for the Appellant; P. Balaji Varma, Spl. SC for CT, for the Respondent

Judgement

V.V.S. Rao

1. These two tax revision cases u/s 22(1) of the Andhra Pradesh General Sales Tax Act, 1957 (the Act) are against the common order dated 20.2.2009 in T.A.Nos.671 and 672 of 2005 passed by the Sales Tax Appellate Tribunal, Hyderabad (STAT). The petitioner and the question involved being common, the two cases are being disposed of by this order. The petitioner is a works contracts company. They are registered dealers on the rolls of the Commercial Tax Officer (CTO)-III, Kurnool under the Act. Their turnover has to be charged to sales tax u/s 5 read with Section 5F of the Act. They however opted for composition of tax payable u/s 5F of the Act. Such benefit is available u/s 5G of the Act. During the assessment years 1998-1999 and 1999-2000, the petitioner executed electrical contracts with the Andhra Pradesh State Electricity Board (APSEB). The CTO-III completed the assessment on 22.1.2001 duly allowing composition and levied the tax accordingly.

2. The petitioner was granted certificate in Form-L1 on 26.12.1998 issued under Rule 6B of the Andhra Pradesh State General Sales Tax Rules, 1957 (the Rules) which was extended from time to time. The CTO however on 14.12.2001

cancelled the certificate in Form-L1 on the ground that the petitioner is not eligible to opt for composition in relation to electrical works contracts. Consequently, the CTO revised the assessment on 29.12.2001 holding that the petitioner is not eligible for composition scheme. On appeal before the Appellate Deputy Commissioner (ADC) the petitioner was successful. The appellate order dated 21.3.2002, however, was revised u/s 20(1) of the Act by the Joint Commissioner (Legal) on 19.8.2004 and held that the L1 certificate issued to the petitioner was void ab initio in view of Section 5G of the Act.

3. Feeling aggrieved, the petitioner filed T.A.No.671 of 2005 relating to the assessment year 1998-1999 and T.A. No. 672 of 2005 relating to the assessment year 1999-2000. The STAT dismissed both the appeals holding that L1 certificate had been mistakenly issued; it is void an initio and non-est in the eye of law and therefore its retrospective cancellation is only a formality. The petitioner, therefore, filed T.Rev.C.No.144 of 2010 against T.A.No.671 of 2005 and T.Rev.C.No.70 of 2010 against T.A.No.672 of 2005.

4. The counsel for the petitioner submits that the cancellation of L1 certificate is illegal being contrary to Rule 6B(2)(iii) of the Rules. Alternatively he would submit that as the CTO cancelled L1 certificate after completion of the tax year, it can only operate prospectively and the cancellation cannot have any effect on the assessments already completed. According to the counsel, grant of L1 certificate enabling the petitioner to opt for composition u/s 5G of the Act was valid and it cannot be treated as void ab initio. He has relied on *Blue Star Ltd. Vs. State of Andhra Pradesh* and *Another, Panchalingala Carbonic Gas Pvt. Ltd v. State of Andhra Pradesh* (2004) 40 APSTJ 41 (AP), *Jai Jagannadh Gases Pvt. Ltd v. CTO* (2009) 49 APSTJ 1 (AP), *Pratibha Constructions Engineers and Contractors (India) Private Limited Vs. Commercial Tax Officer, Aryapuram Circle, Rajahmundry*, and *Banyan Enterprises Vs. Commercial Tax Officer, Somajiguda Circle, Hyderabad* and *Another*,

5. The special counsel for commercial taxes would submit that the works contract being a deemed sale, is chargeable u/s 5 of the Act, and Section 5F read with 5G of the Act being exceptions to charging section, they have to be interpreted strictly. As Section 5G does not enable a dealer to opt for composition in relation to electrical works contract as notified by the Government u/s 5G(2) of the Act, the petitioner who executed electrical works contracts during relevant years is not eligible for composition.

6. In the background facts and having regard to the rival submissions, the only point for consideration is whether the revisional authority was justified in reversing the appellate order of the ADC. We may mention that before the ADC the petitioner did not specifically challenge the cancellation and pressed only the ground of illegality in cancelling L1 certificate with retrospective effect. Probably for the reason that ADC allowed their appeals, the petitioner did not challenge the order of the ADC before the STAT on other grounds. Therefore, our consideration is and ought to be restricted to the validity of the revisional order

as confirmed by the STAT.

7. To appreciate the controversy, it is necessary to read Section 5G of the Act and rule 6B of the Rules, which we quote hereunder.

Section 5G. Composition of tax payable u/s 5F:- (1) Subject to such conditions and in such circumstances as may be prescribed, if a dealer, who executes any works contract other than the category of contracts notified by the Government under sub-section (2), so opts, the assessing authority of the area may accept, in lieu of the amount of tax payable by him under the Act during the year, by way of composition, an amount at the rate of four paise on every rupee of the total amount paid or payable to the dealer towards execution of the works contracts:

Provided that no tax shall be payable under this section on the turnover relating to the amounts paid to a sub-contractor as consideration for the execution of the works contract whether wholly or partly subject to the production of proof that such sub-contractor is a registered dealer liable to tax under the act and that the turnover of such amounts is included in the return of the turnover filed by such sub-contractor:

Provided further that if a dealer who executes a works contract of construction of apartments or buildings, so opts, the assessing authority of the area may accept, by way of composition an amount calculated at the rate of rupees 4/- (Rupees four only) per square foot of the constructed area.

(2) The Government may notify from time to time the category of works contract for which the scheme of payment of tax by composition under sub-section (1) does not apply.

(3) Every Dealer who elects to pay tax under sub-section (1) shall apply in the prescribed form to the assessing authority to be permitted to pay the amount of tax under sub-section (1), and on being so permitted, in the prescribed form, he shall pay tax as specified under Sections 13 and 15 of the Act.

(4) Nothing contained in sub-section (1) shall apply to a dealer, who purchases or receives goods from outside the State for the purpose of using such goods in the execution of works contract.

Rule 6-B. Composition of tax in the case of dealers executing works contracts:-

(1) The dealer who elects to compound the tax for any year u/s 5G shall submit an application in Form-L to the assessing authority each year, within thirty days from the commencement of the year or within thirty days from the date of commencement of the business if he commences the business during the course of the year, as the case may be :

Provided that the assessing authority having jurisdiction may on sufficient cause and for reasons to be recorded in writing condone the delay in respect of application received after expiry of thirty days from the commencement of the year or after the expiry of thirty days from the date of commencement of

business as the case may be. However, the delay condoned shall not exceed sixty days and delay shall be condoned within a period of ninety days from the date of commencement of such year or the business, as the case may be.

(2)(i) The assessing authority concerned, after conducting such verification as may be necessary permit such dealer, subject to the condition specified in sub-rule (1), to pay in lieu of the amount of tax payable by him during the year, in respect of which such permission is granted an amount by way of composition as provided in Section 5-G.

(ii) Such permission for composition shall be granted within thirty days from the date of receipt of the application during the year for which the composition is applied for. The permission shall be in Form L1 and shall be valid for the entire year to which it relates.

(iii) The assessing authority may cancel such permission in the following cases:

(a) if the dealer fails to pay tax in any month within the time specified and, or;

(b) if it appears to the assessing authority that the dealer has suppressed whole or part of turnover in the return filed by him or; the return filed by the dealer appears to be incomplete or incorrect;

(c) if the dealer contravenes any provisions of the Act or the rules made thereunder.

8. As per Section 5 (charging section) of the Act every dealer shall pay tax for each year on every rupee of his turnover at the rates of tax and at the points of levy specified in Schedules I to VII. Section 5F of the Act specifically deals with levy of tax on transfer of property in goods involved in the execution of works contract. For the two assessment years with which we are concerned, a dealer engaged in the execution of works contract shall have to pay the tax at the rate of eight paise on every rupee of his turnover. Whatever may be the rate of tax in the goods incorporated in the works contract, Section 5G levies a flat rate of 8%. But Section 5G of the Act is an exception to Section 5F. It gives an option to pay the tax on the turnover of works contract by way of composition at the rate of four per cent. This is a benefit given to a dealer engaged in the works contract. Because every such contract includes the incorporated value of the goods as well as the value of the labour charges either for transporting the goods or incorporating the goods in the works contract.

9. A dealer so as to avail the composition scheme u/s 5G of the Act has to make an application in Form-L within thirty days from the commencement of the year or the date of commencement of the business. The assessing authority, after conducting verification, would grant permission to the dealer to pay the tax by way of a composition. Such permission in Form-L1 shall be valid for the entire year to which it relates to. A certificate given in Form-L1 can be cancelled by the assessing authority if the dealer (i) fails to pay the tax in any month within the specified time; (ii) if it appears to the assessing authority that the dealer

suppressed the turnover in the return; and/or (iii) contravenes any of the provisions of the Act or the Rules. Be that as it is, the benefit by way of composition scheme is not available to all dealers who execute works contracts. The Government is empowered u/s 5G(2) of the Act to notify the category of the works contracts for which composition scheme does not apply.

10. In exercise of the powers conferred u/s 5G(2), the Government issued notification vide G.O.Ms. No. 787, Revenue, dated 21.9.1996 to the effect that the dealers who undertake the works contracts named therein shall not be eligible to pay the tax by way of composition u/s 5G of the Act. The said notification (as published in A. P. Gazette Part-I Extra-Ord. dt.28.9.1996) reads as under.

G.O.Ms. No. 787 Rev. (CT-II) Department, dated 21.9.1996

In exercise of the powers conferred by sub-section (2) of section 5G of the Andhra Pradesh General sales Tax Act, 1957 (Act No. VI of 1957), the Governor of Andhra Pradesh hereby directs that any dealer who undertakes the following categories of works contracts shall not be eligible to elect to pay tax by way of composition as provided under sub-section (1) of Section 5G of the said Act.

1. Installation of Air-Conditioning
2. Erection of Lifts.
3. Refrigeration work
4. All other types of electrical contracts

11. The petitioner was granted permission in Form L1 on 26.12.1998. As per G.O.Ms.No.787, a dealer engaged in electrical works contracts is not eligible for the scheme of payment of tax by way of composition. Therefore the permission granted by the CTO is ex facie without authority and ultra vires. When initially the CTO completed the assessment for the years 1998-1999 and 1999-2000 the permission in Form-L1 was taken into consideration. Subsequently having realized that being an electrical works contractor, the petitioner is not eligible to the scheme of composition, the CTO cancelled the certificate on 14.12.2001. The cancellation as such is not disputed nor impeached before any of the departmental authorities or the STAT. The question therefore is whether the permissioning Form-L1 is void ab initio and has to be ignored by the assessing authority while revising the assessment u/s 14(4) of the Act, or the cancellation of the permission by the CTO is effective prospectively. There is no dispute that the scheme of payment of tax by way of composition u/s 5G of the Act can be availed only by the dealers whose category of works contracts are not notified as ineligible for the scheme. There is no dispute that by G.O.Ms.No. 787, u/s 5G(2) of the Act the Government notified all types of the electrical contracts as ineligible for the composition. The permission granted in Form-L1 to the petitioner, therefore, was ultra vires.

12. It is axiomatic that a taxing statute is to be interpreted strictly. It is neither possible nor permissible for the Court to read, add or ignore something in the provision charging tax. Insofar as a provision in the fiscal statute providing for exemption or concession is concerned, the tax payer has to show that he comes within the permitted area of exemption and is not disqualified by it. A constitution bench of the Supreme Court in *Commissioner of Central Excise, New Delhi Vs. Hari Chand Shri Gopal and Others, etc. etc.*, was concerned with the question as to whether a manufacturer of a specified final product falling under the Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption from remission of excise duty on specified intermediate goods if they captively consumed for the manufacture of final products. The plea of the central excise department was that the benefit of exemption notification would be available only to the manufacturers who strictly comply with the procedures prescribed under Chapter X of the said Act. It was also contended that substantial compliance with the procedure would not be sufficient to claim duty exemption and that there ought to actual compliance in respect of the substance of the statute. The Supreme Court while reiterating the principle of strict construction of taxing statutes observed.

The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the noncompliance of which would not affect the essence or substance of the notification granting exemption.

13. Further dealing with the question of the doctrine of substantial compliance, the apex Court held as follows.

A fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance with an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the noncompliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements

that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted.

14. The counsel for the petitioner relied on five authorities mentioned above in support of his contention that the cancellation is only prospective. The decisions in Panchalingala Carbonic Gas Pvt. Ltd and Jai Jagannadh Gases Pvt. Ltd. deal with the withdrawal of incentives under the Government scheme Target 2000. In the former decision, it was held that the withdrawal should be prospective as it prohibited the collection of the tax. The decision in Blue Star Ltd holds that discrimination in levy of tax on non-local dealers would be unconstitutional. In Pratibha Constructions the reassessment VAT order was held barred by limitation and in Banyan Enterprises this Court held that the power of reassessment cannot be exercised unless material de hors the record on the basis of which an earlier order of assessment was already made. In these judgments no where was it held that a benefit conferred by the authority de hors the provisions of the Act and in an ultra vires manner cannot be withdrawn retrospectively. The initial permission granted by the CTO permitting composition was ultra vires and therefore, it is to be treated as void ab initio. When an order is void ab initio and the decision so declared, it is effective from the date it was originally issued by the authority without sanction of law. Therefore, we do not find any ground to interfere with the impugned orders of the STAT. The tax revision cases are, accordingly, dismissed without any order as to costs.