
(2022) 12 TEL CK 0062
In the Telangana High Court
Case No : Writ Petition No. 5791 Of 2008

M/S. Sirla Builders Pvt. Ltd.

APPELLANT

Vs

Commercial Tax Officer,

RESPONDENT

Date of Decision : 13-12-2022

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 5B, 5G, 20

Citation : (2022) 12 TEL CK 0062

Hon'ble Judges : T. Vinod Kumar, J; Pulla Karthik, J

Bench : Division Bench

Advocate : Bhaskar Reddy Vemireddy

Final Decision : Allowed

Judgement

1. The present Writ Petition is filed for issue of a Writ of Mandamus to declare the action of 2nd respondent in passing the impugned Revision Order dt.22-11-2007, clubbing the turnovers pertaining to Assessment Years 1998-99 to 2001-02 to turnover of the Assessment Year 2002-03 as illegal, arbitrary, high-handed, without authority of law and jurisdiction, violative of principles of natural justice and also being barred by limitation as prescribed under the provisions of the Andhra Pradesh General Sales Tax Act, 1957 (for short 'the Act'), with a consequential relief to set aside the Revision order.
2. Petitioner contends that it is a Company carrying on business of execution of works contract in construction of Apartments and buildings and is a registered dealer under the provisions of the Act on the rolls of the 1st respondent.
3. It is further contended that petitioner had opted to pay tax in respect of the works contract under composition scheme as provided under Section 5-G of the Act; and that the second proviso to Section 5-G of the Act provides for payment of tax on the basis of square feet of the constructed area.
4. Petitioner further contends that upon petitioner exercising the option to pay tax under Composition Scheme/method under Section 5-G of the Act, the 1st

respondent Authority issued L-1 certificate dt.22-09-2000 and the same was renewed for the subsequent Assessment Years also upto 31-03-2005 on year on year basis; and that the petitioner had paid the appropriate tax on the basis of square feet.

5. Petitioner further contends that since petitioner had opted to pay tax under the composition scheme, the 1st respondent Authority accepted and assessed the petitioner's tax under the provisions of Section 5-G of the Act vide Assessment Order dt.11-10-2004 for the Assessment Year 2002-03.

6. It is further contended that 2nd respondent, however being of the opinion that the Assessing Authority wrongly levied tax at 4% on constructed area in square feet basis instead of subjecting the total works contract receipts to tax, had issued pre-revision show cause notice dt.29-08-2006 proposing to levy tax on works contract receipts turnover in a sum of Rs.21,31,49,886/- by considering the said turnover as gross turnover and net turnover liable to tax at 4% under Section 5-G of the Act.

7. Petitioner further contends that the basis as stated in the pre-assessment show cause notice for issuance of the same is that in the application in Form-L submitted by petitioner, it did not opt for payment of tax at Rs.4/- per square feet basis and also that the Form L-1 certificate issued by the Commercial Tax Officer had not incorporated the same, the assessment made by 1st respondent in levying tax at Rs.4/-per square feet on the basis of constructed area has resulted in short levy of tax.

8. It is further contended that on receipt of above said pre-revision show cause notice, petitioner had filed its objections on 23-03-2007 wherein petitioner had categorically stated that in terms of Section 5-G of the Act and second proviso thereto, petitioner had opted to pay tax under composition method on the basis of constructed area as permitted by the Act.

9. Petitioner further contends that 2nd respondent, not being satisfied with the explanation offered by the petitioner, confirmed the proposal levying tax as made in the show cause notice vide order dt.22-11-2007.

10. Aggrieved by the said order of revision, the petitioner has come up before this Court by way of present Writ Petition challenging the impugned order on multiple grounds viz., (i) that in the process of revising the assessment order for the year 2002-03, the 2nd respondent-Authority in fact subjected the turnover relating to Assessment Years 1998-99 to 2001-02 to tax, as not being authorized by law, without revising the assessment orders of the relevant years; (ii) that for some of the years where assessment orders are passed, the limitation prescribed under Section 20 of the Act has expired; (iii) that the order of revision travels beyond the show cause notice inasmuch as pre-revision show cause notice dt.29-08-2006 issued to the petitioner, is issued only on the ground of L-1 certificate not recording about the petitioner opting for payment of tax on square feet basis for the constructed area; and (iv) that the Form L-1 records only

exclusions noted therein being the condition of petitioner not being entitled for composition in respect of certain activity in terms of G.O.Ms.No.787, Rev. (CT-II) Department dt.21-09-1996; and (v) that the exclusion as noted in Form L-1 does not deal with petitioner not being either eligible to pay tax on square feet basis nor specifying that the petitioner is liable to pay tax on works contract receipts only.

11. Petitioner further contends that the 2nd respondent, by the show cause notice issued proposing to deny the benefit of payment of tax under composition method under second proviso to Section 5-G of the Act, acted contrary to the guidelines issued by the Commissioner of Commercial Taxes in their Booklet titled as "Works Contract Manual", wherein in para 1.7 of chapter-6, it has been stated that there is no necessity for Assessing Authority to issue two separate forms L-1, one for paying tax on square feet basis for constructed area and another for other categories of contract.

12. Petitioner further contends that by the impugned order passed by the 2nd respondent, the said Authority has traveled beyond the show cause notice as the impugned revision order is not based on the ground as put in the show cause notice and thus even on this ground, the impugned order is vitiated.

13. Heard Sri V.Bhaskar Reddy, learned counsel for petitioner and Sri K.Raji Reddy, learned Special Standing Counsel appearing for respondents, and perused the record.

14. Despite the present Writ Petition is pending on the file of this Court since March, 2008, no counter-affidavit has been filed by respondent, and thus the Writ averments remained uncontraverted.

15. Learned counsel for petitioner, while reiterating the Writ averments, would contend that the 2nd respondent-Authority exceeded his jurisdiction in levying tax on works contract receipts turnover from the year 1998-99 to 2002-03 in a sum of Rs.21,31,49,886/- without taking note of the fact that petitioner was assessed to tax by the Assessing Authority for the relevant Assessment Years starting from 1998-99 till 2001-02 and those assessment orders have become final.

16. It is also contended that even in respect of the Assessment Year 2002-03, though works contract receipts are to the tune of Rs.6,69,79,009/-, since petitioner had opted to pay tax under the composition scheme under Section 5-G of the Act and the second proviso thereunder permitting payment on square feet basis, the petitioner had paid tax at 4% on the constructed area during the relevant year, which came to be 91,917 square feet during the Assessment Year 2002-03 as against the total area of construction of 2,99,000 square feet to be constructed by it and 2,04,000 constructed area having been offered to tax during the earlier years which is also in accordance with the guidelines issued by the Commissioner, Commercial Taxes.

17. Learned counsel for petitioner would further contend that none of the grounds, on the basis of which the impugned order was passed by the 2nd respondent, were mentioned in the pre-revision show cause notice dt.29-08-2006 and the only ground mentioned therein was with regard to L-1 certificate issued to it not specifying that the petitioner had opted for payment of tax at Rs.4/- per square feet and thus the impugned order is clearly unsustainable having been passed on the ground beyond the show cause notice resulting in violation of principles of natural justice.

18. Sri K.Raji Reddy, learned Special Standing Counsel appearing on behalf of respondents, on the other hand, submits that though the petitioner had opted to pay tax under composition scheme, it had resorted to division of entire contract receipts artificially into two parts, one for sale of flats and another transaction for providing amenities, facilities and fixtures etc., the receipts of which would not be eligible for payment of tax under composition method of the second proviso to Section 5-G of the Act.

19. Learned Special Standing Counsel, while supporting the order of Revision, would draw the attention of this Court to contend that in the impugned order, the Authority had extended the benefit of composition scheme under the second proviso to Section 5-B of the Act on the basis of square feet to an extent of 91,917 square feet, even though the value of the works contract receipts during the relevant period was of Rs.9,50,57,189/-. On the basis of the above, learned Special Standing Counsel would contend that the Revisional Authority only sought to bring tax the turnover of Rs.11,80,92,697/- relating to receipts under separate agreements relating to provision of amenities, facilities, fixtures etc., which are also liable to tax under Section 5-G of the Act. As the petitioner did not report the said turnover in its return nor was subjected to tax by the 1st respondent, the 2nd respondent had sought to levy tax on such escaped turnover and therefore no illegality can be found with the impugned order.

20. We have taken note of respective contentions urged.

21. Section 5-G of the Act as it stood at relevant time reads as under:

"5-G. Composition of tax payable under Section 5-F. - (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 contract:

Provided that no tax shall be payable under this section on the turnover relating to the amounts paid to a subcontractor 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) xxxx xxxx

(3)xxxx xxxxx

(4) xxx xxxx”

22. A reading of Section 5-G of the Act would indicate firstly that a dealer executing works contract and opting to pay tax under composition scheme, has to pay tax at the rate prescribed thereunder. A reading of second proviso thereto would further indicate that in case of works contract relating to construction of flats, the dealer executing such works contract is permitted to pay tax under composition method either on the basis of works contract receipts or on the basis of per square feet of the constructed area.

23. The petitioner, in the facts of the present case, having opted to pay tax under the composition scheme, had submitted its application in Form-L and was issued with Form L-1 certificate for paying tax under composition method. It is not in dispute that petitioner had paid tax for earlier period while the work was in progress on the basis of square feet area. Even in respect of the Assessment Year 2002-03, petitioner had paid tax on the constructed area of 91,917 square feet out of the total constructed area of 5 blocks totaling to 2,99,900 square feet, having paid tax on the area of 2,04,000 square feet during the earlier period.

24. Though it was sought to be projected before this Court that resort is being made by petitioner to avoid payment of tax by artificially segregating a single contract into two i.e. one for construction and sale of flats and another for providing amenities, facilities etc, it is to be seen that there would no loss to the petitioner even if it had entered into a single contract for sale of flat with all amenities provided for a higher value, as the tax payable under second proviso to Section 5-G of the Act is on the basis of the constructed square feet area, and the same would not make any difference for the builder like the petitioner, even if had shown the total value of the flat including the cost of amenities provided.

25. Further, it is also to be seen that though the impugned order deals with the said aspect of the petitioner entering into separate contracts for sale of flats and for providing amenities, the said ground has not been made the basis in the pre-assessment show cause notice dt.29-08-2006. As rightly contended by the learned counsel for petitioner, pre-assessment show cause notice only mentions of L-1 certificate issued not specifying the option of payment of tax on square feet basis and there is no whisper in the said notice either with regard to petitioner entering into multiple contracts, receiving and accounting for

considerations under respective heads separately or that L-1 certificate issued being applicable only in relation to the construction and sale of flats without provision of facilities. This, in the view of this Court, resulted in impugned order being in violation of principles of natural justice.

26. Further, the stand of 2nd respondent in the show cause that, L-1 certificate does not mention record of petitioner having opted to pay tax under composition scheme on square feet basis of constructed area, it is to be seen that the guidelines issued by the Commissioner of Commercial Taxes Department, Nampally, Hyderabad by its publication titled "Works Contract Manual", wherein chapter-6 dealing with composition scheme, in para 1.7, states as under :

"1.7 As per second proviso under sub-section (1) a dealer who executes a works contract of construction of apartments or buildings can opt to pay tax by way of composition an amount calculated at the rate of Rs.4/- per square feet on the constructed area. If a dealer has opted in form-L, he need not opt once again under this proviso for that year. There is also no necessity for the assessing authority to issue two separate forms L-1, one for paying tax at Rs.4/- per sft. and the other for other categories of contract."

27. A reading of the above para of the Manual clearly indicates that there is no requirement prescribed for recording the option to pay tax on the basis of square feet area as stated in the show cause notice, and the 2nd respondent being subordinate to the Commissioner, the guidelines issued by the Office of the Commissioner would bind the 2nd respondent-Authority and it is not open for the 2nd respondent to contend to the contrary.

28. It may not be out of place to mention that the 2nd respondent, having taken a stand in the pre-assessment show cause notice contrary to the guidelines issued, however, in the impugned order did not subject the works contract receipts to tax. On the other hand, the 2nd respondent rightly adopted/applied payment of tax for the year 2002-03 on square feet area basis of constructed area by taking the constructed area during the relevant year as has been done by 1st respondent in the original assessment order. However, the 2nd respondent, in order to justify the invocation of revision power, sought to levy tax on a turnover representing constructed value claiming it to be the consideration received under separate agreement for providing amenities by giving reasons, which in the view of this Court, cannot be accepted as the petitioner was not put on notice of the said ground in the pre-revision show cause notice.

29. It is settled law that the order cannot travel beyond the show cause as held by the Supreme Court in Commissioner of Central Excise Vs. Ballapur Industries (2007) 8 SCC 89, Commissioner of Customs Vs. Toyo Engineering India Limited (2006) 7 SCC 592 and also by this Court in M/s.Surya Lakshmi Cotton Mills Vs. Joint Director General of Foreign Trade and others Order dt.01-03-2019 in W.P.No.33702 of 2011.

30. In the light of the above, since the impugned order passed is based on extraneous reasons other than the grounds on which the petitioner was put on notice, and also that the basis of the issuance of pre-revision show cause notice is contrary to the guidelines issued by the Commissioner, Commercial Taxes Department, this Court is of the considered view that the impugned order cannot be held to be valid for it to be sustained.

31. Accordingly, the Writ Petition is allowed and the revision order dt.22-11-2007 for the Assessment Year 2002-03 impugned in the present Writ Petition is set aside. No order as to costs.

32. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.