

(2009) 03 MAD CK 0196
In the Madras High Court
Case No : W.A. No. 585 of 2005

Reliance Generators Pvt. Ltd.

APPELLANT

Vs

Commercial Tax Officer

RESPONDENT

Date of Decision : 24-03-2009

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 2, 32, 3B, 55

Citation : (2009) 26 VST 507

Hon'ble Judges : S. Nagamuthu, J;D. Murugesan, J

Bench : Division Bench

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

Final Decision : Allowed

Judgement

D. Murugesan, J.—The writ appeal raises the following question:

Whether the provisions of the Tamil Nadu General Sales Tax Act, 1959 relating to the appeal and revision shall apply to an order of rectification made under Sub-section (4) of Section 55 of the said Act?

2. The appellant (hereinafter referred to as "the company") is carrying on the business of supplying, installing, testing and commissioning of diesel generators. Its transactions are exclusively with Government Departments and predominantly with Bharat Sanchar Nigam Limited. The company is an assessee under the provisions of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the Act") on the file of the Commercial Tax Officer, Vadapalani II Assessment Circle (hereinafter referred to as "the CTO"). For the assessment year 2000-01, the company reported a total and taxable turnover of Rs. 7,99,58,648 and Rs. 4,53,09,582, respectively, in respect of works contract. The Commercial Tax Officer determined the total taxable turnover of Rs. 4,87,89,833 by order dated August 10, 2004. The company questioned the said assessment order, which ultimately came up for consideration in W. A. No. 3871 of 2004 and

the same was dismissed by order dated November 17, 2004 on the ground of existence of alternative remedy.

3. The company therefore filed an appeal. In addition to the above, the company also filed a rectification petition u/s 55 of the Act. The rectification petition was filed on the ground of the following errors which were apparent on the face of the record:

(a) The assessing officer himself had given a certificate dated August 24, 2000 stating that the petitioner was carrying on works contract and paying tax u/s 3B of the Act and holding that tax need not be deducted at source. Contrary to this the respondent treated the transaction as outright sales, without any record or material to arrive at such conclusion.

(b) Once the transaction is held to be a works contract assessable u/s 3B of the Act, necessary deductions provided under that section have to be automatically granted.

(c) Even a transaction done to the C.P.W.D., a Central Government Department had been subjected to tax at a higher rate of 16 per cent instead of the concessional rate of four per cent.

(d) Further as per the provisions of the Act only a taxable turnover could be assessed. Since as per the terms the contract between the awarder and the assessee contemplated consolidated amount including sales tax element as consideration, the entire amount cannot be treated as taxable amount. As per Section 2(r) turnover includes only sales price. Even if the consolidated amount is mentioned in the invoice, since the seller and buyer are aware of the break-up, the tax element should be deemed to have been included in the price and accordingly the sale price, turnover and taxable turnover have to be arrived at. The Bombay Burmah Trading Corporation Ltd. Vs. The State of Tamil Nadu, .

4. The said petition was considered by the CTO, who issued an order of rectification dated February 1, 2005. Though the assessing authority accepted the petition on the three grounds, he did not accept one ground. In respect of the works contract receipts, the CTO granted deduction towards labour charges at 15 per cent only in respect of transactions from October 1, 2000 to March 31, 2001. In respect of the transaction between April 1, 2000 and September 30, 2000, the CTO made the taxable break-up for the period April 1, 2000 to September 30, 2000 after deducting 15 per cent as reported by the company at Rs. 2,32,01,673. In fact, the error being that works contract receipts were treated as sales and once the transaction is treated as works contract, deduction towards the labour charges should have been given.

5. On the ground that the CTO should have given the deduction towards the labour charges in respect of the works contract receipts from April 1, 2000 to September 30, 2000 and the respondent erred in describing April 1, 2000 to September 30, 2000 after deducting 15 per cent as reported by the company,

which is contrary to the facts, the company approached this Court by way of writ petition. The said writ petition came to be dismissed by the order under appeal on the ground that the order impugned in the writ petition is appealable as provided under Sub-section (4) of Section 55 of the Act. The said order is questioned before this court.

6. Section 55 of the Act relates to the power of the assessing authority, appellate authority and the revisional authority including the appellate Tribunal to rectify error/errors. Such rectification should be made within a period of five years from the date of the assessment order. Before such rectification is made which has the effect of enhancement of assessment or any penalty, the assessee should be given a reasonable opportunity of being heard. The grounds on which rectification can be ordered are provided u/s 55(1) to 55 (3A) of the Act. As against the order of rectification, an appeal would lie in terms of Section 55(4) of the Act. The section reads as under:

Section 55. Power to rectify any error apparent on the face of the record.--(1) An assessing authority or an appellate or revising authority (including the Appellate Tribunal) may, at any time within five years from the date of any order passed by it, rectify any error apparent on the face of the record:

Provided that no such rectification which has the effect of enhancing an assessment or any penalty shall be made unless such authority has given notice to the dealer and has allowed him a reasonable opportunity of being heard.

(2) Where such rectification has the effect of reducing an assessment or penalty, the assessing authority shall make any refund which may be due to the dealer.

(3) Where any such rectification has the effect of enhancing an assessment or penalty, the assessing authority shall give the dealer a revised notice of assessment or penalty and thereupon the provision of this Act and the Rules made thereunder shall apply as if such notice had been given in the first instance.

(3A) The powers under Sub-section (1) may be exercised by the assessing authorities even though the original order of assessment, if any, passed in the matter has been the subject-matter of an appeal or revision.

(4) The provisions of this Act relating to appeal and revision shall apply to an order of rectification made under this section as they apply to the order in respect of which such order of rectification has been made.

7. Sub-section (1) of Section 55 employs the words that either the assessing authority or the appellate authority or the revisional authority (including the Appellate Tribunal) at any time within five years from the date of any order passed by it, rectify any error apparent on the face of the record, thereby meaning that such provision of appeal or revision would be available only in respect of an order rectifying the error and not an order refusing the petition for rectification. The very same words are employed in Sub-sections (2), (3) and (3A) of Section 55 as well. The said issue in fact came up for consideration

before a Division Bench of this Court in the judgment in State of Tamil Nadu v. Crompton Engineering Co. (Madras) Limited [1977] 39 STC 260 and the Division Bench has observed as follows : (page 263)

This express statutory provision makes it clear that the provisions relating to appeal and revision shall apply only when an order of rectification is made, and not when the authority concerned refuses to pass an order of rectification. The above reasoning and conclusion of ours will be sufficient answer to the contentions of the learned Counsel for the respondent that Section 55 of the Act should be treated as a proviso to Section 12 as it were and, therefore, even in a case where the application for rectification is dismissed, an appeal must be deemed to be available.

Under these circumstances, we are clearly of the opinion that the Tribunal was in error in holding that an appeal was maintainable to the Appellate Assistant Commissioner of Commercial Taxes against the order of the assessing authority rejecting the application of the assessee for rectification of the alleged error...

8. In the judgment in Deputy Commissioner of Commercial Taxes, Tiruchirappalli Division, Tiruchirappalli v. G. Natesan Pillai [1994] 94 STC 513 (Mad), the Division Bench has observed as follows:

No appeal lies to the Appellate Tribunal against an order of the Deputy Commissioner refusing to exercise his powers of revision u/s 32 of the Tamil Nadu General Sales Tax Act, 1959, on an application filed by the dealer.

9. The same view has been taken in the subsequent judgments in State of Tamil Nadu v. Subbu Chemicals [1996] 102 STC 613 (Mad) and in State of Tamil Nadu v. Speedline Agencies [1999] 114 STC 359 (Mad).

10. In view of the above, the impugned order is liable to be set aside. Accordingly, the impugned order is set aside and the matter is remitted back to the learned single judge for disposal on the merits. The writ appeal is allowed. No costs.