
(2010) 07 JH CK 0039

In the Jharkhand High Court

Case No : Writ Petition (T) No. 135 of 2010

Shekhar Constructions Pvt. Ltd.

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 22-07-2010

Acts Referred:

Jharkhand Value Added Tax Act, 2005 — Section 120, 14, 25, 26, 407

Jharkhand Value Added Tax Rules, 2006 — Rule 23(2), 24, 24(1), 24(2), 4

Citation : (2010) 4 JLJR 310

Hon'ble Judges : Sushil Harkauli, Acting C.J.; Dhirubhai Naranbhai Patel, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. We have heard learned Counsel for the petitioner.
2. The petitioner, who is a (works) contractor, is aggrieved by the decision and consequential order whereby the Road Construction Department is to deduct tax (VAT) at source from the payments made by it to the petitioner.
3. The petitioner's claim to exemption from TDS is based upon Section 45 of the Jharkhand Value Added Tax Act 2005 (hereinafter referred as the Act) read with Rule 24 of Jharkhand Value Added Tax Rules, 2006 (hereinafter referred as the Rules) and the JVAT 407 form issued to the petitioner by the Dy. Commissioner Commercial Taxes which the petitioner claims to be valid till 31.10.2010.
4. Sections 44 and 45 of the Tax and Rule 24 of the Rules are relevant in this case, which are reproduced below for ready reference:
 44. Special Provisions relating to Deduction of Tax at source in certain cases -(1) The State Government may, having regard to the effective recovery of tax, require in respect of contractors or any other class or classes of dealers that any person making payment of any valuable consideration to them for the execution of a works contract in the State involving transfer of property in goods, whether as goods or in some other form or for sale of goods in the State, as the case may

be, shall, at the time of making payment, whether by cash, adjustment, credit to the account, recovery of dues or in any other manner, deduct tax in advance therefrom which shall be calculated by multiplying the amount paid in any manner with such rate not exceeding ten per cent, as the State Government may, by notification in the Official Gazette, specify and different rates may be specified for different works contracts or class or classes of dealers, and that such person shall keep record, of the payments made and of the tax deducted in advance therefrom, for a period of five years"from the close of the year when the payments were made and shall produce such record before the prescribed authority when so required for carrying out the purposes of this Act.

Provided that, no deduction shall be admissible, in the circumstances, where a works contractor opts for Composition Scheme of Tax u/s 58 of the Act.

(2) The provisions of sub-Section (1) shall not apply where the amount or the aggregate of the amounts paid or likely to be paid during a year by any person to a dealer does not or is not likely to exceed one lakh rupees or such other amount as may be prescribed.

(3) Every person who is required to deduct tax in advance under sub-Section (1) shall furnish such returns at such intervals by such dates in such manner to such authority as may be prescribed and shall pay the tax deducted according to such returns to the State Government in such manner as may be prescribed.

(4) Every person referred to in sub-Section (3) shall issue to the payee a certificate of tax deduction and payment in such form in such manner as may be prescribed.

(5) Any tax paid to the State Government in accordance with sub-Section (3) shall be adjustable by the payee, on the authority of the certificate issued to him under sub-Section (4), with the tax payable by him under this Act and the assessing authority shall, on furnishing of such certificate to it, allow the benefit of such adjustment after due verification of the payment.

(6) If any person fails to deduct the whole or any part of the tax as required by or under the provisions of sub-Section (1), or fails to pay the whole or any part of the tax as required by or under sub-Section (3), then, the authority referred to in sub-Section (3) may, at any time within five years of the close of the year when he failed to do so, by order in writing, direct him, after giving him a reasonable opportunity of being heard, to pay, by way of penalty, a sum equal to the amount of tax which he failed to deduct or pay as aforesaid.

45. Special Provision relating to Advance Recovery of Tax on Sales and Supplies to Governments and Other Persons. - (1) Notwithstanding anything contained in this Act but subject to the provisions of Section 14, 49 and 57, any person responsible for paying sale price or any amount purporting to be the full or part payment of sale price in respect of sales or supplies of taxable goods exceeding rupees one lac during a year made to-

(i) the State Government; or

(ii) Central Government; or

(iii) a Company, Corporation, Board, authority, undertaking or any other body owned, financed or controlled either wholly or partly by the State Government or the Central Government shall, at the time of payment, subject to such conditions and restrictions as may be prescribed, deduct an amount at the rate as may be specified by the State Government by a notification on account of tax on the amount of such payment:

Provided that the rate or rates to be specified by the State Government shall not be more than the rate of tax applicable to the goods sold or supplied.

(2) Notwithstanding any law or contract to the contrary, the person making such deduction shall be lawfully competent to make such deduction.

>(3) Payment of the amount deducted under sub-Section (1) into the Government Treasury in the prescribed manner, shall be the liability of the person making such deduction.

(4) Payment of the amount deducted under sub-Section (1) into the Government Treasury by the persons making the deduction shall be deemed to be a payment by or on behalf of the seller or supplier concerned.

(5) If any person contravenes any or all of the provisions of sub-Section (1), (2) or (3), he shall be liable to pay, by way of penalty, a sum not exceeding twice the amount of tax deductible under sub-Section (1):

Provided that such penalty shall not be imposed unless the persons contravening the provisions is given any opportunity of being heard by the prescribed authority.

(6) The provisions of Section 43 and 47 for recovery of any amount of tax due from a dealer shall, mutatis mutandis, apply for recovery of any amount of tax deducted and or any penalty imposed but not deposited under this Section.

Explanation- A "person" in this Section includes all officers or authorities who are competent or authorized to make payment of the sale-price including the tax charged in respect of sales to State Government or Central Government or to Company, Corporation, Board, authority, undertaking or any other body owned, financed or controlled wholly or partly by the State Government or the Central Government.

(7) The provisions of sub-Sections (4) and (5) of Section 44 of the Act shall, mutatis mutandis, apply, so far as it relates, to issuance of certificate to person from whose bills deduction has been made and for filing of quarterly statements.

Rule 24. Non-deduction of Tax at Source from the bills of Supplier and Works Contractors. (1) No deduction shall be made u/s 45-

(a) if the dealer is not liable to pay tax u/s 14, 49 and 57 of the Act;

(b) if the supplier, being a dealer registered u/s 25 or 26 of the Act, produces before the deducting authority a certificate in Form JVAT 407 issued by the in-charge of the circle in which he is registered.

(2) Further; no deduction shall also be made u/s 44-

(a) if the works contractor, in course of execution of works contract, involves such goods in the transfer of property in goods in the same form or in some other forms: and such goods are not liable to tax u/s 14, 49 and 57 of the Act; or

(b) if the works contractor, being a registered dealer: and has opted for composition of tax u/s 58 of the Act, and is registered in terms of Rule 4 of this Rule, and produces before the deducting authority a certificate in Form JVAT 407 issued by the in-charge of the circle; in which he is registered.

(3) A supplier or the works contractor, registered under the Act, for the purpose of obtaining the certificate in Form JVAT 407, shall apply for the same, in Form JVAT 120 and the authority specified in Rule 57, after verifying the particulars furnished in the application, shall issue the certificate in Form JVAT 407.

(4) The provisions of Sub-rules (2) of Rule 23 shall apply mutatis mutandis in so far as they relate to deductions, deposits, returns and certificates.

5. It appears that petitioner is claiming that it falls within Section 45 and consequently under Rule 24(1).

6. The contention of the Respondent Department is that the petitioner falls within Section 44 and consequently Rule 24(2) and not Rule 24(1) will apply to the case of the petitioner.

7. We find from a perusal of Section 44 and from its comparison with Section 45 that Section 44 covers the cases of

(i) contractors (executing works contracts); and

(ii) other dealers (who are merely selling goods not in the course of works contracts).

8. Out of the category (ii) of Section 44 mentioned above (i.e. dealers only and not contractors), exception in respect of one category of dealers has been carved out in Section 45. This category is of the dealers, who are selling or supplying taxable goods only to the State or Central Governments or to Companies/Corporations etc. of Central or State Governments.

9. It has been argued that Section 45 should be held to include the cases of contractors (executing works contract) in the course of which transfer of property in goods is involved. For this purpose, learned Counsel for the petitioner has relied upon the definition of "dealer" given in the Act.

10. We are unable to accept this contention, firstly the definition clause expressly says that the word "dealer" will have the meaning defined therein, unless the

context otherwise requires. In this case we are of the opinion that the context requires otherwise. The reason for this opinion is that Sections 44 and 45 are two sections immediately preceding and succeeding each other. When in Section 44 there is an express use of word "contractors" and that word has been omitted and not used in the immediately succeeding Section 45, it would make intention of the Legislature very clear that Section 45 was confined to dealers other than contractors.

11. The petitioner is admittedly a contractor because of which he falls within Section 44 and not within Section 45 and consequently Rule 24(1) has no application to the petitioner. The case of the petitioner is clearly covered by Rule 24(2).

12. In the circumstances, Rule 24(1)(b) becomes irrelevant.

13. The petitioner's request for exemption from T.D.S. is not covered by the terms of Rule 24(2) and accordingly prayer made by the petitioner has been rightly rejected by the impugned order.

14. It has next been submitted from the side of the petitioner that the amendment to Rule 24, which took place on 26.8.2009 with effect from 1.4.2006, has not been notified in the Gazette and therefore, the impugned order was not right in relying upon the said amendment. By that amendment, the Commissioner has been given the power to issue form JVAT 407. In the case of the petitioner, the form has been issued by the Deputy Commissioner. It has also been argued that cancellation of form JVAT 407 has been made without giving opportunity of hearing to the petitioner and therefore the same is violative of the principles of natural justice. It has also been argued that consolidated registration as mentioned in the impugned order was not necessary for the petitioner to avail the benefit.

15. As already held above, after examining the impugned order and the contention of the petitioner, we are of the opinion that the petitioner was not entitled in law to the benefit claimed by the petitioner and therefore, remaining arguments are based upon technicality, which do not alter the legal position.

16. Lack of hearing does not appear to be a sustainable ground for want of prejudice. We have given adequate hearing to the petitioner today as also on the previous date and we do not think, the hearing would have possibly to lead to any other result.

17. This writ petition is accordingly fails and is dismissed.