
(2011) 04 MAD CK 0023

In the Madras High Court

Case No : TC (R) No's. 829, 883, 884, 885, 887, 889, 890, 891, 892, 898, 903, 905, 907, 908, 910, 913, 925, 926, 928, 929, 950, 951, 952, 953 and 955 of 2006

State of Tamil Nadu

APPELLANT

Vs

Kannaiah Colour Lab and Others

RESPONDENT

Date of Decision : 20-04-2011

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 3(1)(B)

Citation : (2011) 42 VST 130

Hon'ble Judges : P.P.S. Janarthanaraja, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : Haja Nazirudeen, Special Government Pleader Taxes, for the Appellant; P.R. Kumar, K. Venkata Subramanian and R. Vasu Mithran, for the Respondent

Judgement

Chitra Venkataraman, J.—These tax cases filed by the Revenue arise out of the common order of the Tamil Nadu Sales Tax Appellate

Tribunal (Main Bench), Chennai dated September 27, 2000 raising an identical issue. The tax case revisions were admitted on the following

substantial question of law:

Whether the order of the Tribunal holding that the transaction pertaining to taking of photograph, developing and printing is works contract

following M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], is legally sustainable in view of

the sub-sequent judgment rendered in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs,

2. The Respondent/ Assessee carry on business of running photo studio, taking photographs, developing the negatives and giving positive prints.

As against the assessment orders passed, the Assessee in each case went on appeal before the Appellate Assistant Commissioner, contending that there was no outright sale of the developed positive prints; consequently, the question of levy of sales tax did not arise. Following the decision reported in (1995) 97 STC 161 (Ker) (Bavens v. Union of India), the Appellate Assistant Commissioner came to the conclusion that the sitting charges collected by the photographers could not be assessed. As regards developing and printing, the Appellate Assistant Commissioner held that there was no outright sale and as per the decision in Bavens v. Union of India reported in (1995) 97 STC 161 (Ker) , the turnover could not be taxed u/s 3(1) of the Tamil Nadu General Sales Tax Act. He thus remanded that portion to the assessing officer to apply Section 3B of the Tamil Nadu General Sales Tax Act and thereafter assess the turnover. As regards developing charges, the appellate Assistant Commissioner set aside the same and held that it is only a contract of service. Thus, the Appellate Assistant Commissioner allowed the appeal.

3. Aggrieved by the same, the Revenue filed appeals before the Sales Tax Appellate Tribunal. In respect of each of the Assessee's cases, it was contended that a photographer took the photos of the customer in his camera and film and supplied the printed photo, which amounted to sale only. So also in the case of developing and printing. In the circumstances, the Revenue challenged the order of the Appellate Assistant Commissioner.

4. The Tribunal considered the contention taken in the light of the decision reported in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], and held that the activity of the photo studio could not be assessed under the TNGST Act. As regards developing the negative and printing charges, the Tribunal held that by virtue of the law laid down by the apex court as referred to above, no assessment could be made. Even though, the Assessee has not filed any appeal, it was for the assessing officer to decide as to whether it was taxable or not. Thus, the Revenue's appeals were dismissed. The Tribunal also rejected the Revenue's prayer for restoring the penalty. Aggrieved by the same, the present tax case (revision) petitions are before us.

5. The learned Special Government Pleader appearing for the Revenue placed

before us the decision reported in (2008) 14 TNCTJ 81 (R. Mini

Colour Lab v. Tamil Nadu Taxation Special Tribunal), to which one of us was a party, wherein, this Court considered the taxability on the

processing of negatives taken from the customer and taking prints out of it, as sale. In paragraph 25 of the said judgment, it was held as follows:

25. Even though in our opinion the decisions relating to levy of sales tax would have, for reasons which we shall presently mention, no application

to the case of the levy of customs duty, the decision in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others

[OVERRULED], requires consideration. As a result of the Forty-sixth Amendment, sub-article (29A) of Article 366 was inserted as a result

whereof, tax on the sale or purchase of goods was to include a tax on the transfer of property in goods (whether as goods or in some other form)

involved in the execution of a works contract. Taking note of this amendment this Court in M/s. Rainbow Colour Lab and Another Vs. The State

of Madhya Pradesh and Others [OVERRULED], (page 12 of STC) pages 388-389 of STC) observed as follows:

Prior to the amendment of Article 366, in view of the judgment of this Court in The State of Madras Vs. Gannon Dunkerley and Co., (Madras)

Ltd., , the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened

in law after the 46th Amendment and the judgment of this Court in Builders Association of India and Others Vs. Union of India (UOI) and Others,

is that it is now open to the States to divide the works contract into two separate contracts by a legal fiction: (i) contract for sale of goods involved

in the said works contract, and (ii) for supply of labour and service. This division of contract under the amended law can be made only if the works

contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an

incident of contract of service. The amendment, referred to above, has not empowered the State to indulge in microscopic division of contracts

involving the value of materials used incidentally in such contracts. What is pertinent to ascertain in this connection is what was the dominant

intention of the contract. Every contract, be it a service contract or otherwise, may involve the use of some material or the other in execution of the

said contract. The State is not empowered by the amended law to impose sales tax on such incidental materials used in such contracts

6. Thus, this Court pointed out that having regard to Section 3B of the TNGST Act, even if the dominant intention of the contract was to give

positive prints from the negatives supplied, it would amount to works contract and the transaction could be assessed, to tax only u/s 3B of the

TNGST Act. In those circumstances, this Court set aside the order of the Tribunal with a direction to the authorities to make the assessment u/s

3B of the TNGST Act.

7. A reading of the above decision of this Court shows that the said decision was concerned about processing of negatives taken from the

customer and taking prints out of it. Apart from taking positive prints from the negatives supplied from the customers, the present tax cases also

raise an issue as regards taking photographs, developing the negatives and supplying the prints.

8. The learned Counsel for the Respondent/Assessee pointed out that the Revenue had not taken a specific issue before this Court as regards the

turnover relating to taking photographs and the sitting charges, but had raised a dispute only as regards the turnover relating to developing the

negatives and supplying the positive prints. Thus, going by the memorandum of grounds in the tax cases filed, the Revenue could not be said to

have challenged the turnover on taking photographs and sitting charges.

9. We do not find that this objection could be sustained. A reading of the grounds of revision shows that the Revenue has not restricted the

challenge in the tax case (revisions) before us to only one aspect of the transaction, namely, taking positive print out of the negatives supplied by

the Assessee. The grounds covered both transactions, including taking of photographs and sitting charges, as well as developing negatives and

making positive prints out of it. We find, both cases fall under the concept of works contract to be considered u/s 3B of the TNGST Act. In the

circumstances, applying the decision of this Court reported in (2008) 14 TNCTJ 81. (R. Mini Colour Lab v. Tamil Nadu Taxation Special

Tribunal), we set aside the order of the Tribunal, thereby remand the assessment back to the assessing officer to consider the issue afresh in the

light of the development of law in this regard. Before deciding the assessment,

the assessing officer shall grant opportunity to the Assessee to place their objections. After hearing the same, the assessing officer shall pass orders in accordance with law.

10. As far as TC (R). 907 of 2006 is concerned, relating to the assessment year 1993-94, the learned Special Government Pleader for the

Revenue brought to the notice of this Court that the assessing officer himself had not treated the turnover pertaining to the sitting charges received

as falling within the ambit of the TNGST Act and it was not an issue before the appellate authority. In such circumstances, the question of directing

the assessing officer to consider this turnover by way of a remand does not arise.

11. A perusal of the order of the assessing authority shows that the sitting charges received were not taken in for assessment in the case of the

Assessee in TC (R) No. 907 of 2006. Without going into the merits of such view taken by the assessing authority, we direct that the order of the

Tribunal relating to the developing of negatives alone, being the subject-matter in the tax case before us, the same stands remanded for fresh

consideration.

12. The above tax case (revisions) stand disposed of on the above terms. No costs.