(2014) 07 JH CK 0003

In the Jharkhand High Court

Case No : W.P. (T) No. 2629 of 2013 and I.A. No. 2276 of 2014

Triveni Engicons Pvt. Ltd. APPELLANT

Vs

The State of Jharkhand RESPONDENT

Date of Decision : 23-07-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 3, 4, 5
Constitution of India, 1950 — Article 366, 366(29A), 366(29A)(b)
Jharkhand Value Added Tax Act, 2005 — Section 2(lvi), 22, 29, 44, 44(1)

Citation : (2014) 4 AJR 1 : (2014) 4 JLJR 101

Hon'ble Judges : R. Banumathi, C.J;S. Chandrashekhar, J

Bench : Division Bench

Advocate : S.D. Sanjay, Senior Advocate and Sumeet Gadodia, Advocate for the Appellant; Ajit Kumar, AAG and Kumar Sundaram, JC to AAG, Advocate for the Respondent

Judgement

R. Banumathi, C.J.—The Petitioner has filed this writ petition seeking for a direction upon the respondents to make deductions of TDS from the payment of valuable consideration made to the petitioner for execution of various works contracts for the State after deducting the amount therefrom towards labour and service charges including earth work in terms of Section 44 of the Jharkhand Value Added Tax 2005 read with Rule 23 of the Jharkhand Value Added Tax Rules 2006 and for quashing the memo No. 318 dated 11.3.2013, whereby a direction was issued for deduction of TDS from the value of the entire bill of the petitioner and to refund the excess amount of TDS deducted from the petitioner''s bills.

2. The Petitioner is a Company registered under the provisions of the Companies Act and a Civil Contractor. It takes contracts for earth works, construction of minor and major bridges, construction of roads etc. The petitioner is also registered under the Jharkhand Value Added Tax Act 2005 (JVAT Act) as Works Contractor having TIN No. 20891001002. The petitioner entered into various agreements with the State of Jharkhand for execution of contracts and the present dispute pertains to following two agreements entered into by the

petitioner with the Executive Engineer, Baraj Division, Galudih:-

3. Case of the petitioner is that as per the provision of Section 44 of JVAT Act and Rule 23 of JVAT Rules, TDS is required to be deducted from the valuable consideration paid to the petitioner after deducting the amount of labour and service charges. Grievance of the petitioner is that in contravention of the said provision, TDS at a specified rate is being deducted by the State of Jharkhand from the entire bill of the petitioner, including labour and service charges. A letter No. 521 dated 11.10.2011 was sent by the Deputy Commissioner of Commercial Taxes (respondent No. 5) to the 7th respondent and the same was forwarded to the petitioner by the 7th respondent by letter dated 18.10.2011. In response to the said letter, the petitioner filed representation before the 7th respondent stating that the deduction of tax at source are required to be made pertaining to the works contract involving transfer of property in goods and not in respect of ?he payments made towards earth work involving labour and service charges. Pursuant to the representation filed by the petitioner, 7th respondent wrote a letter dated 12.12.2012 (Annexure - 6) to the Joint Commissioner of Commercial Taxes seeking clarification on the issue relating to deduction of TDS from the petitioner''s bills. The Joint Commissioner of Commercial Taxes sent a reply dated 14.12.2012 (Annexure - 7) informing that the deduction of TDS is to be made only in respect of such bills which pertains to execution of works contract where transfer of property in goods is involved. Case of the petitioner is that inspite of such direction issued by the Joint Commissioner, 5th respondent, in order to enhance the revenue collection in his Division, directed the 7th respondent to deduct TDS on the entire value of consideration of the bill amount paid to the petitioner. Being aggrieved and alleging that the respondents are trying to misinterpret the provisions of JVAT Act and Rules, the petitioner has filed the writ petition.

4. Learned Senior Counsel, Mr. S.D. Sanjay, appearing for the petitioner, contended that Section 44 of the JVAT Act specifically states that deduction of tax at source to be made in respect of the execution of 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" and Rule 23 of the JVAT Rules clarifies that "labour charges and service charges shall be excluded while making deductions from the bills of the contractor". Learned Senior Counsel contended that gross bill submitted includes the value of goods used in execution of works contract and also the labour and service components and as per the provisions of the JVAT Act and the Rules, deduction of tax is to be made from the valuable consideration paid to the contractor for execution of works contract only after deduction of labour and service charges and establishment charges. It was further submitted that since authorities are mis-interpreting the statutory provisions under Section 44 of the JVAT Act 2005 read with rule 23 of the JVAT Rules read with Notification No. SO 208 dated 31.3.2006, a direction is to be issued to the respondents not to deduct tax from the entire gross bill of the petitioner but only on the value of transfer of property in goods used in execution

of works contract.

5. To support his contention, learned Senior Counsel has relied upon the decisions rendered in the cases of Larsen & Toubro Ltd. v. State of Bihar & Ors. (117 STC 41 (PAT)), Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, , Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc., , M/s. Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and Others, and other decisions.

6. Learned Additional Advocate General, Mr. Ajit Kumar, has submitted that the works contract granted to the petitioner is a composite work which consists of earth work, lining and all structures by a single work order and transfer of goods (whether as goods or in some other form) is involved in the works contract and deduction of TDS from the entire bill of the petitioner is legal and in accordance with the provisions of the JVAT Act as well as Rules and also the Notification No. SO 208 dated 31.3.2006, which was subsequently amended vide SO 24 dated 3.10.2012. It was contended that the tax deducted at source is on account of the person from whom TDS had been deducted and Section 44(5) of JVAT Act specifically provides that the tax paid to the State Government in accordance with Section 44(3) shall be adjustable by the payee on the authority of the certificate issued to him under sub-section (4) and therefore, the petitioner cannot make grievance of the tax deducted at source. So far as the grievance of the petitioner regarding deduction of excess TDS is concerned, learned Additional Advocate General submitted that the grievance can be raised only at the stage of assessment and not at the stage of TDS. It was further submitted that if the direction, as prayed for by the petitioner, is granted, the same will result in taking away the power of assessment from the appropriate authority resulting in submission of vague figures regarding execution of works contract.

7. Upon consideration of the submissions, primarily two points arise for consideration:-

(i) When the works contract of the petitioner is a composite one involving structural work along with earth work, whether deduction of tax at source on the whole amount is contrary to Section 44 of the JVAT Act and other provisions of the JVAT Act and Rule 23 of the JVAT Rules?

(ii) Letter of the Deputy Commissioner of Commercial Taxes dated 11.3.2013 (Annexure - 11) directing deduction of VAT at source at the rate of 4% from all payments relating to works contract on the entire value of the bill including the earth work is contrary to law and whether the instructions issued by the Deputy Commissioner of Commercial Taxes in Annexure - 11 (dated 11.3.2013) is liable to be quashed?

Re: Article 366(29A)(b) and Works Contract:

8. In the case of The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , the Hon''ble Supreme Court held that the expression "sale" would only

mean and include transfer of property in goods and would not cover within its ambit sale of goods in an indivisible works contract. The Constitutional Bench held that only a divisible contract of sale and service can be taxed on the ''sale'' portion whereas an indivisible works contract cannot be taxed as ''sale''. This necessitated the 46th Constitutional Amendment wherein a new Sub-Article (29A) was introduced to Article 366 of the Constitution. Through this provision, six types of transactions which, under the conventional definition of sale would not mean ''sale'', have now become ''Deemed Sale''. One such transaction is taxing the indivisible Works Contract: Article 366(29A)(b) reads as:-

"Tax on the sale or purchase of goods'' includes 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."

After 46th amendment by virtue of Article 366(29A)(b), it had become possible for the States to levy sales tax on the value of goods involved in the works contract in the same way in which the sales tax was leviable on the price of goods and materials supplied in works contract. Upholding the constitutional validity of 46th amendment, Hon''ble Supreme Court in the case of Builders Association of India and Others Vs. Union of India (UOI) and Others, held as under:-

"....a transfer of property in goods under sub-clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29-A) of Article 366 of the Constitution is, therefore, to enlarge the scope of tax on sale or purchase of goods'' wherever it occurs in the Constitution so that it may include within Its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression ''tax on the sale or purchase of goods'' in Entry 54 of the State List, therefore, includes 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 also."

9. In the case of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, , Hon''ble Supreme Court considered the deductions, which were required to be made from the value of the entire contract in order to arrive at the value of the goods involved in execution of a works contract. In para. (47), Hon''ble Supreme Court held as under:-

"The value of the goods involved in the execution of a works contract will, there/ ore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover-

(a) labour charges for execution of the works;

(b) amount paid to a sub-contractor for labour and services;

(c) charges for planning, designing and architect''s fees;

(d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;

(e) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and

(f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

(g) other similar expenses relatable to supply of labour and services;

(h) profit earned by the contractor to the extent it is relatable to supply of labour and services.

The amounts deductible under these heads will have to be determined in the tight of the facts of a particular case on the basis of the material produced by the contractor."

Re: Section 44 of JVAT Act and other relevant provisions.

10. In order to appreciate the contention of the petitioner, the legal provisions of JVAT Act 2005 and the JVAT Rules 2006 are to be referred to. Section 44 of the JVAT Act speaks about the special provisions relating to deduction of tax at source from the valuable consideration payable to the contractors for the execution of works contract allotted to them. Section 44 reads as under:-

"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 under Section 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 subjection (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".

11. At the time of filing returns, as per Section 44(5) of the Act, any tax paid to the State Government in accordance with sub-section (3) of Section 44 shall be adjustable by the payee on the authority of the certificate issued to him and the Assessing Authority shall allow the benefit of adjustments after due verification of the payments.

12. For smooth and proper implementation of the provisions of JVAT Act, in exercise of powers conferred by Section 94 of JVAT Act, JVAT Rules 2006 have been framed. Rule 23 deals with tax deducted at source by any contractee pertaining to works contract. Rule 23 reads as under:-

"23. Tax Deduction at Source

(1) (a) Where a works contract is awarded to a VAT dealer by any contractee and where the contractee is liable for deduction of tax at source of Advance Tax, as specified in the notification issued under Section 44 of the Act, by the State Government in this behalf, the tax shall be deducted from the payment of the valuable consideration after deducting:-

(i) the amount of labour charges, services and the transactions falling under Section 3, 4 and 5 of the CST Act 1956.

(2) the amount of Advance Tax so deducted by the Contractee in pursuance to the notification issued in this behalf, the same shall be deposited in the Government Treasury in the following manner:-

(a) In the circumstances, when the contractee is the department of the State Government, it will deduct the Advance Tax from the bills of the contractor, in accordance to the rules, as provided by the Government for such respective departments and shall remit to the Government Treasury for credit therein into the respective "0040 Head", and a copy of such Schedule forwarded to the Prescribed Authorities of the appropriate circle.

(b) In the circumstances, where the contractee is other than the contractee mentioned in sub-rule (a) of this Rule, such person shall deposit the deducted Advance tax into the Head "0040", directly into the Government Treasury through a prescribed Challan, in the name of such contractors), from whose bills such deduction has been made, and furnish a statement to be submitted to the respective Circle In-charge for each month on the 15th day of the following month along with copies of challans.

(c) Every person or Government Department referred in this Rule, shall issue to the contractor, a certificate of tax deduction at source in Form JVAT 400 deducted for the respective year.

Provided that, a Certificate issued to the contractor in Form JVAT 400, shall be accepted and adjusted against the tax payable by such-contractor, by the Assessing Authority, where the contractor is registered".

Re. Contention:- Decoction of tax at source on the whole bill amount without deducting the value of earth work which involves labour and service is arbitrary.

13. The case of the petitioner is that even though in Section 44 and Rule 23 provisions have been made for deduction of TDS from the payments made towards execution of the works contract, where transfer of property in goods is involved, the said deduction is to be made on the valuable consideration only after deducting therefrom the amount paid towards labour and service charges. Grievance of the petitioner is that in the Notification SO 208 dated 31.3.2006, no provision has been made for deducting the amount of labour and service charges from the value of bill before making TDS. According to the petitioner, in Annexure - 11 (dated 11.3.2013), respondent No. 5 ordered for deduction of TDS on the entire bill amount of the petitioner including the earthwork, which is wholly arbitrary. In sum and substance, the contention of the petitioner is that the contractee cannot deduct tax at source on the whole amount including earth work which involves labour and service charges and the deduction of TDS from the entire bill without deducting labour and service charges is not in accordance with the provisions of Article 366(29A) and the principles laid down in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, and other judgments of Hon''ble Supreme Court. Further contention of the petitioner is that if a person is not liable for payment of tax at all, the plea that on completion of

the assessment, refund can be taken at a later stage, is no solace. Reliance was placed upon the decision in the case of Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, , in which Hon''ble Supreme Court held as under:-

"If a person is not liable for payment of tax at all, at any time, the collection of a tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid; because, if particular sales or purchase are exempt from taxation altogether, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turnover and for levying tax".

14. Reliance was also placed on the case of Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc., , in which Orissa Sales Tax Act for deduction of TDS was considered and the same was held ultra vires the power of the State Legislature to the extent it provided for deduction of tax at source to tax non-taxable turnover relating to component of inter-State as well as outside State sales or sales in course of import. Hon''ble Supreme Court in paras. (13) and (15) held as under:-

"13. There can be no doubt, upon a plain interpretation of Section 13-AA, that it is enacted for the purposes of deduction at source of the State sales tax that is payable by a contractor on the value of a works contract. For the purposes of the deduction neither the owner nor the Commissioner who issues to the contractor a certificate under Section 13-AA(5) is entitled to take into account the fact that the works contract involves transfer of property in goods consequent upon an inter-State sale, an outside sale or a sale in the course of import. The owner is required by Section 13-AA(1) to deposit towards the contractor''s liability to State sales tax four per cent of such amount as he credits or pays to the contractor, regardless of the fact that the value of the works contract includes the value of inter-State sales, outside sates or sales in the course of import. There is, in our view, therefore, no doubt that the provisions of Section 13-AA are beyond the powers of the State Legislature for the State Legislature may make no law levying sales tax on inter-State sales, outside sales or sales in the course of import.

......

15. It was then contended by learned counsel for the State that the Preamble of the Orissa Sales Tax Act took account of the fact that that statute was limited to the sale or purchase of goods in Orissa. Unfortunately, it would appear that the State Legislature overlooked its limitations, even as contained in the Preamble, when enacting Section 13-AA. It was also contended that the deduction that was required to be made under Section 13-AA(1) was of four per cent of the amount credited or paid by the owner to the contractor, whereas the sates tax liability of the contractor thereon was eight per cent. It was contended that this requirement proceeded on the assumption that half of the amount was not liable to tax being in respect of interstate sales, outside sales and export sales. No such assumption based on the rate of tax at any given point of time can be

made. Section 13-AA should have been precisely drafted to make it clear that no tax was levied on that part of the amount credited or paid that related to inter-State sales, outside sales and sales in the course of import, particularly after the previous Section 13-AA had been struck down by the Orissa High Court for the reason that it was couched in terms wider than were permissible to the State Legislature and that Judgment was accepted."

15. While considering the provisions of Bihar Sales Tax Act and referring the case of Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc., , Hon''ble Supreme Court in the case of M/s. Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and Others, held as under:-

"4. A bare perusal of the two provisions will make it clear that in either provision there is an obligation to deduct from transactions relating to works contract on bills or invoices raised by the works contractor an amount not exceeding 4 per cent or 2 per cent, as the case may be. Though the object of the provision is to meet the tax in respect of the transactions on all works contracts on the valuable consideration payable for the transfer of property in goods involved in the execution of the works contract, the effect of the provision is that irrespective of whether the sales are inter State sales or outside sales or export sales which are outside the purview of the State Act and those transactions in respect of which no tax can be levied even in terms of the enactment itself such deductions have to be made in the bills or invoices of the contractors. To say that if a person is not liable for payment of tax inasmuch as on completion of the assessment refund can be obtained at a later stage is no solace, as noticed in Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, . Further, there is no provision for certification of the extent of the deduction that can be made by the authority. Therefore, we must hold that arbitrary and uncanalised powers have been conferred an the person concerned to deduct up to 4 per cent from the sum payable to the works contractor irrespective of whether ultimately the transaction is liable for payment to any sales tax at all. In that view of the matter, we have no hesitation in rejecting the contention advanced on behalf of the State."

Similar view was expressed in the case of Rapti Commission Agency Vs. State of U.P. and Others, .

16. On behalf of the petitioner, reliance was also placed on the judgments of other High Courts reported in Larsen and Toubro Limited Vs. State of Karnataka and Others, , V.T.P. Constructions Vs. State of Chhattisgarh and Others, , State of Chhattisgarh and Others Vs. VTP Constructions, and also State of Andhra Pradesh and Others Vs. Larsen and Tourbo Ltd. and Others, .

17. Reliance was also placed on the case of Larsen and Tourbo Ltd. v. State of Bihar & Ors. ((2000) 117 STC 41 (PAT)) to contend that the mechanism for TDS should be rational and have independent connection with the tax and there is no rationale in making deduction of tax at source on those components over which State Legislature has no competence to levy tax and thereafter making the

assessee to file application for refund of excess amount. In the said case, the vires of Section 25A of the Bihar Finance Act regarding deduction of sales tax at source from the contractors'' bills was in question. If the contracted or any other person making payment, makes deduction under Section 25-A of the Bihar Finance Act on the full or gross value of the works contract, the amount deducted can be adjusted against the amount of tax finally assessed by the department at the time of assessment, and if the same is found to be in excess it may also be refunded, vide sub-sections (2) and (7) of Section 25-A. Pointing out that the Bihar Finance Act prescribes a period of four years as the period of limitation, the Assessing Authority may not complete the assessment till the limitation is about to expire and that the assessee cannot get back the amount which would continue to lie with the State for a period of four years, the Patna High Court struck down Section 25A of the Bihar Finance Act.

18. In Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, the assessee had contended that the second Proviso to Section 5(1) and Clause (vi) of Section 5(2)(a) of the Punjab General Sales Tax Act, 1948 were opposed to the material provisions of the Central Sales Tax Act, 1956. Taking note of the provision in the Central Act which makes it mandatory that the Tax can be collected only at one stage, the Hon''ble Supreme Court observed that the State was not justified in insisting a person who is not liable to pay tax, nevertheless to pay it in the first instance and then, claim refund at the latter stage. That was a case in which the dispute arose at the stage of assessment and not at an initial stage. The case of the present petitioner is clearly distinguishable on facts.

19. The learned Additional Advocate General has contended that the segregation of the component of labour and services from the composite works contract like the present one, is not possible at the initial stage as it requires a certain knowledge of accounting processes. It is further contended that there may be a situation in which the contractee is a layman who doesn''t know the complexity of accounting at all and thus, holding that tax deduction at source by the contractee must exclude labour and service charges involved in execution of such contract, would make the provision for TDS unworkable.

20. It is a well settled principle of interpretation of statute that a provision must be construed in such a manner so as to make it workable. In Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam and others, the Hon''ble Supreme Court observed, "the Courts strongly lean against any construction, which tends to reduce a statute to a futility". The provision of a statute must be so construed as to make it effective and operative, on the principle "ut res magis valeat quam pereat".

21. In Narmada Bachao Andolan Vs. State of Madhya Pradesh and Another, the Hon''ble Supreme Court held, "the construction that results in hardship, serious inconvenience or anomaly or gives unworkable and impracticable results, should be avoided."

22. The judgments relied upon by the petitioner [except State of Andhra Pradesh and Others Vs. Larsen and Tourbo Ltd. and Others,] refer to tax deducted at source under the Sales Tax Act. Presently we are in VAT regime, whereby every registered dealer is to file monthly/periodical/annual returns claiming deduction as prescribed or making adjustments of input tax credit. VAT being the State subject, each State has its own separate laws governing the levy of tax, rate of tax, tax deducted at source, filing of returns etc.

23. As discussed earlier, the Scheme of the JVAT Act being self contained, stands on a different footing. In terms of Section 29 of the Act, it is mandated upon every registered dealer to file periodical returns adjusting input credit and making deductions as prescribed under the Act. Section 44 stipulates deduction of tax at source to be made by the contractee for execution of the works contract in the State involving transfer of property in goods whether as goods or in some other form. The works contract referred to in Section 44 is a composite contract which involves transfer of property in goods whether as goods or in some other form and also labour and service. As per Section 44(5), any tax deducted at source paid to the State Government shall be adjustable by the payee on the authority of the certificate issued to him under subsection (4) with the tax payable to him under the Act. Having regard to the various provisions of the Act under the VAT regime, there is no question of the dealers waiting for years to get back the refund of any excess amount deducted from him. In this regard, Revenue has submitted the monthly returns filed by the petitioner which shows that in the monthly returns filed by the petitioner, tax deducted at source was adjusted from the tax payable by the petitioner. The monthly returns filed by the petitioner was assessed then and there and therefore the decision of the Patna High Court in the case of Larsen and Tourbo Ltd. v. State of Bihar & Ors. ((2000) 117 STC 41 (PAT)) is of no assistance to the petitioner.

24. Section 44 starts with "having regard to the effective recovery of tax?. Tax deducted at source is for effective recovery of tax then and there when the bill amount is paid by the contractee for the execution of works contract. It is pre-assessment of calculation of tax which is to safeguard the interest of the Revenue. At the time of making payment of the bill for execution of the work, if the contractee is to decide whether the works contract involves transfer of property in goods and then to deduct tax, it is not desirable for more than one reason. Firstly, there will not be any uniformity in deduction of tax at source relating to works contract; secondly, in view of the various provisions of the Act, if the contractee is to decide the issue, the contractee will be usurping the power of the Assessing Authorities under the Act.

25. There is sufficient guidance and mechanism provided in the Act as well as in the Rules which controlled and governed the deductions. The provision under Section 44 of the Act clearly postulates that a certificate of tax deduction can be obtained from the persons referred in sub-section (4) of Section 44 and such and any tax paid to the State government shall be adjustable by the payee, on the

authority of the certificate issued under sub-section 4. The vires of Section 44 of the JVAT Act, 2005 is not under challenge. The tax deduction at source commonly referred to as TDS" is also known as "withholding tax". The TDS provisions are meant for tentative deduction of tax subject to regular assessment. The Act does not conceive a situation that there would be a pre-assessment prior to the assessment by the Assessing Authority.

26. Further, the extent of the component of labour and service is essentially a question of fact to be determined on the terms and conditions of the contract, nature of the work and subject to production of documents at the time of assessment. In Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, , the Hon''ble Supreme Court has categorically pointed out that the expenses deductible under various heads incurred for labour and services would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. At the time of assessment of the registered dealer, the Assessing Authority will examine the books of accounts and other documents pertaining to the extent of labour and service and similar other like charges at the time of making assessment. If the contractee is to decide the component of labour and service barges involved in the works contract, the object of TDS which is intended for effective recovery of tax will be defeated. We find no merit in the contention of the petitioner that the contractee is under an obligation to exclude the component of labour and service charges involved in the execution of a composite works contract while making deduction of tax at source as prescribed under notification dated 31.03.2006 and TDS @ 4% on the entire bill amount is illegal and not supported by authority of law.

Re. Contention: Letter dated 11.03.2013 directing deduction of VAT @ 4% on the entire value of the Bill is contrary to law.

27. Coming to the facts of the case, it appears that the nature of the work, which the petitioner is required to perform, is of following three types:-

1. Pure earth work where no material is involved.

2. Lining work where both, material and labour, are involved.

3. Structure construction work where both, material and labour, are involved.

The contention of the petitioner is that the agreement entered into by the petitioner with the respondents contained three types of woks to be executed. According to the petitioner, the earth work shown in Part A of the agreement is mainly excavation of canals/ordinary rocks/foundation trenches. In such pure earth work involving labour and service, where no transfer of property in goods, either as goods or in any form, is involved, the petitioner is not liable to pay tax on the component of earth work which involves only labour and service and therefore, TDS for the value of the said earth work is not permissible.

28. Though the agreement of the petitioner is divided into three parts including earth work, it cannot be contended that the entire earth work, involves only

labour and service and when the structural work involves earth work, it also involves transfer of property of goods either as goods or in other form. In Annexure - 11 (dated 11.3.2013), 5th respondent rightly stated that where structural work is included along with earth work, deduction at 4% on the whole amount in which earth work is also included will be necessary.

29. So far as rate at which tax to be deducted in advance in respect of works contracts, Government issued Notification SO 208 dated 31.3.2006 (Annexure - 1), prescribing the rate at which deduction is to be made. As per the said Notification, 2% TDS to be deducted on the works contract subject to the restrictions thereunder. The aforesaid notification was amended so far as the rates are concerned, vide SO 24 dated 3.10.2012, by which rate at which tax to be deducted at source was increased from 2% to 4% with effect from 1.4.2012.

30. In Annexure - 7, Joint Commissioner of Commercial Taxes clarified that the deduction at the rate of 4% of advance VAT at source has to be made from the bills of the works contract but the bills of the works contract in which transfer of property in goods is not involved, deduction of VAT at source is not to be made. The Deputy Commissioner of Commercial Taxes sent Annexure - 11 to the 7th respondent in response to the clarification sought for by the 5th respondent. In Annexure - 11, 5th respondent clarified that "where structural work is included along with earth work, in such payment deduction at 4% on the whole amount in which the earth work is also included will be necessary. Annexure - 1, which also clarifies the position, is well in consonance with the provisions of the JVAT Act and Rules".

31. The Revenue has contended that since the contract of the petitioner is a composite contract involving structural work along with earth work, deduction at 4% on the whole amount, in which earth work is also included, is necessary. In terms of Section 44(5), any tax is paid to the State 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); tax payable by him under JVAT Act where any component of labour or service is involved in the earth work and if so, what is the extent of such labour and service involved will be examined at the time of filing returns with supporting documents. When tax is deducted at source by the contractee, it is not physically possible to segregate the elements of labour and service.

32. Much arguments were advanced, relying upon Annexure 6, communication sent by the 7th respondent, stating that the estimated amount of the earth work is 41.684% of the value of the contract and lining work 58.316% and seeking clarification whether 4% sales tax on earth and lining work has to be deducted or not. At the outset, it is to be pointed out that Annexure - 6 has no relevance to the subject matter in dispute. In the writ petition, the petitioner has stated that the subject matter in dispute relates to (i) Agreement No. 19F-2/07-08 dated 22.2.2008 and (ii) Agreement No. 01/F-2/08-09 dated 14.5.2008; whereas Annexure - 6 relates to Ichcha Bayai Main Canal of Agreement No. SBD -

1/2012-1013 of M/s. Triveni Engicons Pvt. Ltd. 3/6 H-S Tower L-Road Bistupur, Jamshedpur. Annexure - 6 stating that the volume or earth work is 41.684% has got nothing to do with the present contract.

33. There is no merit in the contention that various items of the earth work in the agreement of the petitioner involved only labour and services and therefore, the petitioner is not liable to pay tax for the earth work. Though the earth work might involve certain amount of labour and service, it has to be substantiated by the documents. As rightly contended by the Revenue, the works contract is a composite work involving transfer of property in goods as well as labour and services. In so far as the contention of the petitioner regarding the earth work, it is to be pointed-out that in execution of the said earth work, where transfer of property in goods either as goods or some other form and component of labour and service are involved, what are the prescribed deduction to be made are the questions that are to be decided at the time of assessment by the Assessing Authorities. Merely going by the description of the items of earth work contained in the agreement, it cannot be said that the items contained in Part A of the Contract, earth work is purely earth work involving only labour and services.

Re. Contention: Notification not making provision for deduction of labour and service charges.

34. In exercise of powers conferred under sub-section (1) of Section 44 of JVAT Act, the State Government issued notification dated 31.3.2006 prescribing rate of tax as 2% at which deduction to be made from the consideration amount of the works contract. The said notification was amended vide SO 24 dated 3.10.2012 by which tax to be deducted at source was increased from 2% to 4% with effect from 1.4.2012. The notification SO 208 dated 31.3.2006 reads as under:-

The said notification enumerates only two conditions in so far as works contract, in execution of which transfer of property in goods is involved. The restrictions are (i) no deduction shall be made for the transactions falling within Sections 3, 4 and 5 of the CST Act, 1956 and (ii) no deduction shall be made, if the works contract is under composition scheme under Section 58 of the Act.

35. The contention of the petitioner is that the above notification dated 31.3.2006 does not provide for deduction to be made for labour and service charges and thus, the said notification does not take within its fold the deductions to be made for labour and service charges as stipulated in Rule 23.

36. The above contention of the petitioner cannot be countenanced. It is to be pointed out that the vires of the said Notification SO 208 dated 31.3.2006 is not under challenge. The petitioner has filed I.A. No. 2276/2014 seeking amendment of the writ petition by inserting the prayer challenging the Notification SO 208 dated 31.3.2006 as ultra vires of Section 44 of the JVAT Act 2005 read with Rule 23 of the JVAT Rules 2006 and that it is beyond the legislative competence of the State Legislature so far as deduction of TDS from the payment of the

consideration amount pertaining to labour and service charges is concerned. Even though the writ petition was filed way back in 2013, the Interlocutory Application was filed only in the month of April, 2014 and the Interlocutory Application was not earlier pressed and only at the time of final hearing of the writ petition, arguments were sought to be advanced challenging the notification.

37. Be that as it may, let us consider the merits of the contention of the petitioner. The Notification SO 208 dated 31.3.2006 was issued in exercise of powers conferred by sub-section (1) of Section 44 of the Act. Section 44(1) of the Act stipulates that the State Government may by notification in the official gazette specify TDS to be deducted by the contractee from any valuable consideration paid to the contractors for the execution of works contract in the State. Since the notification was issued in exercise of power under Section 44(1) of the Act, the notification is not be read in isolation but to be read along with the Scheme and other provisions of the Act.

38. The Scheme of the Act provides for filing of monthly/periodical/annual returns, deductions to be made as prescribed under the Act and assessment by the competent authorities. In terms of Section 2(lvi), ''taxable turnover'' means turnover on which dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed.

39. Rule 22 deals with determination of taxable turnover for the purpose of works contract. Rule 22 reads as under:-

"22. [Determination of Taxable Turnover FOR THE PURPOSE OF WORK CONTRACT]

1.(a) The works contractor VAT Dealer shall be liable to pay tax at the appropriate rates, on the total value of goods, transferred in property (either in the same Form or in other Form) involved in execution of works contract.

(b) When such VAT dealer awards any part of the contract to a subcontractor, such sub-contractor shall issue a tax invoice to the contractor for the value of the goods at the time of incorporation in such subcontract.

The tax charged in the tax invoice issued by the sub-contractor shall be accounted by him in his returns.

(c) The value of the goods used in execution of work in the contract, declared by the contractor shall not be less than the purchase value and shall include total consideration contract charges, including blasting and breaking charges, crusher charges, loading, transport and unloading charges, stacking and distribution charges, expenditure incurred in relation to hot mix plant and transport of hot mix to the site and distribution charges.

(d) The value of goods involved shall be taxable after deducting from it, the following charges, such as:-

(i) Labour charges for execution of the works; (ii) Charges for planning, designing and architect fees; (iii) Charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract; (iv) Cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract, the property in which is not transferred in the course of execution of a works contract; (v) Cost establishment of the contractor to the extent it is relatable to supply of labour and services; (vi) Other similar expenses relatable to supply of labour and services; (vii) Profit earned by the contractor to the extent it is relatable to supply of labour and services.

2. Where the amount of charges towards the labour, services, hire charges or all other like charges in any contract are not ascertainable, from the terms and conditions or the accounts famished in this behalf of the contract, the amount of such charges shall be calculated at the following percentages:-

Provided, where such contractor VAT dealer has not maintained the accounts to determine the correct value of the goods at the time of Incorporation he shall pay tax w.e.f. 07.05.2011 at the rate of fourteen percent (14%) on the total consideration received or receivable subject to the deductions specified in the table aforesaid. In such cases the contractor VAT dealer shall not be eligible to claim input tax credit and shall not be eligible to issue tax invoices.

3. Where a works contractor is permitted to pay lump-sum amount or Composition of Tax under Section 22 or 58 respectively of the Act, the provisions of this Rule shall not apply in such cases."

40. As per Rule 22(1)(d), the value of goods involved shall be taxable after deducting from it the charges as indicated in Rule 22(1)(d)(i) to (vii) where the amount of charges towards labour and service, hire charges or any other like charges in any contract are not ascertainable, in terms of Rule 22(2), such charges shall be calculated at the prescribed percentage as indicated in Rule 22(2). The various provisions of the JVAT Rules, in particular Rules 22 and 23, stipulate various provisions for deductions to be made including labour and service charges and the Notification SO 208 has to be read along with other provisions of the JVAT Act and Rules and not in isolation. The Notification SO 208 dated 31.3.2006 is not derogatory to the provisions of the JVAT Act and the Rules.

41. We summarize our conclusion as under:-

? Tax deducted at source is for effective recovery of tax then and there, when the bill amount is paid by the contractee for the works contract for the execution of the works contract. If the contractee is to decide the component of labour and service involved in the works contract, it would lead to practical inconveniences and make the provision unworkable. The object of the deduction of tax at source, which is intended for effective recovery of tax, will thus, be defeated.

? Various provisions of the JVAT Act and Rules, in particular Rules 22 and 23, stipulate various provisions for deduction to be made including labour and service charges and the Notification SO 208 dated 31.3.2006 has to be read along with other provisions of the JVAT Act and Rules. The communication of the 5th respondent (Annexure - 11 dated 11.3.2013) only clarifies the position and is in consonance with the provisions of the JVAT Act and Rules.

? There is no merit in the contention that the various items of the earth work in the agreement of the petitioner involve only labour and service and no deduction of tax at source to be made on the earth work.

42. From the bills submitted by the petitioner, it appears that deduction of certain taxes at source have been made. The petitioner had obtained interim order in this writ petition on 21st June, 2013 and thereafter no deduction of VAT at source was made from the bill amount paid to the petitioner. Since the writ petition is dismissed, it is for the Department to take appropriate steps to collect the amount payable by the petitioner either from the pending bills, if any, or otherwise by separate proceedings and in accordance with law.

43 In the result, writ petition is dismissed. The amendment application, I.A. No. 2276/2014, is also dismissed and the interim order granted in this writ petition on 21st June, 2013 stands vacated. The respondents are at liberty to proceed against the petitioner for recovery of the VAT payable by the petitioner in accordance with law.

