PROCEEDINGS OF THE APPELLATE DEPUTY COMMISSIONER(CT),
PUNJAGUTTA DIVISION, HYDERABAD
PRESENT: SMT. Y. SUNITHA,

ADC Order No.417 Date of hearing:22-06-2020
Appeal No.BV/64/2019-20 Date of order :27-02-2021

1. Name and address of the Appellant.		M/s Nilgiri Estates, Hyderabad.
2. Name & designation of the Assessing Authority.	:	Commercial Tax Officer, M.G.Road-S.D.Road Circle, Hyd.
3. No.,Year & Date of order	:	TIN No.36607622962,dt.25-07-19, (2017-18 / Entry Tax)
4. Date of service of order	:	30-07-2019
5. Date of filing of appeal	:	27-08-2019
6. Turnover determined by The Assessing Authority	:	-
7. If turnover is disputed:		
(a) Disputed turnover	:	-
(b) Tax on disputed turnover	:	-
8. If rate of tax disputed:		
(a) Turnover involved	:	-
(b) Amount of tax disputed	:	-
9. Amount of relief claimed	:	₹1,76,588/-
10. Amount of relief granted	:	REMANDED
11. Represented by	:	Sri M. Ramachandra Murthy, Chartered Accountant

NOTE: An appeal against this order lies before the Telangana VAT Appellate Tribunal, Hyderabad within (60) days from the date of receipt of this order:

ORDER

M/s Nilgiri Estates, Hyderabad, the appellant herein, is a registered dealer under the TVAT Act bearing TIN 36607622962 and an assessee on the rolls of the Commercial Tax Officer, M.G.Rod-S.D.Road Circle, Hyderabad (hereinafter referred to as the territorial Assessing Authority).

The present appeal is filed against the assessment orders dated 25-07-2019 (A.O.No.39341) passed by the Assessing Authority for the tax periods falling under the year 2017-18 (upto June, 2017) under the Telangana Tax on Entry of Goods into Local Areas Act, 2001 (for short – Entry Tax on Goods Act), disputing levy of tax amounting to ₹1,76,588/-.

The grounds of appeal filed by the appellant are extracted hereunder:

"The impugned order is ex-facie illegal, arbitrary, improper and unjustifiable.

It is submitted that the learned AC has issued a very brief proforma show cause notice stating that examination of data and records available in the VATIS system of Commercial Taxes Department revealed that appellant has imported notified goods into the State of Telangana by issuing statutory forms and that exemption from liability of Entry Tax is available only when the notified goods are resold or used as inputs in manufacture. Accordingly it has been proposed to demand tax of Rs.1,76,588/- on the purchase of notified goods during the period 2017-18 (upto June, 2017).

It is submitted that the appellant has executed the project of constructing flats in Hyderabad and has opted for payment of tax under composition. Appellant has purchased cement and parts and accessories of lifts, from out of State and used the goods purchased within the State and from outside the State in the construction of flats and thereafter effected deemed sale of those goods in the nature of works contract along with the constructed flats. All the goods purchased by the appellant from other States are deemed to have been sold in the execution of works contracts.

As per the annexure enclosed to the notice the learned AC proposed to levy entry tax on cement; lifts, elevators, accessories & parts thereof. It shall be pertinent to submit that except stating that they are 'notified' goods, there is practically no clue in the notice or in the impugned order as to in which Notification, these goods have been notified. The show cause notice as well the order is therefore non-speaking. The learned AC failed to discharge the burden cast upon him. Under Article 265 of the Constitution of India, no tax shall be levied except by an authority of law. There is nothing to show in the impugned order as to under which law (Notification), tax has been levied. For this ground only the impugned order is liable to be set aside.

Appellant contended that sub Section (28) under Section 2 of TVAT Act, 2005, inter alia defines 'sale' as follows:-

"Section 2 (28) 'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods (whether as such goods or in any other form in pursuance of a contract or otherwise) by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration or in the supply or distribution of goods by a society (including a co-operative society), club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on goods.

Explanation VI :- Whenever any goods are supplied or used in the execution of a works contract, there shall be deemed to be a transfer of property in such goods, whether or not the value of the goods so supplied or used in the course of execution of such works contract is shown separately and whether or not the value of such goods or material can be separated from the contract for the service and the work done."

In view of the above, appellant submitted that there is no difference between a deemed sale and a simple sale. Both constitute one and the same for the purpose of sales taxation. A simple sale and deemed sale shall therefore stand on the same footing and are to be given the same status and legal validations. There cannot be any differentiation and discrimination between normal sale and a deemed sale. Therefore there shall be deemed sale of goods, when the goods are used and transferred in the execution of works contracts. Hence appellant has resold all those goods.

It is next submitted that under Section 3 (1) of the Entry Tax Act, only entry of the notified goods into any local area is liable to tax at the rates notified by the Government. Further Section 3 (2) of the Act reads as follows:-

"(2) Notwithstanding anything contained in sub-section (1), no tax shall be levied on the notified goods imported by a dealer registered under the Andhra Pradesh Value Added Tax Act, 2005 who brings such goods into any local area for the purpose of resale or using them as inputs for manufacture of other goods in the State of Andhra Pradesh or during the course of inter-State trade or commerce :"

Thus if any notified goods are brought into the local area by a registered dealer for the purpose of resale in the State, no entry tax need be paid. In this connection appellant submits that in his circular No.A1(3)/ 2089/2002 dated 17.8.2002, the Honourable Commissioner of CT, AP, Hyderabad has clarified that if Bitumen brought is sold or used in Works Contract, no tax is payable. It is settled law that for the purposes of sales taxation, there is practically no difference between an ordinary sale and a deemed sale of goods. Goods incorporated in the works are deemed to have been sold. The above clarification of the Commissioner of CT holds

good in respect of this case also. Appellant therefore submits that it is eligible for exemption from payment of tax in respect of the entire turnover mentioned in the notice in terms of Section 3 (2) of the Act.

On submission of reply as above the learned AC stated that in support of the objections filed the appellant has not filed any documentary evidence showing that it has consumed the purchased material in the works contract. Appellant submits that in the letter of objections the appellant has clearly stated that the commodities as per the annexure have been used by it in the construction of flats ie., execution of works contract and hence by virtue of definition of sale as per Section 2(28) of TVAT Act and Explanation VI given thereunder, there shall be deemed to be a transfer of property in goods in the execution of contract and there is no difference between a deemed sale and a simple sale. Hence there is no liability to pay entry tax. As the appellant has already stated that the goods purchased from outside the State are used in the construction of flats which are deemed to have been sold and paid the tax on the output turnover it is highly unjustified to make a sweeping comment that there is no other documentary evidence. The AC being the assessing authority under the VAT Act vey much knows that the appellant has been paying tax on the sale of flats as and when they are sold. No other documentary evidence is required. Thus the assessment order passed is not justified and is therefore liable to be set aside.

CEMENT, LIFTS, ELEVATORS, ACEESSORIES AND PARTS THEREOF AND SANITARYWARE—Appellant submits that if any notified goods are brought into the local area by a registered dealer for the purpose of resale in the State, no entry tax need be paid. In this connection appellant submits that it has used these goods in the construction of flats, etc., which are sold subsequently. As the appellant has resold all these goods purchased from other States, the same are exempt from levy of entry tax in terms of Section 3 (2) of the Entry Tax Act.

It shall be pertinent to submit that whereas all the other builders have been exempted from payment of entry tax in similar circumstances, there is no reason in targeting the appellant for the purpose of levy of entry tax.

Without prejudice to all the above, it is submitted that under the Proviso to Section 3 of the Entry Tax Act, 2001, VAT or CST paid to the other State seller has to be deducted from out of the entry tax leviable. Hence such deduction has to be given, if at all entry tax is leviable. This is without prejudice to the appellant's main contention that the appellant is not liable to pay any entry tax for the reasons already explained supra.

It is therefore submitted that the impugned levy of entry tax is illegal and improper.

For these grounds and the other grounds that may be urged at the time of hearing, appellant prays to set aside the impugned order and allow the appeal."

Sri M. Ramachandra Murthy, Chartered Accountant and Authorised Representative of the appellant appeared and argued the case reiterating the contentions as set-forth in the grounds of appeal. The Authorised Representative also placed reliance in certain case law in support of the contention that the deemed sale is also to be treated as on part with normal sale by furnishing certain documentary evidence and pleaded for setting-aside of the impugned orders.

I have heard the Authorised Representative and gone through his contentions as well as the contents of the impugned orders. The appellant is dealing in execution of works contract. For the disputed tax periods, the Assessing Authority observed that on examination of the records available in the VATIS system of the Department, it was revealed that the appellant had made purchases of notified goods from other States and since the exemption from of liability for entry tax is available only when such notified goods are re-sold or used as inputs in manufacture and as seen from the nature of the business and the commodities purchased, it was opined that the commodities purchased are consumed by the appellant. With these observations, the Assessing Authority issued a show cause notice proposing to levy tax under the Entry Tax on Goods Act involving the disputed tax amount herein. The appellant filed their objections stating that since the goods purchased were used in the execution of works contract undertaken by them, no entry tax can be fastened on such purchases as the transaction is one in the nature of deemed sale. However, the Assessing Authority rejected such objections on the ground that the appellant had not filed any documentary evidence to support their claims and passed the impugned orders confirming the levy of tax as was proposed in the show cause notice.

The levy of tax made by the Assessing Authority is assailed by the appellant on several counts, but mainly on the ground that they have purchased the goods in question from outside the State and used the same in the execution of works contract and the applicable VAT has been paid and since there is a deemed sale of the goods used in the works contract and the deemed sale is to be treated on par with a normal sale and in view of the provisions of Section 3(2) of the Entry Tax Act, no tax can be levied. In support of such contention, the appellant also furnished a copy of assessment order passed under the TVAT Act for the disputed tax periods.

Thus, the only point that arises in the present appeal is whether the Assessing Authority is correct in levying the impugned entry tax or not or the appellant is eligible for exemption on the goods purchased from outside the State used in the execution of works contract, as per the provisions referred to above.

In order to examine the rival claims, it is necessary to go through the provisions contained under Section 3 of the Entry Tax on Goods Act, which reads as under:

> *"3. **Levy and collection of tax**:*
>
> *(1) (a) There shall be levied and collected a tax on the entry of the notified goods into any local area for sale, consumption or use therein. The goods and the rates at which, the same shall be subjected to tax shall be notified by the Government. The tax shall be on the value of the goods as defined in clause (n) of sub-section (1) of section 2 and different rates may be prescribed for different goods or different classes of goods or different categories of persons in the local area.*
>
> *(b) The tax shall be payable by the importer in such manner and within such time as may be prescribed.*
>
> *(c) The rate of tax to be notified by the Government in respect of any commodity shall not exceed the rate*

applicable for that commodity under the Andhra Pradesh Value Added Tax Act, 2005 (Act 5 of 2005) or the Notifications issued thereunder:

Provided that the tax payable by the importer under this Act shall be reduced by the amount of tax paid, if any, under the law relating to Value Added Tax in force in Union Territory or State, in which the goods are purchased or Central Sales Tax Act, 1956.

(2) Notwithstanding anything contained in sub-section (1), no tax shall be levied on the notified goods imported by a dealer registered under the Andhra Pradesh Value Added Tax Act, 2005 who brings such goods into any local area for the purpose of resale or using them as inputs for manufacture of other goods in the State of Andhra Pradesh or during the course of inter-State trade or commerce.

....."

From the above provisions, it can be seen that as per clause (a) of sub-section (1), tax is to be levied and collected on entry of the notified goods into any local area for sale, consumption or use therein on the goods and rates that will be notified by the Government. As per sub-section (2), no tax is to be levied on the goods imported by a dealer registered under the VAT Act who brings such goods into the local area for the purpose of re-sale or using them as inputs for manufacture of other goods in the Sate or during the course of inter-State trade or commerce.

Here, it also necessary to take note of the circular issued by the Commissioner of Commercial Taxes in ref No. CCT's Ref. No.AI (3)/911/2005- dated 23-01-2006, wherein it was clarified and instructed that all the notified goods, imported by the dealers, registered under APVAT Act, from outside the state for the purpose of resale as well as for the purpose of using them as inputs for manufacture of other goods in the State are not liable tax under the Entry Tax on Goods Act.

Now the only issue that needs to be decided is whether there is a resale of goods when goods are used as inputs in execution of works contract or not? Not only the definition of "Sale" as contained in sub-section (28) of Section 2 of the TVAT Act takes within ambit a deemed sale within its ambit, but also it is a settled law that deemed sale is also to be treated on par with a normal sale since in both of them, there is a transfer of property in goods from one person to another. This view of deemed sale is also to be treated on par with a normal sale is further fortified by the decision rendered by the Honourable Supreme Court in the case of M/s Builders Association of India & Others Vs Union of India & Others (73 STC 370), as relied upon by the Authorised Representative, during the course of personal hearing. In the said decision, while examining the constitutional validity of the provisions relating to levy of tax on the transaction of works contract (deemed sale), as to the treatment of deemed sale on par with a normal sale, the Honourable Supreme Court observed and held as under:

> *"If the power to tax a sale in an ordinary sense is subject to certain conditions and restrictions imposed by the Constitution, the power to tax a transaction which is deemed to be a sale under article 366(29-A) of the Constitution should also be subject to the same restrictions and conditions. Ordinarily unless there is a contract to the contrary in the case of a works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building. The contractor becomes liable to pay the sales tax ordinarily when the goods or materials are so used in the construction of the building and it is not necessary to wait till the final bill is prepared for the entire work.*
>
> *It is not correct to say that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate, that is the entire building that is actually constructed. The Forty-sixth Amendment does not more than making it possible for the States to levy sales tax on the price of goods and materials used in works*

contract as if there was a sale of such goods and materials. Sub-clause (b) of article 366(29-A) should not be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under clause (29-A) of article 366 is to be found only in entry 54 and not outside it.

What follows from the above observations of the Honourable Supreme Court is that restrictions and conditions apply to the normal sale shall also be applicable to the deemed sale.

Here, it is also relevant to refer to the circular issued by the Commissioner of Commercial Taxes, Hyderabad in CCT's Ref.No.AI(31)/2089/2002, dated 17-08-2002 on a representation with regard to Entry Tax on Bitumen filed by M/s Indian Oil Corporation, it was clarified as under:

"With reference to your letter cited, it is to inform that if the Bitumen brought is sold or used in Works Contract, no tax is payable."

In the light of the discussion made above, it is to be concluded that if the goods imported from outside the State are used in execution of works contract, there is a deemed sale and in such a case, no tax can be levied under sub-section (1) of Section 3 of the Entry Tax on Goods Act.

As seen from a copy of assessment order passed under the TVAT Act in A.O.No.5460, dated 23-04-2018 now produced, it is seen that the assessment of the appellant for the tax periods from July, 2015 to Jun2, 2017 (including the disputed tax periods in the present appeal i.e., from April, 2017 to June, 2017) was completed by the Commercial Tax Officer, Maredpally circle, Hyderabad (for short – Audit Officer) on the authorization issued by the Deputy Commissioner(CT), Begumpet Division, Hyderabad. While doing so, the Audit Officer while rejecting

the claim of the appellant that their turnovers to be assessed under Section 4(7)(d) of the TVAT Act on the ground that the appellant had not opted to pay tax under composition by filing Form VAT 250, determined the turnovers of the appellant under Section 4(7)(a) of the TVAT Act read with Rule 17(1)(g) of the TVAT Rules by allowing a standard deduction at 30% towards labour and services and levied tax on remaining 70% of the total contractual receipts. Thus, the claim of the appellant that they are doing business as a works contractor is found to be reasonable.

However, as already observed above, since the Assessing Authority has passed the impugned order confirming the proposed levy of tax made in the show cause notice only on the ground that the appellant had not filed any documentary evidence, I find the matter herein requires verification at the Assessing Authority's end.

For the reasons discussed above, I feel it just and proper to remit the matter back to the territorial Assessing Authority, who shall cause examination of the claims made by the appellant with reference to the relevant documentary evidence that were already available on record or that would be produced by the appellant and pass such orders as deemed fit in accordance with the provisions of law, duly bearing in mind my observations made as well as the judge made law, referred to above, after affording a reasonable opportunity to the appellant to present its case. With this direction, the impugned order is set-aside on the disputed tax amounting to ₹1,76,588/- and the appeal thereon remanded.

In the end, the appeal is **REMANDED**.

APPELLATE DEPUTY COMMISSIONER(CT),
PUNJAGUTTA DIVISION, HYDERABAD.

To
The Appellants.
Copy to the Commercial Tax Officer, M.G.Road-S.D.Road Circle, Hyd.
Copy to the Dy.Commissioner(CT), Begumpet Division, Hyderabad.
Copy submitted to the Additional Commissioner(CT) Legal, and Joint Commissioner(CT), Legal, Hyderabad.