THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE

AND

THE HON'BLE SHRI JUSTICE ANIL KUMAR JUKANTI

WRIT PETITION No.35543 OF 2012

ORDER: *(Per Hon'ble Shri Justice Anil Kumar Jukanti)*

Mr. K.P. Amarnath Reddy, learned counsel representing Mr. Karthik Ramana Puttamreddy, learned counsel for the petitioner.

Mr. B. Narasimha Sarma, learned Additional Solicitor General of India representing Mr. Gadi Praveen Kumar, learned Deputy Solicitor General of India for respondent No.3.

2. This writ petition is filed seeking the following relief:

> *"…to issue Writ of Certiorari or any other appropriate order or direction*
>
> *(a) calling for the records on the file of the 1st Respondent relating to the assessment order dated 15.10.2012 for the period 2006-07 under APVAT Act, 2005 and quash the order of assessment dated 15.10.2012, as passed without proper authorization from the Deputy Commissioner.*

(b) to declare that the transactions fall under Section 65(105)(zzzm) of the Finance Act, 1994 and that the Petitioner is not liable to pay VAT under Section 4(8) of the APVAT Act on this turnover.

(c) to declare Section 4(8) of the APVAT Act as travelling beyond Entry 54 of List II of the Seventh Schedule to the Constitution of India in so far as it seeks to levy tax on a service transaction without identifying the value of sale involved.

(d) in the alternative if the transactions entered into by the Petitioner are to be treated as transferring right to use goods attracting tax under Section 48 of the APVAT Act declare that the Petitioner is entitled to pay at 4 only under Section 48(B) of the APVAT Act.

(e) and further declare that the payment of service tax of Rs.1,45,99,350/- by the Petitioner and the retention of same by 3rd and 4th Respondent as without authority of law and contrary to Article 265 of the Constitution of India and consequently direct 3rd and 4th Respondents to transfer the amount of Rs.1,45,99,350/- paid as service tax for the period 2006-07 to the credit of 1st Respondent towards VAT dues payable as per impugned order of the 1st Respondent and pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice".

3. Facts giving rise to filing of this petition in nutshell are that the petitioner is in the business of leasing of hoardings to various customers for display of advertisements. The Commercial Tax Officer passed orders of assessment dated 25.09.2009 for a period from 2005-06 to 2008-09 levying

service tax under Section 4(8) of the Andhra Pradesh Value Added Tax Act, 2005 (for short 'the VAT Act, 2005') on the amounts received for leasing of hoardings. The aforesaid orders of assessment were challenged by the petitioner in a batch of writ petitions, namely W.P.Nos.23810, 23811, 23816 and 23839 of 2009. A Division Bench of this Court by a common order dated 11.02.2009 directed the Commercial Tax Officer to issue fresh show cause notice to the petitioner and to afford an opportunity of hearing and thereafter to pass fresh orders. In compliance of the aforesaid order, the Commercial Tax Officer issued a show cause notice on 30.08.2011. The petitioner filed objections on 05.10.2011.

4. Thereafter a fresh notice dated 16.01.2012 was issued. The petitioner filed a reply on 31.01.2012. The opportunity of personal hearing was afforded to the petitioner on 22.06.2012 and thereafter the Commercial Tax Officer by an order dated 15.10.2012 levied tax on the transactions under Section 4(8)

of the VAT Act, 2005 for the period from 2006-07. The aforesaid order of assessment is under challenge.

5. The learned counsel for the petitioner submitted that the petitioner is not a dealer within the meaning of Section 2(10) of the VAT Act, 2005 and therefore did not register itself as a dealer. It is submitted that hoardings installed and erected for display of advertisements for a specific period cannot be considered as goods within the meaning of Section 2(16) of the VAT Act, 2005 and therefore, the petitioner cannot be fastened with the liability under Section 4(8) of the VAT Act, 2005. It is further submitted that the assessment is without jurisdiction as there is no authorization as required under Rule 59 of the Telangana Value Added Tax Rules, 2005 (hereinafter referred to as 'the VAT Rules, 2005'). It is contended that there is no transfer of right to use and the hoardings always remain with the petitioner and the petitioner maintains structure along with unipole sheet for the entire contract period and receives consideration for the

services provided. It is urged that the petitioner pays license fee to the municipality for display of such advertisements. It is urged that Section 4(8) of the VAT Act, 2005 is *ultra vires* as the same is beyond Entry 54 of List II of Seventh Schedule to the Constitution of India. It is contended that if a transaction involves a transfer of right to use of goods and a taxable service under the Finance Act, 1994, the Centre and the State Governments simultaneously cannot levy service tax and value added tax on full value of consideration and there is no provision to split the value of consideration.

6. It is argued that the service tax paid by the petitioner either be refunded to it or be credited towards dues payable by the petitioner under the VAT Act, 2005. It is also argued that value of tax collected from the customers cannot be part of consideration for the purpose of levy under Section 4(8) of the VAT Act, 2005 and levy of service tax and tax under the VAT Act, 2005 amounts to double taxation, which is not permissible under the law.

7. On the other hand, learned Additional Solicitor General of India has supported the levy of service tax under the provisions of the VAT Act, 2005 and has submitted that the petitioner is liable to pay the value added tax under Section 4(8) of the VAT Act, 2005 on the turnover. It is urged that the contention that Section 4(8) of the VAT Act, 2005 is beyond Entry 54 of List II of the Seventh Schedule to the Constitution of India is misconceived. In support of his submissions, reliance has been placed on the decisions in **Greater Eastern Shipping Company Limited v. State of Karnataka[1], Ad Age Outdoor Advertising Private Limited vs. Government of Andhra Pradesh[2], G.S.Lamba & Sons v. State of Andhra Pradesh[3], Viceroy Hotels Limited v. Commercial Tax Officer[4]** and **Aggarwal Brothers v. State of Haryana[5].**

8. Heard learned counsels, perused the record.

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[1] (2020) 3 SCC 354
[2] 2011 SCC OnLine AP 1077 : (2011) 39 VST 323
[3] 2011 SCC OnLine AP 1108
[4] 2011 SCC OnLine AP 1089
[5] (1999) 9 SCC 182

9. Undisputedly, the orders of assessment were passed against the petitioner by the Commercial Tax Officer for the period from 2005-06 to 2008-09 levying service tax on the amounts received for lease of hoardings under Section 4(8) of the VAT Act, 2005. The petitioner thereupon challenged the validity of the aforesaid notices in writ petitions, namely W.P.Nos.23810, 23811, 23816 and 23839 of 2009. In the aforesaid writ petitions, the petitioner has prayed for the following reliefs:

> *"(a) W.P.No.23810 of 2009:*
>
> > *"... issue an appropriate writ, direction or order especially in the nature of writ of mandamus declaring the assessment order dated 25.09.2009 passed by the respondent No.3 for the assessment year 2007-08 as being illegal, arbitrary, unlawful and consequently set aside the same."*
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> *(b) W.P.No.23811 of 2009:*
>
> > *"... issue an appropriate writ, direction or order especially in the nature of writ of mandamus declaring the assessment order dated 25.09.2009 passed by the respondent No.3 for the assessment year 2006-07 as being illegal, arbitrary, unlawful and consequently set aside the same."*

(c) W.P.No.23816 of 2009:

> *"… issue an appropriate writ, direction or order especially in the nature of writ of mandamus declaring the assessment order dated 25.09.2009 passed by the respondent No.3 for the assessment year 2008-09 as being illegal, arbitrary, unlawful and consequently set aside the same."*

(d) W.P.No.23839 of 2009:

> *"… issue an appropriate writ, direction or order especially in the nature of writ of mandamus declaring the assessment order dated 25.09.2009 passed by the respondent No.3 for the assessment year 2005-06 as being illegal, arbitrary, unlawful and consequently set aside the same."*

10. The above writ petitions filed by the petitioner were disposed of by a judgment in **Ad Age Outdoor Advertising Private Limited** (supra). The operative portion of the aforesaid judgment reads as under:

> *"**19.** The jurisdictional facts, as to whether the items in question constitute "goods" or "immovable property", are required to be examined by the assessing authority in the light of the principles, and the judgments, aforementioned. We consider it appropriate, therefore, to set aside the impugned orders of assessment, direct the third respondent to issue a detailed show- cause notice afresh, give a reasonable opportunity to the petitioner to submit their objections thereto and, thereafter, pass fresh orders of assessment in accordance with law. We make it clear that we have neither expressed any opinion on the merits nor have we considered any of the other contentions urged before us by counsel on either side. Needless to state that*

> *it is open to the petitioner to raise all such grounds, as are available to them in law, before the third respondent on receipt of the show-cause notice."*

11. Thus, from perusal of the aforesaid writ petitions, it is clear that the petitioner has challenged the impugned assessment orders as illegal and arbitrary. The petitioner did not seek the following reliefs in the aforesaid writ petitions, which are sought in the present writ petitions:

> "*(b) to declare that the transactions fall under Section 65(105)(zzzm) of the Finance Act, 1994 and that the petitioner is not liable to pay VAT under Section 4(8) of the APVAT Act on this turnover;*
>
> *(d) to declare Section 4(8) of the APVAT as travelling beyond Entry 54 of List II of the Seventh Schedule to the Constitution of India insofar as it seeks to levy tax on a service transaction without identifying the value of sale involved;"*

Thus, it is evident that the petitioner did not challenge the validity of Section 4(8) of the VAT Act, 2005 as well as that the transaction falls within the provisions of the Finance Act, 1994, in the earlier round of litigation, i.e., in W.P.Nos.23810, 23811, 23816 and 23839 of 2009.

12. It is well settled proposition of law that the principle of constructive *res judicata* applies to writ proceedings [see **Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra**[6]; **S. Nagaraj (dead) by L.Rs v. B.R.Vasudeva Murthy**[7]; **M. Nagabhushana v. State of Karnataka**[8] and **Union of India v. Major S.P. Sharma**[9]]. Therefore, it is not necessary to deal with the aforesaid reliefs as the same are barred on the principles of constructive *res judicata.*

13. Therefore, the only issue which arises for consideration in the instant writ petition is with regard to the validity of order dated 15.10.2012. The Commercial Tax Officer in his order dated 15.10.2012 on the basis of physical inspection, which was conducted in the presence of the petitioner on 22.11.2011 with a view to ascertain the degree and object to annexation of hoardings *inter alia* held that if the hoarding is classified as one of the movable properties, the question of

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[6] (1990) 2 SCC 715
[7] (2010) 3 SCC 353
[8] (2011) 3 SCC 408
[9] (2014) 6 SCC 351

levy of tax on transfer of right to use under Section 4(8) of the VAT Act, 2005 arises. The Commercial Tax Officer after taking into account the place of erection and the types of hoardings, namely unipole hoarding, building top roof based hoarding, ground based hoarding recorded a finding that the rectangular metal frame hoarding and structure installed by the petitioner are such a nature that they are detachable without causing damage to the steel structure and therefore, it is a movable property and is 'goods' within the definition under the provisions of the VAT Act, 2005. The Commercial Tax Officer further held as follows:

> "*From the reading of the above, it indicates that the attachment of hoarding to the earth or building with nuts and bolts and welding alone cannot decide the nature of property as either immovable or movable. Apart, the other factor i.e. the purpose of attachment can decide the nature of property. The hoarding is erected on the leased earth/building. This means the assessee is a lessee. The purpose of attachment is for the temporary beneficial enjoyment of the hoarding. The attachment under no stretch of imagination is not for permanent enjoyment. The assessee as a lessee shall vacate/remove/detach*

hoardings from the land or building on end of the tenancy. The hoarding cannot be part and parcel of the land/building. The hoarding is erected on the land/building with an agreement to remove/detach from the building/land for temporary period. When the attachment is for temporary purpose, irrespective of the degree of annexation/attachment with nuts and bolts or welding, the nature of property constitute movable. The hoarding is erected with an intention to enjoy benefits from the hoarding but not from the land/building. The building in which the hoarding is attached cannot get any benefit from the hoarding. It is also necessary to extract the proposition of the Apex Court in the case of M/s the Solid and Correct Engineering Works case ((2010) 5 SCC 122) (para 23).

> *…Doors, windows and shutters of a house are attached to the house, which is imbedded in the earth. They are attached to the house which is imbedded in the earth for the beneficial enjoyment of the house. They have no separate existence from the house. Articles attached that do not form part of the house such as window blinds, and sashes, and ornamental articles such as glasses and tapestry fixed by tenant, are not affixtures.*

It is clear from the above proposition that the hoarding has erected/installed on the land/terrace of the building/ on the walls of the building for the beneficial enjoyment of the hoardings and not the building or land. The building cannot get any thing from the hoarding. Thus,

the hoardings are separate existence from the building/land and the hoarding under no stretch of imagination do not form part of the building/land erected by the assessee lessee/tenant. Hence, the hoardings are constitute movable property.

It is also relevant to rely on the judgment in the case of M/s Sirpur Paper Mills Ltd Vs. Collector of Central Excise Hyderabad (1 SCC 400). Held that it is, however, not necessary that whatever is embedded in the earth must be treated as immovable property. For example, a factory owner or a house-holder may purchase a water pump and fix it on a cement base for operational efficiency, and also for security. That will not make the water pump an item of immovable property. Some of the components of a water pump may even be assembled on site. That too will not make any difference to the principle. Just because a machine is fixed to the earth for better functioning does not automatically make it an immovable property".

In view of the above facts and circumstances discussed supra, it is obvious that the hoardings are movable property.

14. The Commercial Tax Officer further concluded that the transaction is a transaction of right to use the hoarding,

which is 'goods' and is amenable to tax under Section 4(8) of the VAT Act, 2005 for the followings reasons:

> *"The assessee is also relied on the judgment of the Hon'ble High Court in the case of State of AP Vs Prakash Arts (2008) 18 VST 39 (AP) wherein the court affirmed the judgment of the Tribunal. The Tribunal passed the order holding that the hoardings are immovable property. But the Hon'ble High Court recently passed a detailed judgment in the case of M/s Ad Age Outdoor Advertising Private Ltd, Hyderabad Vs State of AP (W.P. 23811 of 2009 dt 11-02-2011) on the subject of hoardings for fresh consideration with certain directions to the assessing authority. In view of the new judgment, the assessee cannot rely on the old judgment on the same subject. More so the Apex Court in the case of M/s BSNL Vs Union of India (145 STC 91) laid certain principles or parameters/attributes to constitute a deemed sale i.e. transfer of right to use. In view of this judgment and judgment of the Hon'ble High Court in the case of M/s Ad Age Outdoor Advertising Private Ltd, the point for consideration whether the attributes prescribed by the Apex Court are present or not in the present case.*
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> *The assessee is also relied on the judgment in the case of M/s Imagic Creative (12 VST 371). It is held in the judgment that either service tax or sales tax has to be paid but not both. It does not mean that if service tax is paid*

there is no sales tax. In other words it does mean that appropriate tax is to be paid. In this case by the nature of the transaction the appropriate tax is sales tax inasmuch as the hoardings are movable property.

The assessee is also relied on the judgment of the Apex Court in the case of BSNL (145 STC 91) and Gannon Dunkerely (9 STC 353) on the point of certain amount of service involved in the transfer of lease of hoardings i.e. mounting of flexi on the hoarding. It is the contention of the assessee that Section 4 (8) does not permit bifurcation of the consideration in to deemed sale portion and service element. This contention is not sustainable. In the case of Gannon Dunkerely the Hon'ble Court held that dominant nature test is to be applied. This means if the contract is in composite in nature and as per the dominant nature test the transaction is decided either the sale or service. Example: In the hospital the intention is treatment of disease to a patient is a service and during the rendering such service though administered certain medicines the portion value of the medicines cannot be treated as sale of goods and the State cannot resort to impose tax on the portion of medicines. After 46th amendment to the Constitution and as per the judgment in the case of BSNL (145 STC 91) this dominant nature test does not applicable to the six transaction mentioned in the Art 366 (29 A). The six transactions includes the works contract, catering and transfer of right to use. It is permitted in the Constitution

for artificial splitting of sale and service in the composite contract of works contract and catering. In the case of transfer of right to use of goods there is no such artificial splitting except in the circumstances of separate contract for lease of goods and service if any. This means during the course of lease of hoardings, if any, service is rendered such as mounting of flexi on the hoarding the entire transaction cannot be categorized as service. If it is a composite contract and if the consideration towards lease of hoarding cum mounting of flexi is not ascertainable the entire consideration is treated as transfer of right to use the goods and no artificial splitting is permitted. But if the consideration is ascertainable towards lease of hoarding and mounting of flexi from the contract then the lease of hoarding is only treated transfer of right to use goods and the mounting charges is liable for exemption. This is supported by the Apex Court in the subsequent judgment in the case of M/s BSNL (145 STC 91) (Para 45) Thus, there is no point in the contention of the assessee that the bifurcation of the lease and service cannot be permitable is not sustainable.

The lease of hoarding for advertisement for consideration is different from the Sale of space or time for advertisement" as defined in the Finance Act 1994. The phrase is defined in the Finance Act 1994 in relation to the providing public places and buildings which are immovable property for advertisement. In the instant case the

hoarding is an movable property and lease of the same for consideration cannot fall under the definition of Finance Act to attract service tax. Any lease of movable property including hoarding subject to fulfillment of other conditions is falls under Art. 366 (29 A) of the Constitution as deemed sale and the same attracts tax under Section 4(8) of the APVAT Act 2005.

Hence, the transaction is transfer of right to use of hoardings which is goods and is amenable to tax under Section 4(8) of the Act."

15. The Commercial Tax Officer, thereafter dealt with the composition of tax under Section 4(8)(b) of the VAT Act, 2005 and held as under:

"The transaction of transfer of right to use of goods is governed by the Section 4(8) of the Act. This section stipulates that the effective rate of tax is the applicable rate of tax to the goods as per the schedule appended to the Act. Accordingly, the pre-assessment notice is issued proposing to levy standard rate of tax applicable to the hoardings during the relevant period either @12.5% or 14.5%. In the meanwhile Section 4(8B) introduced by Ordinance 7/2011 on 15-09-2011. This is with retrospective effect from 01-04-2005 with effective rate of tax @4% during the relevant period. To pay tax under this

sub-Section the assessee has to exercise his option. Though Section is introduced no rules are framed in which manner the option to be exercised. Further the assessee has not expressly exercised its option either in the letter of objection dt: 31-1- 2012 or subsequently, application of 4% is not eligible. Therefore the contention of the assessee that it is eligible to tax @ 4% is rejected and confirmed levy of tax @ 12.5%.

In the end, the proposed levy of tax on the consideration received towards lease of hoardings for advertisement for year 2006-07 on a turnover of Rs. 17,69,59,912/-@ 12.5% VAT is as under

Tax Period	*Input/ Output*	*Tax declared*	*Tax found to be due*	*Tax undue declared*
2006-07	*Output tax*	*0*	*2,21,19,998*	*2,21,19,998*
Total				

Total amount of tax due to the department Rs. 2,21,19,998/-.

From the foregoing it indicates that the dealer has committed an offence under the provisions of APVAT Act, 2005 and the penalty proceeding as per the provisions of APVAT Act will be issued separately.

Further the dealer is liable to pay interest @1% on tax due for the period of delay. Separate proceedings to this effect will be issued.

The amount of Rs. 2,21,19,998/-shall be paid within (30) days of receipt of this order. Failure to make the payment will result in recovery proceedings under the AP VAT Act 2005."

Thus, the Commercial Tax Officer, for valid and cogent reasons, has held that the nature of transaction constitutes 'goods' and is in the nature of the movable property and therefore, falls within the purview of Section 4(8) of the VAT Act, 2005.

16. In addition, it is pertinent to note that the petitioner has an efficacious alternative remedy of filing an Appeal before the Appellate Authority under Section 31 of the VAT Act, 2005. The petitioner without availing the aforesaid efficacious alternative remedy, rushed to this Court under Article 226 of the Constitution of India. Therefore, liberty is reserved to the petitioner to prefer Appeal before the appellate authority. Needless to state that in case, petitioner files an appeal within thirty days from today, the same shall be considered by the

appellate authority. The petitioner shall be granted the benefit of Section 14 of the Limitation Act.

17. The writ petition is accordingly disposed of. No costs.

Miscellaneous applications, pending, if any, shall stand closed.

ALOK ARADHE,CJ

ANIL KUMAR JUKANTI, J

Date: 02.05.2024
PLP