THE HON'BLE SRI JUSTICE K.C.BHANU

AND

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Special Appeal No.1 of 2002

JUDGMENT: *(Per Hon'ble Sri Justice M.Seetharama Murti)*

This Special Appeal under Section 23(1) of the A.P. General Sales Tax Act ('the APGST Act', for brevity) read with Rule 41 of the Rules under the Act by the appellant-assessee is directed against the order dated 16.10.2001 of the Commissioner of Commercial Taxes, Andhra Pradesh, Hyderabad, passed in CCT's Ref. No. III(2)/1628/99.

2. We have heard the submissions of the learned counsel for the appellant-assessee ('the appellant', for brevity) and the learned Special Standing Counsel representing the respondent/Commissioner of Commercial Taxes ('the respondent', for brevity). We have perused the material record.

3. The introductory facts, in brief, are as follows:

The appellant is a registered dealer on the rolls of the Commercial Tax Officer, Maharajgunj circle, Hyderabad. The appellant manufactures vegetable oil and dall. The Commercial Tax Officer had finalised the assessment year for the year 1994-95 under the CST Act. While finalizing the assessment and passing the final order, the CTO had disallowed the exemption claimed by the appellant under Section 5(3) of the CST Act insofar as a turn over of Rs.1,15,35,532/- which represented sales in the course of export covered by the declarations in Form 'H'. The CTO in his orders had *inter alia* observed that for the export sales, the appellant has to file documentary evidence such as contracts/agreements, bills of lading, documents showing mode of payments and form 'H' along with the quantity particulars as per the requirement of the provisions of law and that the columns of the 'H' form filed by the appellant are not filled properly. Aggrieved of the said orders, the appellant had preferred an appeal before the Appellate Deputy Commissioner (ADC). The ADC, vide orders dated 24.10.1998 had allowed the appeal of the appellant holding that the 'H' certificates prove that the dealer who had furnished the 'H' certificates exported the goods involved to foreign buyer and that the 'H' certificates cover the entire disputed turnover and that the appellant is eligible for the benefit of exemption on the disputed turn over under Section 5(3) of the CST Act. Having so observed, he had set aside the orders of the CTO and had allowed the appeal. The ADC had also considered another issue in his orders, i.e., rate of tax on inter-state sales amounting to Rs.1,97,744/-. While considering the said issue, the ADC had observed that the Commissioner of Commercial Taxes, Hyderabad issued a circular in CCT Ref.A1(1)/1747/98, dated 15.07.1998 stating that 'C' Form is not required on the inter-state sale of vegetable oils since the rate of tax is less than 4% and had therefore, found that the contentions of the appellant that they are entitled for concessional rate of tax on this turn over in the absence of 'C' Form is acceptable. On that issue, he had set aside the orders of the CTO. The Commissioner i.e., the respondent having examined the orders of the ADC insofar as it related to the disputed turn over of Rs.1,15,35,532/- representing the sales in the course of export, was of the view that the orders of the ADC in regard to the said turn over are prejudicial to the interests of the revenue of the State and had therefore, entertained a *suo motu* revision by exercising the power vested in him under Section 20(1) of the Act. After giving an opportunity of hearing to the appellant and having examined the objections of the appellant, the Commissioner had observed to the effect that 'in order that a sale preceding the export sale is a sale in the course of export there must be nexus between such sale and export and that such a nexus can be proved only by a pre-existing agreement or order and that the appellant could not produce any document to show any such nexus between such sale and export and that a nexus can be proved only by a pre existing agreement of sale and that such a nexus is not available in the case and that therefore, no nexus between the sale of castor oil and export of castor oil by the exporter is established; and he had, hence set aside the order of the ADC and had restored the order of the CTO for the year 1994-95 in relation to the assessment under the CST Act and brought the disputed turnover of Rs.1,15,35,532/- to tax.

4. It is necessary to first deal with the turn over related to inter-state sales not covered by ‘C’ Form and the issue of rate of tax on the said turnover. The learned counsel for the appellant first contended that the Respondent had not proposed to revise the order of the ADC in regard to the rate of tax on the inter-state sales turnover not covered by ‘C’ Forms amounting to Rs.1,97,744/- and that the Commissioner had indisputably entertained the revision in regard to the turnover of Rs.1,15,35,532/-related to sales in the course of export, but while passing the final orders, the Commissioner had set aside the entire order of the ADC including the portion of the order giving the benefit to the appellant insofar as the other turn over of Rs.1,97,744/- and that therefore, the order of the Commissioner in that regard is illegal and is liable to be set aside. On this issue, the learned Special Standing counsel had fairly conceded that the Commissioner/respondent did not exercise the revisional jurisdiction insofar as this turnover and therefore, while setting aside the orders of the ADC, the learned Commissioner ought not to have disturbed the orders of the ADC insofar as this turnover of Rs.1,97,744/-. The law is well settled that if any proposal to revise the order of the ADC and cancel the relief granted by the ADC is not set out in the revision show cause notice and the said relief is withdrawn in the final order passed, such order becomes illegal being violative of the ‘Principles of Natural Justice’. Thus, the revision order, which was passed without issuing a show-cause notice and opportunity of hearing on the subject aspect cannot be sustained being opposed to the Principles of Natural Justice. Therefore, the order of the Commissioner, which is impugned, is liable to be set aside partly, i.e., insofar as it related to the issue in regard to rate of tax on inter-state sales not covered by ‘C’ Forms amounting to a turnover of Rs.1,97,744/-. Accordingly, the impugned order in that regard only is set aside and the order of the ADC on this subject aspect is restored.

5. Coming to the next issue/main issue, viz., the disputed turn over of Rs.1,15,35,532/- which represented sales in the course of export covered by declarations in ‘Form-H’, the learned counsel for the appellant would contend that the ADC had carefully considered the evidence produced before him and had passed a detailed order and that when the Commissioner had proposed to revise the orders of the ADC, the appellant had filed detailed objections to the show-cause notice, but, the learned Commissioner having brushed aside the valid objections of the appellant had erroneously set aside the well reasoned orders of the ADC by incorrectly observing that mere export of goods to other countries by an exporter will not automatically confer exemption to the sale of those goods to the exporter and that in order that a sale preceding the export sale is a sale in the course of export there must be nexus between such sale and export. He had further contended that the appellant had filed Form ‘H’ and that the Commissioner is not justified in observing that a nexus can be proved only by a pre existing agreement of sale and that such an agreement is not available in the case of the appellant. He had also submitted that the documents would show that the appellant is eligible for exemption under Section 5(3) of the CST Act and that the Commissioner is not right in holding that the appellant could not prove the nexus; he had also pointed out that in the order of the Commissioner, it is observed that filing of ‘H’ Form or filing of ‘confirmation of purchase’ document do not in any way establish the nexus and that therefore, the order impugned would show that the appellant had produced all relevant documents. On the other hand, the learned Standing Counsel had vehemently contended that except the ‘H’ Form, no other document is filed by the appellant and that even that ‘H’ Form, which was filed is defective and that all the columns of the ‘H’ form are not filled up as required under law and that Section 5(3) of the CST Act clearly mandates that for the purpose of compliance of the provision of the Section of Law, ‘the agreement or order for or in relation to such export’ must be produced and that mere production of defective ‘H’ Form is not going to advance the case of the appellant. He had further submitted that the observations in the order of the Commissioner to the effect that ‘filing of ‘H’ Form or filing of confirmation of purchase document do not in any way establish the nexus’ are general observations and it is nowhere stated in the order that such documents are filed by the appellant in this case.

6. Now the only point that remains for determination is –

'Whether the Commissioner was justified in setting aside the orders of the ADC and restoring the orders of the CTO insofar as the turnover which represented sales in the course of exports covered by the declaration in form 'H'?'.

7. POINT:

7. (a) We have given earnest consideration to the facts and the submissions. The facts which are not in dispute are already stated supra. Except contending that all the necessary documents are produced, the appellant could not establish before this court that all the required documents are produced by the appellant in due compliance of the requirements of the provisions of law. Rule 10 of the CST (R&T) Rules, 1957 reads as follows:

"(10)(a) Prescription of goods for certain purposes: A dealer may in support of his claim that he is not liable to pay tax under this Act in respect of any sale of goods on the ground that the sale of such goods out of the territory of India within the meaning of sub-Section (3) of Section 5, furnish to the prescribed authority a certificate in Form 'H' duly filled and signed by the exporter along with the evidence of export of such goods.

(b) The provisions of the rules framed by the respective State Governments under sub-sections (3), (4), and (5) of Section 13 relating to the authority from whom and the conditions subject to which any form of certificate in Form 'H' may be obtained, the matter in which such form shall be kept in custody and records relating thereto maintained and the manner in which any such forms may be used and any such certificate may be furnished in so far as they apply to declaration in Form 'C' prescribed under these rules shall mutatis mutandis apply to certificate in Form 'H'."]

A plain reading of the said Rule would clearly show that an assessee in support of his claim that he is not liable to pay tax in respect of any sale of goods on the ground that the sale of such goods is a sale in the course of export of those goods out of the territory of India within the meaning of sub-section (3) of

Section 5 may furnish to the authority concerned a certificate in form 'H' duly filled and signed by the exporter along with the evidence of export of such goods.

Further, Section 5 of the Act reads under:

> **"When is a sale or purchase of goods said to take place in the course of import or export:**
>
> **A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.**
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> 1. **A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.**
> 2. **Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after and was for the purpose of complying with, the agreement or order for or in relation to such export."**

A plain reading of the provision of law would show that the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such sale took place after and was for the purpose of complying with the agreement or order for or in relation to such export. Therefore, this provision of law contemplates that such sale must have taken place only after the agreement or order for or in relation to such export and that such sale must be for the purpose of complying with such agreement or order for or in relation to such export and that such sale or purchase must have taken place for the purpose of complying with the 'such agreement or order for or in relation to such export'.

7. (b) In the case on hand, the CTO in his orders had categorically observed that for export sales, the assessee has to file the documentary evidence such as contracts/agreements, bills of lading, document showing mode of payments and Form 'H' along with the quantity particulars as per the requirement of law; and that the 'H' Form filed by the appellant is defective for the reason that all the columns in the 'H' form are not filled up. The ADC had also noted that the appellant had furnished 'H' certificates covering the entire disputed turnovers and had further observed that the assessing authority did not find fault or deficiency in the 'H' certificates categorically pointing out any defects. Though he had observed that the assessing authority did not find fault or deficiency in the 'H' certificates categorically by pointing out any such defect or deficiency, he did not record a finding that all the columns in the 'H' Form are filled up and they are not defective in any manner. He did not observe in his orders that any other required documentary proof other than declaration in 'H' Form is produced by the appellant. Without production of any other reliable evidence showing the nexus between such sales and export and merely placing reliance on the declarations in Form 'H', which is defective according to the observation of the CTO, the ADC had allowed the appeal. Not even bills of lading are filed. The ADC also did not note in his orders that the bills of lading were filed. No explanation or reasons are forthcoming from the appellant as to why incomplete and defective 'H' Form was produced even without producing any other reliable documents in compliance of the requirement of law. The appellant could not show that the appellant made a request earlier to give an opportunity to rectify the defects and resubmit the defective 'H' Form after rectification. Therefore, when an exemption is claimed without fulfilling the requirements of the provisions of law and without establishing the nexus as required under law, the Commissioner is justified in finding fault with the orders of the ADC and in restoring the orders of the CTO after setting aside the orders of the ADC.

7. (c) The learned counsel for the appellant-assessee strenuously contended that the CTO has not pointed out as to what are the defects in the 'H' declaration Form and that the CTO had not given an opportunity to the appellant-assessee to rectify the defects in the 'H' Form and resubmit the same and that therefore, it is a fit case to remit the matter to the CTO with a direction to give an opportunity to the appellant to rectify the defects in the 'H' declaration Form and resubmit the same. On the other hand, the learned Standing Counsel would submit that the material record and the successive orders of the officers including the impugned order would show that except the 'H' Form, no other material documents like bill of lading or any other documents showing the nexus between sale and export are produced and that, therefore, in the peculiar facts and circumstances of the case, no purpose would be served even if the matter is remitted to the CTO and that the appeal is liable to be dismissed.

7. (d) Coming to this request on behalf of the appellant that the matter may be remitted to the CTO giving an opportunity to the appellant to rectify the defects in 'H' Form and resubmit the same, what is to be noted is that the learned counsel for the appellant could not produce even the office copies of Form 'H', bill of lading or any other relevant document and it is fairly submitted that the appellant's concern is closed long time back and it is not possible to produce any such record. However, it is submitted that the copy of 'H' form and other documents are submitted with the objections and that necessary documents are available in the record of the Department. The learned counsel for the appellant had placed reliance on the decisions in **Faruk Anvar Co. v. CCT**, **Bharat Electronics Ltd. V. Deputy Commissioner (CT) (AP)** and also on an unreported decision in Special Appeal No.1 of 2014, dated 12.02.2015 of this Court in support of the contention that in cases of this nature, this court is giving an opportunity to the assessee to have the defective Form rectified and resubmit the same for fresh consideration and for passing orders in accordance with the procedure established by law and that therefore, the appellant-assessee may also be given a similar opportunity by setting aside the order impugned and remitting the matter to the CTO. In **Faruk Anvar Co.** (1 supra), this Court came to a conclusion that the finding recorded by the Commissioner in that case is not based on any discernible evidence and material and that in other words, the finding recorded by the Commissioner in the fact situation of the case was held to be perverse. Therefore, in the cited decision, after allowing the special appeals, this Court remitted the proceedings to the first appellate authority, i.e., the Appellate Deputy Commissioner with a direction to determine the tax liability of the appellant de novo by considering all the relevant documents and materials placed before him by the appellant-asseessee. I n **Bharat Electronics Ltd's case** (2nd supra), the Deputy Commissioner had not specified in the show cause notice the defects which he had found in the 'F' Forms and thereafter, had not afforded an opportunity of rectifying such defects and the show cause notice, which preceded the revisional orders also did not give the details of the alleged defects in the 'F' Form. Having regard to the facts of that case, this Court held as follows:

> **" Viewed from any angle, the show-cause notice falls foul of the *audi alteram partem* rule necessitating the revisonal order passed by the first respondent being set aside for violation of principles of natural justice. The first respondent shall issue notice afresh to the petitioner giving details of F forms which he found defective, give them opportunity of being heard, permit them to rectify the defects, if any, in the F forms within a reasonable period and, thereafter, pass an order afresh in accordance with law."**

In the third cited decision, which is unreported, the learned counsel for both the sides had submitted that the matter be remitted to the assessing authority by giving an opportunity to the assessee to have the 'F' forms rectified and resubmit the same for fresh consideration by the assessing authority and passing orders in accordance with the procedure established by law. Having regard to the facts of that case and the submissions made in that case, this court considered the request and had remitted the matter to the CTO without going into the question of bar of limitation. Therefore, a reading of the facts of the cited cases would show that the ratios in the decisions are not helpful to advance the case of the appellant-assessee in regard to the request to remit the matter to the CTO.

7. (e) Reverting back to the facts of the case on hand, the material record, as already observed, would show that except 'H' Form, which is found to be defective, no other documents were produced to show the nexus between the sale and the export. Further, the learned counsel for the appellant had submitted that since the concern of the appellant is closed long time back, the appellant is not having possession of any record to assist the assessing authority in the matter. Therefore, in the peculiar facts and circumstances of the case and in the light of the discussion coupled with reasons supra, we are not inclined to consider the request to remit this matter of the year 1994—95 at this distance of time, as from the submissions made it appears that no useful purpose would be served even if the matter is remitted to the CTO.

7. (f) On an analytical examination of the material facts in juxtaposition with the law, we find that there is no need to interfere with the orders of the respondent insofar as this aspect is concerned and that there is also no need to remit the matter to the CTO on this particular aspect. The point is accordingly answered against the appellant.

8. In the result, the appeal insofar as it related to the disputed turn over of Rs.1,15,35,532/- which represented sales in the course of exports is dismissed confirming the orders of the respondent in that regard. However, the appeal is partly allowed and the impugned order is set aside in part, i.e., insofar as it related to the issue in regard to rate of tax on inter-state sales not covered by 'C' Form amounting to a turnover of Rs.1,97,744/- and to that limited extent only, the orders of the ADC are restored. No costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

K.C.BHANU, J

M. SEETHARAMA MURTI, J

06th April, 2015

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