IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.04.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
And
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

T.C.Nos.55 and 56 of 2014

M/s.Jansons Textiles Processors
... Petitioner in both T.Cs.

Vs.

The State of Tamil Nadu,
Represented by the Deputy Commissioner (CT),
Salem.
... Respondent in both T.Cs.

Common Prayer:

Tax case revisions filed under Section 38 of the TNGST Act, 1959, seeking to revise the order of the Sales Tax Appellate Tribunal (Additional Bench), Coimbatore dated 26.05.2014 in Coimbatore Tribunal State Appeal Nos.73/05 and 74/05 respectively.

For Petitioner : Ms.R.Hemelatha
For Respondent : Mr.S.Kanmani Annamalai
Additional Government Pleader (Taxes)

C O M M O N   O R D E R

(Order of the Court was delivered by RAJIV SHAKDHER,J.)

1.These are two revision petitions directed against a common judgment and order passed by the Sales Tax Appellate Tribunal (Additional Bench), Coimbatore (in short, the Tribunal), dated 26.05.2014.

2.The petitioner, before us, is the Assessee, i.e., M/s.Jansons Textiles Processors (in short, JTP).

2.1.These revision petitions pertain to the assessment years 2001-02 and 2002-03.

2.2.The revision petitions were admitted on 19.09.2014, when, the following common question of law was framed:

> ***"Whether penalty under Section 23 of the Tamil Nadu General Sales Tax Act is imposable when the ingredients of Section 45(2)(e) of the Tamil Nadu General Sales Tax Act, more particularly the words "fails without reasonable excuse to make use of the goods for the declared purpose", has not been satisfied?"***

2.3.During the course of arguments, learned counsels for the parties agreed that an additional question of law, ought to be framed, which is:

> ***"Whether in the given facts and circumstances of the case, under Section 23 of the 1959 Act, the Assessing Officer***

> ***could have straight away impose penalty on the Assessee at the maximum rate of 150%."***

3.In order to adjudicate upon the captioned revision petitions, the following brief facts are required to be noticed:

3.1.JTP claims to be a works contractor which, processes cotton fabrics. For this purpose, they purchased furnace oil and hytherm oil against Form XVII. The JTP thus, claim a concessional rate of tax, as provided in Section 3(3) of the Tamil Nadu General Sales Tax Act, 1959 (in short, the 1959 Act), on the ground that furnace oil and hytherm oil, was used by them in processing cotton fabrics. The Revenue, found fault with it and accordingly, issued a show cause notice.

3.2.We are told, a reply was filed and after a hearing was held in the matter, two separate adjudication orders of even date, i.e., 25.10.2004 were passed. By virtue of the said adjudication orders, the Adjudicating Authority, came to the conclusion that JTP had misused the declaration as contained in Form XVII and thus, directed levy of penalty under Section 23 of the 1959 Act. Consequent thereto, penalty at the rate of 150% of the tax due was proposed.

3.3.Resultantly, in absolute terms, penalty in the sum of Rs.1,87,028/- was levied in respect of the assessment year 2001-02, while, in respect of the assessment year 2002-03, penalty amounting to Rs.2,19,515/- was levied.

3.4.Being aggrieved, JTP preferred an appeal with the Appellate Assistant Commissioner (CT)(FAC) (in short, AAC). The Commissioner by a common order dated 29.12.2004, consciously, set aside penalty, in respect of, both the assessment years.

4.The Revenue, being aggrieved, carried the matter in appeal to the Tribunal. The Tribunal after examining the matter at length, came to the conclusion that the concessional rate of tax was available against Form XVII only in respect of those Assessees' who manufactured their own goods.

4.1.The Tribunal found that JTP had processed yarn and cloth, which was supplied to its buyers/customers and therefore, in terms of Section 3(3) of the 1959 Act, it was not entitled to the concessional rate of tax. Based on this reasoning, the Tribunal came to the conclusion that there was a clear violation of Section 45(2)(e) of the 1959 Act and thus, penalty under Section 23 of the very same Act, was warranted.

4.2.In other words, in effect, the Tribunal sustained the order of the First Appellate Authority i.e., the AAC, with regard to levy of penalty, in respect of furnace oil and hytherm oil purchased by JTP against Form XVII.

5.Being aggrieved by the same, the present revision petitions have been preferred before us.

6.Ms.Hemalatha, who appears for JTP, argues that the work executed by JTP, was, in the nature of works contract and therefore, came within the ambit of the provisions of Section 3(3) of the 1959 Act.

6.1.The learned counsel submitted that JTP was, thus, entitled to avail of the concessional rate of tax which was 3%.

6.2.Learned counsel, further informed us, that in any event, JTP had deposited differential rate of tax, even before the order of assessment was passed by the Adjudicating Authority.

6.3.Learned counsel further submits that the First Appellate Authority, i.e., AAC had correctly appreciated the provisions of the Act and thereupon, proceeded to delete the penalty.

6.4.It was the learned counsel's submission that Section 23 of the 1959 Act, gave discretion to the Authorities below, to reduce, and/or remove completely, the rigour of penalty, having regard to the facts and circumstances of the given case.

6.5.In other words, it was the learned counsel's submission that such discretion had been deployed in the instant case and therefore, the Tribunal, ought not to have interfered in the matter.

7.Mr.Annamalai, on the other hand, largely relied upon the order of the Tribunal.

7.1.It was the learned counsel's submission that concessional rate of tax could not have been availed of, by JTP, in view of the fact that it had only processed the cotton fabric, albeit, on job work basis, which activity took it out of the ambit of Section 3(3) of the 1959 Act.

7.2.Learned counsel further submitted that in view of the clear violation of the provision of Section 3(3) of the 1959 Act, the First Appellate Authority, i.e., AAC, rightly, sustained the order of the Adjudicating Authority, whereby, penalty was imposed.

8.We have heard the learned counsels for the parties and perused the record.

9.Before we proceed further, it may be important to set forth hereunder the relevant extracts of Section 3(3) of the 1959 Act:

> ***"Sec.3(3) Notwithstanding anything contained in [3][sub-section (2), (2-A) or (2-C),] but subject to the provisions of sub-section (1), the tax payable by a dealer in respect of sale of any goods including consumables, packing material and labels, but***

excluding plant and machinery, to another dealer for use by the latter in the manufacture, and assembling, packing or labelling in connection with such manufacture inside the State, for sale by him of any goods *[[other than ethyl alcohol, absolute alcohol, methyl alcohol, rectified spirit, neutral spirit and denatured spirit] goods falling under Part A of the Third Schedule, goods falling under item 1 of the Sixth Schedule] and arrack, shall be at the rate of only three per cent on the turnover relating to such sale:

> ***Note 1: *The expression "other than ethyl alcohol, absolute alcohol, methyl alcohol, rectified spirit, neutral spirit and denatured spirit" was substituted for the expression "those falling under item 22 in Part-D mentioned in the First Schedule" by Act 13 of 96 – Gazette dated 21-2-1997 – Effective from 17.7.1996 (Retrospective).***
>
> ***2: By Act 38/96 Effective from 17-7-1996, the expression "other than those falling under item 22 in Part-D mentioned in the First Schedule, goods falling under Part A of the Third Schedule, goods falling under item 1 of the Sixth Schedule" was substituted for the expression "mentioned in the First Schedule, other than those falling under item 56 in Part D of the said Schedule". The expression "item 22 in Part D" mentioned in the Amendment Act 38/96 is apparently an error for "item 23 in Part D" By making amendment vide Note 1 above the error thus being rectified.***

> ***3: The expression "sub-section (2) or (2-A)" was substituted for the expression "Sub-section (2)" by Act 47/2002 – Gazette dated 18.11.2002 – Effective from 27.3.2002 (Retrospective). By the same amendment Act 47/2002, the expression "sub-section (2), (2-A) or (2-C)" was substituted for the expression "sub-section (2) or (2-A)" with effect from 1.7.2002 (Retrospective)."***

9.1.A perusal of Section 3(3) of the 1959 Act, would show that an Assessee can avail of the concessional rate of tax of 3%, only, if the consumable, in this case, furnace oil and hytherm oil, is used in the manufacture of goods, which are sold by him.

10.While we have noted in the present case, the findings of fact recorded by the Adjudicating Authority, which have been affirmed by the Tribunal, to the effect, that JTP had processed cotton fabric, albeit, on a job work basis, we have no difficulty in accepting the submission of Ms.Hemalatha, that, job work would fall within the scope and ambit of the expression "manufacture", Having said so, what we are not able to agree with, is that, manufacture, in this case, processing, can be done in respect of a third party's property.

10.1.The reason for the same, is that the provision requires that the consumable should be used in the manufacture of goods, which are sold by the manufacturer. In case of job work, the property is not that of the Assessee, but, is that of a third party.

10.2.Therefore, according to us, the concessional rate of tax of 3% was not available to JTP. The JTP, was thus, as found by the Adjudicating Authority, required to pay tax at the usual and normal rate, which at the relevant time was 12%.

11.That being said, as to the other aspect of the matter, whether penalty ought to have been levied in the instant case, Ms.Hemalatha has pointed out that tax was paid by JTP, prior to the passing of the order by the Adjudicating Authority, though, after the issuance of show cause notice.

11.1.This fact is not disputed by Mr.Annamalai, which is a fact, that emerges from the record as well.

12.The question, therefore, is, as to whether in these circumstances, penalty ought to have been imposed and if so, at what rate.

12.1.In this behalf, the provisions of Section 23 and 45 (2)(e) of the 1959 Act become relevant. The relevant parts of the same are therefore, extracted hereafter, for the sake of convenience:

> "***Section 23. Levy of penalty in certain cases.*** - *If any person purchasing*

goods is guilty of an offence under clause (e) of sub-section (2) of section 45, the assessing authority, may, after giving him a reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not exceeding one and a half times the tax payable on the turnover relating to the sale of such goods at a rate which is equal to the rate prescribed in the First Schedule less three per cent:

Provided that no prosecution for an offence under section 45 shall be instituted in respect of the same facts on which a penalty has been imposed under this section.

***Sec. 45(2)(e)** after purchasing any goods in respect of which he has made a declaration *[under the second proviso to sub-section (3) or sub-section (5) of section 3] fails without reasonable excuse to make use of the goods for the declared purpose; or"*

12.2.A mere perusal of Section 23 would show that, if it is found that a person is guilty of any offence under clause (e) of subsection (2) of Section 45 of the 1959 Act, the Assessing Officer "may" after giving a reasonable opportunity of being heard to the Assessee, impose by way of penalty, a sum, not exceeding one and a half times the tax payable on the turnover relating to the sale of such goods, at a rate, which is equal to the rate prescribed in the First Schedule to the said Act, less the concessional rate i.e., 3%.

12.3.The incorporation of the word "may" in Section 23 gives discretion to the Assessing Officer to levy penalty up to a maximum rate of 150%.

12.4.Similarly, Section 45 (2) (e) of the 1959 Act, mandates that penalty can be levied, if the Assessee fails to make use of the goods, without reasonable excuse for the declared purpose.

12.5.A reading of the order of the Adjudicating Authority does not disclose, as to how, he came to the conclusion in the given facts and circumstances of the case that penalty ought to be levied at the maximum rate.

12.6.The fact that there was a violation, would not necessarily mean, that in every case penalty would have to be levied at the maximum rate.

12.7.Given the facts and circumstances obtaining in this case, the Adjudicating Authority ought to have discussed this aspect of the matter. This is specially so, as Section 23 of the 1959 Act, provides for discretion qua, the quantum of levy of penalty as well.

12.8.As indicated above, since the First Appellate Authority, i.e., AAC, reversed the view of the Adjudicating Authority on merits and hence, concluded that no penalty was leviable. The Tribunal via the impugned judgment reversed the view of the First Appellate Authority, i.e., AAC, on merits and thereafter, simply affirmed the levy of penalty, without discussing, as to whether in the facts and circumstances of the case, penalty ought to have been levied at the maximum rate.

13.Given the aforesaid, we are inclined to set aside the order of the Tribunal, to the extent, the levy of penalty, has been confirmed at the rate of 150%.

13.1.The matter is remanded to the Adjudicating Authority for the limited purpose of *de novo* quantification of the penalty.

13.2.While doing so, the Adjudicating Authority will bear in mind, the totality of facts, including the fact that penalty qua, machinery has been deleted by the Tribunal on the ground that it came within the ambit of Section 3(5) of the 1959 Act.

13.3.The impugned order of the Tribunal is modified to the aforesaid extent. In so far as the answer to the questions of law is concerned, Question No.1 has to be answered against the Assessee and in favour of the Revenue, as there was no reasonable excuse available to JTP to have made purchases against Form XVII. In so far as Additional Question No.2 is concerned, it is answered against the Revenue and in favour of the Assessee.

13.4.We have remanded the matter for the limited purpose of only quantification of the penalty. We are in agreement, with the Revenue, that this was a case in which, penalty ought to have been levied.

14.The tax case revisions are disposed of in the aforesaid terms. However, there shall be no order as to costs.

[R.S.A.,J.] [R.S.K.,J.]
27.04.2017

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Speaking order / Non Speaking order

Index: Yes / No
Internet: Yes / No

To

1.The Sales Tax Appellate Tribunal (Additional Bench),
Coimbatore.

2.The Deputy Commissioner (CT),
Salem.

RAJIV SHAKDHER,J.
AND
R.SURESH KUMAR,J.

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