IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2020

CORAM

THE HONOURABLE MR. JUSTICE DR.VINEET KOTHARI
&
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.NO.15703 OF 2007

M/s. R. Prakashchand Jewellery,
represented by its Proprietor
No.156, Mint Street,
Chennai -79. .. Petitioner

Vs

1. The Secretary,
Tamilnadu Sales Tax Appellate
Tribunal (AB), 2nd Floor,
City Civil Court Building,
Chennai 600 104.
2. The Deputy Commissioner (CT),
North Division, Chennai.
3. The Deputy Commercial Tax Officer,
Sowcarpet I Asst. Circle, Chennai. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorari to call for the records of the first respondent in STA.No.549/01, dated 17.08.2006 and quash the order dated 17.08.2006.

For petitioner : Mrs.C.Rekha Kumari
For Respondents : Mr. R. Swarnavel,
Govt. Advocate (for taxes)

ORDER

(Order of the Court was made by Dr.Vineet Kothari, J.)

The assessee M/s. R. Prakashchand Jewellery, No.156, Mint Street, Chennai 79, has filed this writ petition, assailing the order passed by the learned Tamilnadu Sales Tax Appellate Tribunal on 17.08.2006, by which, the learned tribunal set aside the order passed by the first Appellate Authority in favour of the assessee, allowing the appeal filed by the State and restored the assessment order passed against the assessee under the provisions of Tamil Nadu General Sales Tax Act.

2. The assessing authority had imposed purchase tax upon the assessee under section 7 A of the TNGST Act 1959 on the ground that the gold jewellery deposited by his relatives with permission to melt the said ornaments and use them as the assessee deems fit and to receive a compensation at the rate of 5% on the value of such gold jewellery, amounts to purchase of such gold jewellery from unregistered dealers and therefore, the assessee is liable to purchase tax, on the same.

3. The relevant findings of the assessing authority in this regard are quoted below for ready reference.

> 'It is clear from the records the deposit by family members of 1,726.000 grams and 4,157.000 grams and by the proprietor himself of 1,753.000 grams. The proprietory at liberty to melt any ornaments and use them as he deems fit. It is thus clearly proved that the deposited goods were liable to be utilized in the conduct of business or practically used by the dealers. Though the dealers have stated that the deposits were returned on 11.3.98 and 14.3.98 there was no evidentiary proof to substantiate the claim and even if it is so, it has not passed through the accounts. And can be termed only an after thought by creating the consorted records to that effect. Further the dealers have got deposits of gold and gold jewellery and liable to pay compensation at 5% for the period the goods held by the dealers. In that the goods were used in the conduct of the business but were not kept idle and returned as such.
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> Further more according to the clarification issued by the Special Commissioner and Commissioner of Comml. Taxes in Acts Cell II/92840/98 dated 21.1.99. In respect of such transaction as like the one of the dealers. It was stated that gold brought into the account of the proprietory business has to be treated as purchase of the proprietory concern since the proprietor and the individual is one and the same and the gold used in manufacture and sales of gold ornaments is liable to tax under section 7a of the TNGST Act 1959. The above clarification is subsequent to the one issued in special Commissioner and Commissioner of Comml. Taxes letter K.Dis.Act cell I/90517/97

dated 12.11.97 to the effect that "if the proprietor brings gold into the business as Capital contribution". It will be included in the purchase turnover liable to be taxed under sect.7A of the Act.'

4.The first appeal filed by the assessee came to be allowed by the Appellate Assistant Commissioner, vide his order dated 16.08.2000, holding that there was no purchase of gold jewellery by the assessee, but only a deposit or loan of such jewellery taken by him from the relatives and it did not attract the levy of purchase tax under section 7A of the Act.

5.The said appellate authority quoted the terms of Memorandum of Understanding between these parties which were reduced in writing also. The said relevant portion of the order passed by the learned Appellate Assistant Commissioner from the said order dated 16.08.2000 are also quoted below for ready reference.

'4. I have heard the arguments of the Authorised Representative and Departmental Representative and perused the connected records, In this case, the point for determination is,

whether the orders of the learned Assessing Officer is sustainable or not?

5. In this case on hand, the appellants are dealers in gold jewellery and they have reported a total and taxable turnover of Rs.1,60,200/-. The appellants in this case on hand, have received pure gold as a borrowed pure gold jewellery. The learned Assessing Officer has also given such details regarding the receipt of goods from their brother, grandmother, Father, Mother etc., and the receipt of gold jewellery based on borrowing contract shown in the quantity of the goods received by them. They have also entered into an agreement of memorandum of deposit of Gold Jewellery and pure gold to their relatives and their main terms and conditions are as follows;-

I) That the Deposited Gold Jewellery of 22 carrot Jewellery and pure gold with the borrower for use in his business. The borrower is free to melt the above ornaments and use them as they deem fit.

II) The borrower shall pay every year a compensation calculated at the rate of Rs.5% of the gold jewellery pure gold deposited. The compensation may be either in the form of gold jewellery pure gold or in cash calculated at the market value of jewellery on the date of payment of compensation.

III) Wherever the depositor wants the jewellery back he shall intimate the borrower atleast 15 days in advance. The borrower shall henceforth delivery gold ornaments of 22 carrots/pure gold 24 carrots purely of the equivalent weight which was deposited by the depositor.

IV) In case the depositor wants a part of the jewellery the borrower shall return part of the jewellery pure gold of the same purity.

V) The 5% compensation is to be calculated/prorate for the period for which the jewellery is held by the borrower.

VI) In no case, the borrower shall been entitled to demand market value of the gold jewellery in cash. However, the compensation for use of the same can be demanded in cash.

VII) It is specifically agreed that the borrower is keeping the jewellery in trust and that the does not leave any proprietory rights over the same. The ownership shall vest with the depositor always.

VIII) In no case if any dispute touching this memorandum the same shall be referred to the arbitrator, one to be appointed by each partner and their umpire pursuant to the arbitrate by law in force at the relevant point of time.

6. In the above said agreement, the learned Assessing Officer has noticed that there is no time limit for returning the pure gold or gold jewellery to the depositor by the borrower i.e., proprietor of the concern and as per the conditions laid down in the agreement in para (1). It is inferrred that the borrower is free to melt the ornaments and used them as they deem fit. In this case on hand, the conditions laid down in the agreement in para No.(1) was made to propose the value of the borrowed jewellery for the purpose of making assessment. Whereas the appellants in the grounds of appeal have contended that the question of purchase will arise only if there is a buyer and a seller, there is a consideration and there is a transfer

of property in the goods from the seller to the buyer; that unless all the above ingredients are satisfied, there cannot be any sale or purchase. Thus, the appellants have stated that there is no transfer form the borrower to the appellants. In this case on hand, from the factual matrix of the case, it could be inferred that the appellants are only the custodian of this goods; that the goods in question had not been transferred as a property of the appellants. It is all along with the property of the depositor only. There is no occasion brought before the learned Assessing Officer for transfer of property from the depositor to the appellants. There is no material evidence placed to establish the sale of goods into the hands of the appellants the terms that the borrower is free to melt the above ornaments and use them as they deemed fit and there is no time limit for returning the pure gold/jewellery to the depositor are not enough to assess the transactions in question, as there is no sale element involved. Therefore, in this case on hand, the assessment made on the value of the borrowed pure gold jewellery and gold ornaments is not correct as per the provisions of the Act. Therefore, the assessment made on the value of the borrowed pure gold and gold ornaments are liable to be set aside. Hence, it is deleted. Accordingly, the point is answered.'

6.The State preferred Second Appeal before the learned Sales Tax Appellate Tribunal, which allowed the appeal filed by the State reversing the order passed by the First Appellate Authority with the following reasons and the relevant portion of the order is also quoted below for ready reference.

'4. In the grounds of appeal the State submitted before this Tribunal that according to the agreement made between the depositors of the respondent the respondent was permitted to made use of the deposited gold and gold jewels for business and also melting them for use in the manufacture of new gold ornaments and that such borrowed gold had been taken to the process of manufacture and the gold taken for manufacturing process by borrowing from the members of the family as well as diversion of pure gold owned by the respondent himself were nothing but a purchase liable to be taxed under section 7-A of the Act and that the same was includable in the turnover for the purpose of assessment under section 3E of the Act. The State also cited the clarification issued by the Special Commissioner and Commissioner of Commercial Taxes in Ref K Dis Acts. Cell 19017/97 dated 12.11.97 in which the Commissioner of Commercial Taxes had clarified that if the proprietor bought gold into the business as capital contribution a would be mcladed in the purchase turnover for the purchase turnover liable to be taxed under section 7A of the Act and the total turnover for the purpose of assessment under section 3E of the Act. The learned Additional State Representative besides recoating the grounds of appeal pleaded for sustaining the order of the assessing officer.

5. On the other hand the learned Advocate appeared for the respondent dealer filed written submission and argued that pure gold and old gold jewellery deposited by the members of the family as well as the proprietor himself in the business was only a deposit and liable to be returned to the depositors at any time as requested by the depositors and there was no transfer of property from the members to the business or by the proprietor himself to the business and also filed copies of return for the purpose of payment of wealth Tax by the depositors and claimed that pure gold and old gold jewellery deposited in the business had always been the deposit and that there was no sale at all and pleaded to sustain the order of the first appellate authority.

6. The point for consideration before the Tribunal is whether the assessing officer is correct in having assessed the value of the gold and gold jewellery borrowed from his family members and invested in the business and also pure gold of his own brought in the business as capital as liable to be taxed under Section 7A of the Act treating them as purchase and included such purchase turnover for the purpose of assessment under section 3E of the Act?

7. The points putforth in the grounds of appeal by the State and the written submission filed by the respondent dealer and the

arguments of the learned Advocate on behalf of the respondent and the learned Additional State Representative on behalf of the State have been examined. The salient features of the agreement which prompted the assessing officer to keep the disputed transaction as purchase as follows.

I) There was no time limit for returning the pure gold or gold jewellery deposited by the borrowed by the dealer.

II) The dealer is free to melt the above ornaments and use them as deemed fit.

III) Pure gold or gold ornaments are meant only for the business of the dealer.

IV) The borrower shall par every year a compensation at the rate 5% of the value of the gold jewellery deposited.

V) The above said compensation may be either in the form of gold jewellery or in the form of cash calculated at the market value of the jewellery on the date of payment of such compensation.

In view of the above features of the agreement the assessing officer has come to the conclusion that the above transaction is nothing but a purchase liable to be taxed under section 7-A of the Act and includable in the total turnover for the purpose of assessment under section 3E of the act. The claim of the respondent is that the dealer borrowed gold and gold jewellery and not purchased the same from his relatives. Further the Proprietor himself has brought in capital in the form of pure gold thus there is no sale or purchase either form the proprietor to the business or from the family members to the business. The argument of both side have been considered and examined. As per the argument the gold so borrowed are diverted and deposited in the business need not be kept as a deposit for ever but can be used in the business either by using the same in the manufacture of jewellery or disposing of the same by wah of sale etc. The borrower/dealer has been permitted to melt the gold jewels and use as he likes. When this is one of the condition incorporated with the agreement the appellant cannot claim that the gold and gold jewellery under dispute is onlya deposit. Whenever the family members who have deposited the gold or gold jewellery ask for the return of gold he cannot return the gold or gold jewellery as such as received from the family members. But he can return the exact quantum of gold or gold jewellery as received. Till such time the Dealer has paid interest in the form of compensation at the rate of 5% per year on the value of the goods so borrowed. This is applicable onlyt to the gold or gold jewellery borrowed from his family members. Thus the transaction at the time of borrowing the gold and at the time of returning the gold is nothing but a transaction i.e. Purchase and sales for consideration. Therefore the assessing officer is correct in having brought the above turnover for liability under section 7A and for inclusion in the total turnover for the purpose of assessment under section 3E. So also the pure gold brought into the business as capital by the proprietor himself. The cclaim of the dealer that there can be no purchase by the business concern from the proprietor is not acceptable . High Court of Gujarat in its decision reproted in 91 STC 25 has held that the supply of groundnut by partners to Firm amounts to purchase by firm from partners and the firm is liable to pay purchase tax as the firm is distinct legal entity from the partners. This decision is applicable to the case on hand also. The receipt of old or gold jewellery from the proprietor himself as well as from his family members to his business concern is a distinct legal entity from the proprietor and the depositors. In view of the above it is evident that the pure gold and gold jewellery received by the proprietor either from himself or form his family members as borrowing is only for business purpose and thus it is proved the pure gold and gold ornaments brought into the business as capital will amount to purchase from other source and is liable to be taxed under section 7A of the TAMIL NADU GENERAL SALES TAX ACT and includible in the total turnover for the purpose of assessment under section 3E of the Act.

8. In the result, the State Appeal stands ALLOWED.'

7. Learned counsel for the petitioner/assessee Mrs. Rekha Kumari urged before us that there was no contract of purchase, but only deposit of gold jewellery with the assessee by the

relatives and they were entitled to return of the gold jewellery in whole or in part or even take a cash in compensation, if the jewellery was used by the assessee dealer by melting the same. She therefore submitted that there was no sale or purchase involved in the same and therefore the provisions of section 7-A of the Act were not attracted.

8. On the other hand, learned counsel for the Revenue supporting the impugned order of the tribunal, submitted that since the assessee dealer had right to use the deposited jewellery in the manner he liked and it was also agreed that the relatives who deposited the jewellery, were entitled to compensation at the rate of 5% on yearly basis, the same amounted to purchase of gold jewellery by the assessee from the unregistered dealers and accordingly purchase tax was levied.

9. We have heard the learned counsel appearing for both sides and perused the records.

10. In our opinion, the writ petition filed by the assessee dealer deserves to be allowed and the order of the learned assessing authority as well as the tribunal upholding the levy of purchase tax under section 7-A of the Act is liable to be set aside.

11.The provisions of 7-A of the TNGST Act are quoted below for ready reference.

> '7-A. Levy of Purchase Tax. - (1) Subject to the provisions of sub-section (1) of Section 3, every dealer who in the course of his business purchases from a registered dealer or from any other person, any goods (the sale or purchase or which is liable to tax under this Act) in circumstances in which no tax is payable under Section 3 or 4 as the case may be, (not being a circumstance in which goods liable to tax under sub-section (2) [(2-A) or (2-C)] of Section 3 or Section 4, were purchased at a point other than the taxable point specified in the First [the Fifth, the Eleventh] or the Second Schedule) (respectively) and either,-
>
> (a) consumes or uses such goods in or for the manufacture of other goods for sale or otherwise; or
>
> (b) disposes of such goods in any manner other than by way of sale in the State; or
>
> (c) despatches or carries them to a place outside the State except as a direct result of sale or purchase in the course of inter-State

trade or commerce, or

[(d) instals and uses such goods in the factory for the manufacture of any goods,

shall pay tax on the turnover relating to the purchase as aforesaid at the rate mentioned in Sections 3 or 4, as the case may be,

(2) Notwithstanding anything contained in sub-section (1), the provisions of Section 7 shall apply to a dealer referred to in sub-section (1) who purchases goods (the sale of which is liable to tax under sub-section (1) of Section 3 and whose total turnover for a year is not less than one lakh of rupees but not more than two lakhs of rupees and such a dealer may, at his option, instead of paying the tax in accordance with the provisions of sub-section (1), pay tax at the rates mentioned in sub-section (1) of Section 7":

Provided that this sub-section shall not apply to the purchases made on or after the 1st day of April, 1990.

(3) Every dealer liable to pay purchase tax under sub-section (1) , shall, for the purposes of this Act, be deemed to be a registered dealer.'

12. There is no doubt that except in the case of purchase or sale made by unregistered dealers, in the circumstances, that on such sale, no tax is payable under section 3 or 4 of the Act, the liability of purchase tax is not attracted. Unless there is a basic contract of sale or purchase involved in the matter, mere loan, deposit, hypothecation of goods, cannot amount to sale or purchase, attracting levy of purchase tax under section 7A of the Act. From the Memorandum of Understanding or Agreements between the parties, we do not see even the use of the word 'sale' or 'purchase' in the same. On the contrary, the terms of the agreement clearly and explicitly bear out a deposit or borrowal of the gold jewellery between the parties. Clause 1 permitting the assessee to use, to melt the gold jewellery and use the same in the manner considered by him does not per se amount to the contract of purchase. Such melting of gold jewellery and user, if any, may only give rise to a claim of compensation in favour of the lender or relative, who gives such gold jewellery to claim the compensation for such gold jewellery used. On the other hand, the agreement clearly stipulates that the lender will be entitled to return either in whole, or in part of the said gold jewellery and the payment of 5% compensation every year, is nothing but a substitute of interest or compensation for fluctuations in price, if any.

Neither any advance is taken by the depositors of gold jewellery, nor any price, as such, is shown to have been paid by the assessee to such depositors or relatives of such gold jewellery. Therefore, in our opinion, the elements of transfer of property and passing on of the consideration for the same are completely absent in the present case. Therefore the said transaction cannot amount to a sale or purchase of gold jewellery of such relatives of the assessee to him.

13. Therefore, in our considered opinion, the provisions of Section 7A of the Act, are not at all attracted in the present case. The learned tribunal with respects, seems to have hurried in arriving at a conclusion of purchase in the present case, but, no such case of actual user of goods or no such user of the gold jewellery by the dealer, has even been noted in the present case during the year in question. Therefore, the present writ petition is allowed and the impugned order passed by the learned tribunal as well as the learned assessing authority to the extent it imposed purchase tax on the assessee on such gold jewellery deposited by the relatives of the assessee, under the agreement in question, is liable to be set aside.

14.The impugned orders are accordingly set aside and the writ petition is allowed. No costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

msr
To
1. The Secretary,
Tamilnadu Sales Tax Appellate
Tribunal (AB), 2nd Floor,
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Chennai 600 104.
2. The Deputy Commissioner (CT),
North Division, Chennai.
3. The Deputy Commercial Tax Officer,
Sowcarpet I Asst. Circle, Chennai.
+1cc to Mr.C.Rekhakumari, Advocate, SR. No. 22647
+1cc to Special Govt.Pleader(taxes),High Court, Chennai.23012

W.P.NO.15703 OF 2007

KJ(CO)
RMP(15/04/2020)