IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 12.2.2021
CORAM
THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA
Writ Petition No.4164 of 2005

M/s.Sri Ramakrishna Mills
(Coimbatore) Ltd., rep.by
its Managing Director
D.Lakshminarayanaswami ...Petitioner

Vs

1.The Tamil Nadu Sales Tax
Appellate Tribunal, Additional
Bench, Coimbatore-18.

2.The Appellate Deputy Commissioner,
(Commercial Taxes), Coimbatore.

3.The Assistant Commissioner (CT)
(FAC), Fast Track Assessment
Circle-1, Coimbatore ...Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorari to call for the records on the file on the 1st respondent in his order in C.T.A.No.173/2002 dated 09.11.2004 and quash the same.

For Petitioner : Mrs.R.Hemalatha
For Respondents : Mr.Mohammed Shaffiq, SGP

Order of the Court was made by by T.S.SIVAGNANAM,J

It is not in dispute that the legal issue arising for consideration in this writ petition has been answered against the assessee in the decision of the Hon'ble Division Bench of this Court in the case of Tube Investments of India Ltd. Vs. State of Tamil Nadu [reported in (2010) 36 VST 66].

2. The relevant portions in the said judgment read as follows :

> "32. When the underlining principles of the framers of the Constitution itself in respect of export sales was so very paramount, at the very outset, it should be held that the imposition of tax as provided under Section 3(4) to be applicable to such an export sale would run counter to such an

intention of the Parliament, which cannot be countenanced. In other words, when the State lacks the legislative competence by virtue of the Constitutional embargo to levy any tax on export sale, the indirect creation of any tax liability on such 'export sales' on the inputs purchased cannot at all be recognised. To put it differently, if the levy of 1% tax on the value of the goods purchased by the dealer who is dealing in manufacture of goods inside the State by availing concessional rate of 3% tax by using Form-XVII, under Section 3(3) of the Act would negate the very Constitutional restriction imposed under Article 286 as a 'deemed export' as set out under Section 5 (3) of the Central Sales Tax Act, the same cannot be countenanced. In this context, it will be worthwhile to refer to a Division Bench decision of this Court reported in 2005 (3) LW 101 (N.PRIYADARSHINI VS. THE SECRETARY TO GOVERNMENT, EDUCATION DEPARTMENT, FORT ST. GEORGE, CHENNAI-9 AND ANOTHER). Para 27 of the said decision is relevant for our purpose, which reads as under:-

'.....27. In this connection, it may be mentioned that according to theory of the eminent jurist Kelsen (the pure theory of law) in every country there is a hierarchy of laws and the general principle is that a law in a higher layer of this hierarchy will prevail over the law in a lower layer of the hierarchy (see Kelsen's "The General Theory of Law and State") In our country this hierarchy is as follows:-

(i) The Constitution of India

(ii) Statutory law (which may be either Parliamentary law or law made by the State legislature).

(iii) Delegated Legislation (which may be in the form of rules made under the statute, regulations made under the statute, etc)

(iv) Purely administrative or executive orders.'

Applying the said principles to the facts of this case, as in the hierarchy of law, the Constitution provision will supersede any conflicting statutory provision, we hold that the interpretation sought to be laid on behalf of the State, to hold that Section 3(4) will apply to the export sale of the assesses will run counter to the well laid legal principles referred to above and the same cannot be countenanced.

33. On these grounds itself, it can be held that there would be no scope for invoking Section 3(4) in regard to the export sales of the goods manufactured.

34. When we examine the other submissions of the learned counsel appearing for the petitioners that the export sale is fully covered by the definition of 'sale' under Section 2(n) read along with Explanation 3(a) and thereby that is also a sale within the State, on that ground as well, no liability by way of tax can be fastened under Section 3(4) of the Act. The said submission of the learned counsel for the petitioners is also well founded.

35. When we examine Section 2(n) which defines sale to mean "every transfer of the property in goods other than by way of a mortgage, hypothecation, charge or pledge by one person to another in the course of business for cash, deferred payment or other valuable consideration". The Explanation 3 (a) makes it further clear that such export sale should also be construed as a sale for the purposes of this Act. In order for a sale to come within the fiction of sale as prescribed in Explanation 3, the conditions are:

(a) the goods should be within the State;

(b) such situs of the goods in the case of specific or ascertained goods should be at the time of contract of sale or purchase was made; and

(c) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase either by the seller or the purchaser irrespective of whether the assent of the other party is prior or subsequent to such appropriation.

36. Therefore, Explanation-3 to Section 2(n) is wider in amplitude. It can never be disputed that the goods manufactured by

availing the concessional rate of tax in respect of those materials purchased in the manufacture of such goods as provided under Section 3(3) by itself would make it unambiguous that such goods are within the State.

37. In the case on hand, it is not in dispute that Explanation-3(a)(i) is attracted viz., that such goods are specific or ascertained goods. It is also not in dispute that such ascertainment of the goods were existing at the time when the contract of sale or purchase in respect of the export was made. When such stipulations to be satisfied as prescribed under Explanation-3 are fulfilled, certainly the export sale is also deemed to be a sale as defined under Section 2(n) of the Act for the purpose of the Act.

38. When once we are able to assimilate the definition of 'sale' in the case of an export under the provisions of the Act, we are convinced that such a sale, is nothing but a sale for which an exigency of tax liability would not occur as provided under Section 3(4) of the Act.

39. In other words, the expression "but does not sell the goods so manufactured" cannot be put against the export sale in order to levy the tax on the value of the goods so purchased by availing the concessional rate of tax under Section 3 (3) of the Act.

40. In view of our above conclusions, we have no hesitation to hold that such an export sale cannot be brought under the set of expressions "in any other manner" as used in Section 3(4) of the Act.

41. As rightly contended by the learned counsel for the petitioners, the said set of expressions having been used following the expression "for sale" and applying the maxim Ejusdem Generis, it can only mean and taken to the effect that any despatch to a place outside the State either by way of branch transfer or by transfer to an agent by whatever manner called, either for sale or for any other purpose, certainly it cannot be attributed to an export sale. It would be directly covered by the definition of 'sale'

under Section 2(n) of the Act and thereby would not come within the exclusion of sale. We therefore need not have to even deal with the submission based on the comparison made by making a reference to Section 7(a), 7 (b) and 9(b) of the Act.

42. On behalf of the State, heavy reliance was placed upon the decision of the Honble Supreme Court reported in (1997) vol 107 STC 571 (STATE OF KARNATAKA VS. B.M.ASHRAF & CO.). That was a case where, the assessee thereon purchased fish oil from unregistered dealers within the State of Karnataka, in turn, it sold the said oil to another dealer, who purchased the said oil in order to comply with the export order from its buyer in a foreign country. The assessee therein, claimed exemption from payment of sales tax on the sale made to another by claiming umbrage under Section 5 (3) of Central Sales Tax Act 1956 i.e., last sale or purchase prior to the export. The said claim was however rejected by the assessing authorities. In fact, the levy of tax was based on Section 6 of the Karnataka General Sales Act, which provided for levy of purchase tax under such circumstances, as stipulated under Section 6 of the said Act. Section 6(1) of the Karnataka General Sales Tax Act specifically stipulated as under :-

....6(i) :- either consumes such goods in the manufacture of other goods for sale or otherwise (or consumes, otherwise) or disposes of such goods in any manner other than by way of sale in the State, or

(ii) dispatches them to a place out side State except as a direct result of sale or purchase in the course of inter-State trade or commerce Dealing with the said provision as well as after considering Section 5 of the Central Sales Tax Act, the Honble Supreme Court has held as under in paragraph 12 :

" ...12. Similarly situs is irrelevant as regards the sales being in the course of export, as in the present case. In the context of sales tax law, the expression "sale in the State" occurring in Section 6 can only mean a local sale or an intra State sale as opposed to sale in the course of export or in the course of inter-State trade or commerce. Therefore, wherever, there is a sale in the course of export or an inter-State sale, then, that would not be regarded as a "sale in the State" falling under Section 6(i) of the Act and therefore, sale by the respondent to Kalbhavi, which was admittedly a sale in the course of export under Section 5(3) would not be regarded as "sale in the State" ......

43. While examining the reliance placed upon the said decision on behalf of the State, it will have to be noted that Section 6 of the Karnataka General Sales Tax Act is more or less in pari materia with Section 7 (A) of the Act i.e., (TNGST Act). From what has been laid down by the Honble Supreme Court in the first blush, it does appear that irrespective of the fact that the sale of fish oil by the assessee therein was a sequel to an export order thereby governed by Section 5(3) of the CST Act, but, yet the Supreme Court held that such a sale cannot be construed as a Sale in the State and consequently it does not fall within the Set of expressions specifically stipulated in Section 6(i) of the Karnataka GST Act.

44. But at the very outset, it will have to be stated that the said decision can be considered in the event of a question arising relating to the exigibility of tax (purchase tax) under Section 7-A of the Act. Consequently, it is relevant to note that in Section 6(i) of the Karnataka Act, a specific expression by way of sale in the State has been used and the decision of the Honble Supreme Court was primarily while interpreting the said expression contained in Section 6(i) of the Karnataka Act. It is well laid down principle that a judgment cannot be an authority for a proposition which was not canvassed before it. In this context, it will be appropriate to refer to the decision of the Honble Supreme Court reported in 2003(4) Labour Law Notes = AIR 2003 SC 2661 = (2003) 11 SCC 584 (ASHWANI KUMAR SINGH VS. UTTAR PRADESH PUBLIC SERVICE COMMISSION AND OTHERS), wherein, the Honble Supreme Court has held as under:-

".....Observations of courts are not to read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes...."

In this regard, reliance can also be placed upon the decision reported in (2004) 2 SCC 362 (MEHBOOB DAWOOD SHAIKH VS. STATE OF MAHARASHTRA), wherein, the Supreme Court in paragraph 12, has held as follows:-

".... A decision is available as a precedent only if it decides a question of law. A judgment should be understood in the lights of facts of that case and no more should be read into it than what it actually says. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court divorced from the context of the question under consideration and treat it to be complete law decided by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. .... Reliance can also be placed upon the decision reported in AIR 2008 SC 1120 (SUDESH KUMAR VS. STATE OF UTTARAKHAND). In para 22, the Honble Supreme Court has held as under:-

".....The Court would not construe a Section of a statute with reference to that of another statute unless the latter is in pari materia with the former. Therefore, a decision made on a provision of a different statute will be of no relevance unless underlying objects of the two statutes are in pari materia. ...."

Support can also be had on the very recent decision of the Honble Supreme Court reported in 2009 (8) SCC 483 (BIHAR SCHOOL EXAMINATION BOARD VS. SURESH PRASAD SINHA). In paragraphs 20, 21, 22, the Honble supreme Court after referring to certain earlier decisions has held as under in para 23:-

".... 23. We have referred to the aforesaid decisions and the principles laid down therein, because often decisions are cited for a proposition without reading the facts of the case and the reasoning contained therein. ..."

45. Applying the principles referred to in the above two decisions and the reliance placed upon Ashrafs case, it will have to be held that the said decision rendered in the context of the specific provisions contained in Section 6(i) of the Karnataka Act cannot be mutatis mutandis apply to the case on hand where Section 3(4) are worded differently. While in Section 3(4) the qualifying words are does not sell the goods so manufactured and the expression by way of sale in the State as contained in Section 6 (i) of the Karnataka Act is significantly absent in Section 3(4). Therefore, what are to be examined while applying Section 3 (4) is as to whether the dealer after availing the concession rate of sale under Section 3(3) failed to effect a sale. It is unnecessary for that dealer to establish that such a sale was a sale either by way of intra state sale or export sale. Keeping the above specific content of Section 3(4) in mind, when we examine, the definition of sale as contained in Section 2(n) read along with explanation 3(a) of the Act, the position becomes clear to the effect that by virtue of the fact that the manufactured goods of the assessee is available in the State and by virtue of compliance of explanation of 3(a) to Section 2(n), the transaction of the assessee even by way of export satisfies the definition of sale under the Act and consequently the application of Section 3(4) automatically gets excluded. Therefore, having regard to the application of Section 2(n) read along with explanation 3(a) of the Act, the invocation of Section 3(4) of the Act stands excluded. The said legal position viz., reading of Section 2(n) into 3(4) being a special situation in the case on hand, which legal position was not present in Ashrafs case, we have to hold that whatever stated in Ashrafs case cannot be applied to the case on hand.

46. In this context, the reliance placed upon the decision reported in 41 STC 409 (POLESTAR ELECTRONIC (PVT.)LTD. VS. ADDITIONAL COMMISSIONER, SALES TAX, AND

ANOTHER), of the Honble Supreme Court on behalf of the Assessees, fully fortifies their claim. At page 422, the Honble Supreme Court has held as under:-

".....It may be pointed out in the first place that the legislature could have easily used some such words as "inside the Union Territory of Delhi" to qualify the word "resale", if its intention was to confine resale within the territory of Delhi, but it omitted to do what was obvious and used the word "resale" without any limitation or qualification, knowing fully well that unless restrictions were imposed as to situs, "resale" would mean resale anywhere and not merely inside the territory of Delhi. The legislature was enacting a piece of legislation intended to levy tax on dealers who are laymen and we have no doubt that if the legislative intent was that "resale" should be within the territory of Delhi and not outside, the legislature would have said so in plain unambiguous language which no layman could possibly misunderstand. It is a well-settled rule of interpretation that where there are two expressions which might have been used to convey a certain intention, but one of those expressions will convey that intention more clearly than the other, it is proper to conclude that, if the legislature used that one of the two expressions which would convey the intention less clearly, it does not intend to convey that intention at all. We may repeat what Pollock, C.B., said in Attorney-General Vs. Sillem. That "if this had been the object of our legislature, it might have been accomplished by the simplest possible piece of legislation ; it might have been expressed in language so clear that no human being could entertain a doubt about it". We think that in a taxing statute like the present which is intended to tax the dealings of ordinary traders, if the intention of the legislature were that in order to qualify a sale of goods for deduction, "resale" of it must necessarily be inside Delhi, the legislature would have expressed itself clearly and not left its intention to be gathered by doubtful implication from other provisions of the Act. The absence of specific words limiting "resale" inside the territory of Delhi is not without significance and it cannot be made good by a process of judicial construction, for to do so would be to attribute to the legislature an intention which has chosen not to express and to usurp the legislative function. ...."

47. Applying the ratio laid down therein and having regard to the specific provision contained in explanation 3(a) to Section 2(n) wherein, it has been specifically provided that by virtue of the said explanation and the satisfaction of which would include the sale or purchase of goods as deemed sale or purchase for the purposes of this Act and in the event of satisfaction of the stipulations contained in Explanation 3(a), such transaction will have to be necessarily construed as a sale within the State, it will stand excluded for the application of Section 3(4) of the Act. When once such a construction is authorized under the Act, negative stipulation viz., does not sell the goods so manufactured contained in Section 3(4) will not apply and consequently, invocation of Section 3(4) in the case of even an export sale will stand excluded. The reliance placed upon the decision reported in 63 STC 169 (MADRAS MARINE AND CO., VS. STATE OF MADRAS) by the assesses is also helpful to the petitioner. At page 176, the Honble Supreme Court has held as under:-

"....The ratio of this decision would be applicable to the facts and circumstances of this case. It was rightly urged that the appropriation of goods took place in the State of Tamil Nadu when the goods were segregated in the bonded warehouse to be delivered to the foreign going vessels. It was not a case of export as there was no destination for the goods to a foreign country. The sale was for the purpose of consumption on board the ship. It was not as if only on delivery on board the vessel that the sale took place. The mere fact that shipping bill was prepared for sending it for customs formalities which were designed to effectively control smuggling activities could not determine the nature of the transaction for the purpose of sales tax nor does the circumstances that delivery was to the captain on board the ship within the territorial waters make it a sale outside the State of Tamil Nadu. ...."

To support the above conclusion, the decision of the Honble Supreme Court reported in 134 STC 473 (ASHOK LEYLAND LTD VS. STATE OF TAMIL NADU AND ANOTHER) can also be referred to. Paragraphs 69 and 71 of the said decision reads as under:-

"...69. The expression "For the purpose of this Act", unless the context otherwise requires would mean "all the purposes" thereof. ......

71. The expression "for the purpose of the said Act" must also be given effect to. The same would ordinarily mean "for the purpose of all the provisions of the said Act". ......"

Applying the said ratio, it can be safely held that the export sale of the petitioners would squarely fall under the definition of sale.

48. We therefore hold that the 'export sale' is also a 'sale' as contemplated in the first part of Section 3(4) of the Act and consequently the exigibility to tax as provided under the said Section cannot be applied.

49. On behalf of the assesses, reliance was placed upon 2002 8 SCC 139 (CEMENTO CORPORATION LTD VS. COLLECTOR, CENTRAL EXCISE). In paragraph 17, the Honble Supreme Court held as under:-

".....17. In our view, the Tribunal and the Collector have incorrectly interpreted the provisions of Tariff Item 23 of the First Schedule to the 1944 Act. The tariff heading of the entry is "Cement.". Therefore when TI 23(2) speaks of "all others" it means "all other kinds or varieties of cement". It is axiomatic that if the product is not cement but can be used for some purposes like cement, such product is not cement. The test as enunciated by the Tribunal for determination of the question of classification is no doubt how the product is known to the trade. The appellant has produced evidence to show that lympo had never been known or indeed advertised as "cement" whether of a superior or inferior quality, but was known as a cement substitute. The respondents have produced nothing to show to the contrary. A substitute necessarily implies a difference in identity. When once it is admitted that lympo is a cement substitute, the Tribunal could not have come to the conclusion that lympo was cement or a variety of cement. In our view, there is no ambiguity in the definition of TI 23(1) or TI 23(2). Even if there were, on the principle that when two constructions can be equally drawn, the one favourable to the taxpayer should be adopted, the Tribunal should have held in favour of the appellant."

50. Applying the said principle to the case on hand, in the first place, we do not find any doubt at all to hold that there was a 'sale' viz., situs of sale' was within the state and consequently, the application of Section 3(4) of the Act stands excluded. Assuming if there is any doubt, it will have to be held that constructions which would favour the tax payer should be adopted and on that basis it will have to he held that Section 3(4) will not apply.

51. The contention of the learned Special Government Pleader (Tax) that the concession rate of tax provided under Section 3(3) of the Act by the State was with the paramount principle that the ultimate manufactured goods would derive better revenue at the time of its first sale within the State and that if an export sale were to be brought within the definition of sale and thereby applicability of Section 3 (4) is excluded, the state would be deprived of its revenue in all respects and that was not the contemplation of the provision contained in Section 3(3) and 3(4) of the Act.

52. In fact the said contention was repelled by the Honble Supreme court in the following words in paragraph 5 of the decision reported in (1994) 2 SCC 434 (PRINTERS (MYSORE) LTD. AND ANOTHER VS.

ASSTT. COMMERCIAL TAX OFFICER AND OTHERS):-

"....Section 8, read as a whole, sys inter alia : where a dealer purchases goods (being non-declared goods) required by him for use in the manufacture or processing of goods for sale and issues Form 'C' to the selling dealer, the selling dealer shall be liable to pay tax only @ 4% as per Section 8 (1) and not 10% as provided in Section 8(2), provided that the certificate of registration of the purchasing dealer specifies the class of goods purchased by him. (In case of declared goods, the selling dealer has to pay tax at the rate applicable to sale of such goods within the appropriate State.) It necessarily means that the selling dealer will collect (pass on) tax from the purchasing dealer only at the said concessional rate. The idea behind this provision is self-evident. It is to ensure that the price of the product manufactured by such purchasing dealers does not go up to the detriment of the consumers of those goods. The Parliament does not want to tax both the raw material and the finished goods at the full rate. Where the finished goods are meant for sale, the raw material utilised or consumed for the manufacture of said finished goods is taxed at the concessional rate, for the reason that the State derives revenue again by taxing the sale of the finished goods. However, it is not necessary that the finished goods are actually subjected to tax on their sale for they may be exempted either by the Act or by a notification issued thereunder. It is enough that the finished goods are meant for sale. Ordinarily, of course, their sale is taxed. ....."

Therefore, when a constitution embargo is created on export sales, on that sole ground, the contention of the respondent will have to be rejected.

53. The reliance placed upon the Division bench decision of this Court reported in 38 STC 519 (THE STATE OF TAMIL NADU VS. CHETTINAD CEMENT CORPORATION LTD.) on the interpretation of explanation 3 to Section 2 (n) of the Act on behalf of the State, cannot be accepted for the simple

reason that in the said decision, what all the Division Bench has said is that the purpose of explanation of 3 to Section 2 (n) is to fix the situs of the sale, for the purpose of taxation and made it clear that the question as to when the sale is completed was outside the scope of Explanation 3. As a matter of fact, the conclusion of the Division Bench to the effect that Explanation 3 to Section 2 (n) was purported to fix the situs of the sale supports the sale of the assessee. Therefore, based on the said decision the interpretation to Section 3(4) cannot be made.

54. The decision relied upon by the State reported in 138 STC 169 (KRISHNA TRADERS AND ANOTHER VS. COMMERCIAL TAX OFFICER ANNANTHANPATTY CIRCLE, SALEM AND OTHERS) cannot also be applied inasmuch as the said decision follows the decision of the Supreme Court in Ashraf s case. The Division Bench rejected the contention of the assessee claiming exemption from purchase tax of Section 7(A) of the Act by relying on Section 5(3) of the CST Act inasmuch as the said decision was rendered in the context of application of Section 7 (A) of the Act. For imposition of purchase tax, the ratio of the decision of the Honble Supreme Court in Ashrafs case was fully applicable. The said decision cannot however be applied to the case relating to the applicability of Section 3(3) and 3(4) of the Act. Reliance was placed upon the decision of the Supreme Court reported in 95 STC page 93 (STATE OF ORISSA VS. JOHRIMAL GAJANAND). The Honble Supreme Court while dealing with the provision contained in the Orissa Sales Tax Act, in the context, where an Assesee, a registered dealer to the said Act, purchase certain goods from another registered dealer based on a declaration furnished by it for resale of the purchased goods in the state and the goods were however sold in the course of inter state trade, in that context, held as under at page 97:-

" .....It is the admitted case of the assessee that the sales in question were the sales in the course of inter-State trade and if that is the position then the question of the same sales being the sales within the State did not arise. ...."

Having regard to the peculiar facts involved in that case, the decision rendered therein cannot be applied to the facts of this case.

55. Similarly, the Division Bench decision reported in 45 STC 291 (PONNU SAW MILLS VS. THE STTE OF TAMIL NADU) cannot also be applied inasmuch as the said decision came to be rendered while applying Section 7-A of the Act. Inasmuch as the said section varies in very many degrees as compared to 3(3) and 3(4) of the Act, the same cannot be applied to the facts of this case. Similar is the decision reported in 87 STC 315 (STATE OF TAMIL NADU VS. A.S.RAJ & CO.,). Therefore, the same cannot be applied to the facts of this case.

56. Having regard to our above conclusions, we hold that Section 3(4) of the Act will have no application since situs of the export sales of the petitioners for the purpose of said Section was the State of Tamilnadu and by virtue of the said factual position, the applicability of Section 3 (4) stands excluded for the exigibility of tax. The questions are accordingly answered in favour of the petitioners/assessee.

57. The petitions stand allowed. The impugned orders are set aside."

3. Following the same, the above writ petition stands dismissed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To
1.The Tamil Nadu Sales Tax Appellate Tribunal,
Additional Bench,
Coimbatore-18.

2.The Appellate Deputy Commissioner,
(Commercial Taxes),
Coimbatore.

3.The Assistant Commissioner (CT) (FAC),
Fast Track Assessment
Circle-1, Coimbatore

+1 cc to M/s.Special Government Pleader(Taxes) sr8549

W.P.No.4164 of 2005

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