BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the order	Date of Pronouncing the order
10.02.2023	23.02.2023

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

Tax Case (MD)No.61 of 2009

Tvl. S.L.N. Exports,
No.122, M.M. Street,
Karaikudi. ... Petitioner

vs.

1.The Secretary,
Tamil Nadu Sales Tax Appellate Tribunal
(Additional Bench),
Commercial Taxes Complex,
Dr.Balasundaram Road,
Coimbatore – 641 018.

2.The Appellate Assistant Commissioner (CT)
(Now designated as Appellate Deputy Commissioner),
Commercial Taxes Building, Madurai Road,
Virudhunagar.

3.The Deputy Commercial Officer
(Now designated as Commercial Tax Officer),
Sales Tax Office,
Karaikudi. ... Respondents

[R2 and R3 impleaded vide order dated 29.01.2010, made in M.P.(MD)No.1 of 2009 in T.C..(MD)No.61 of 2009]

Prayer :- Tax Case filed under Section 38 of the T.N.G.S.T. Act, 1959, to revise the order of the Sales Tax Appellate Tribunal (Additional Bench), Coimbatore, dated 20.01.2007, passed in Coimbatore Tribunal State Review Application No.2 of 2006.

For Petitioner : Mr.R.D.Ganesan

For Respondents : Mr.D.Sasikumar
Additional Government Pleader

ORDER

DR.G.JAYACHANDRAN, J.

The Tax Case under Section 38 of the Tamil Nadu General Sales Tax Act, 1959 [hereinafter referred to as "the TNGST Act"] read with Rule 30 of the Tamil Nadu General Sales Tax Rules, 1959, is directed against the order passed by the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore, in Review Application No.2 of 2006, dated 20.01.2007.

2. The factual background leading to filing of this case is re-capitulated as under:-

2.1. The petitioner is the dealer in coffee seeds. They are assessed to commercial tax for their transaction by the Deputy Commercial Tax Officer, Karaikudi. The petitioner claims that they have operation at Karaikudi, State of Tamil Nadu as well as a Branch Office at Kushal Nagar, State of Karnataka. The petitioner engaged in procuring raw coffee seeds within the State of Tamil Nadu and sent them to the Karnataka Unit, where the raw seeds are processed and exported to foreign countries. For the Assessment Year 2001-2002, the petitioner reported a total taxable turnover of Rs.40,39,994/-. They claimed exemption from levy of tax to the tune of Rs.2,24,00,783/-, which, according to the petitioner, falls under the definition of Inter-State stock transfer of goods purchased for foreign country export. The petitioner claims that the transfer and movement of coffee seeds worth Rs. 2,24,00,783/- was a result of direct purchase by the Karnataka Branch in the course of Inter-State purchase. In such circumstances, Section 7-A of the TNGST Act will not apply. The Assessing Authority after verification of their accounts, disallowed the claim of exemption and levied tax with penalty. The assessment order dated 29.08.2003, imposing tax on turnover of Rs.2,24,00,783/- at the rate of 8% with penalty under Section 7-A of the TNGST Act was challenged by way of an Appeal before the Appellate Assistant Commissioner [CT], Virudhunagar, in Appeal No.319 of 2003.

2.2. In the appeal, the dealer contended that the purchase and movement outside the State were integrated with each other and therefore, there is no separate transaction for the purpose of levy of tax on the purchases from unregistered dealer and transported to the Branch at Karnataka. It was further contended before the Appellate Authority by the dealer that the coffee seeds transported to Karnataka was primarily by and for the Branch at Kushal Nagar, Karnataka. There is no break between the purchase of coffee seeds within the State of Tamil Nadu and the movement of the goods to Karnataka, where the Branch Office is located. Therefore, the liability under Section 7-A of the TNGST Act is not attracted. Judicial decisions were also relied upon to buttress the said argument that the turnover to the tune of Rs.2,24,00,783/-, including the penalty imposed by the Assessing Authority was sought to be set aside.

2.3 The Appellate Authority in Appeal No.319 of 2003, vide order dated 14.01.2004, accepted the plea of the petitioner/dealer seeking exemption for the turnover of Rs.2,24,00,783/- as stock transfer purchased from unregistered dealer within the State issuing bought vouchers and despatched to the Branch at Kushal Nagar Karnataka State as stock transfer. The purchase made against the specific order by Karnataka Unit directly is exempted from tax under Section 7-A(1)(c) of the TNGST Act. In short, the finding of the Assessing Authority that the turnover cannot be exempted as a stock transfer was reversed by the Appellate Authority and the said turnover was taken as stock transfer purchased from unregistered dealers and despatch to a place outside the State. As a result, the tax and penalty levied for the turnover of Rs.2,24,00,783/- was set aside.

2.4. Not satisfied with the order of the Appellate Authority allowing exemption, the State preferred an Appeal before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Madurai, in M.T.S.A.No.382 of 2004, vide order dated

18.10.2004. The Tribunal dismissed the Appeal, confirming the order of the Appellate Authority.

2.5. Challenging the said order, the State preferred Review Application No. 2 of 2006 under Section 36(6)(a) of the TNGST Act to review the order of the Sales Tax Appellate Tribunal [Additional Bench], Madurai, in M.T.S.A.No.382 of 2004, dated 18.10.2004, granting exemption to the assessee and reversing the levy of tax and penalty imposed by the Assessing Officer.

2.6. In the Review Petition, it was contended by the State that the Sales Tax Appellate Tribunal, Madurai, failed to follow the principle laid down by the Hon'ble Supreme Court in the case of **State of Karnataka vs. B.M.Ashraf and Co.** reported in **1997 (8) SCC 468**, wherein the Hon'ble Supreme Court has held in similar kind of transaction, *viz.,* purchases from unregistered dealers and sold to exporters, who purchase the goods in order to comply with the export order from its buyer in a foreign country, the sale effected by the dealer to the exporter has to be regarded as the sale in the course of export by virtue of Section 5(3) of the CST Act and since it was not pursuant to an inter-State sale or as a result of inter-State sale, it fell directly within the ambit of Section 6(1) of the Karnataka Sales Tax Act and the dealer was therefore, liable to pay purchase tax for the purchases from unregistered dealers.

2.7. According to the State, in the Review Application, such sale falls under Section 7-A(1)(c) of the TNGST Act as per the judgment of the Tamil Nadu Taxation Special Tribunal in the case of **Razack Trading Co. Vs. State of Tamil Nadu, Deputy Commercial Tax Officer, Ariyalur and others** reported in **MANU/ST/0007/1999** [T.C.R.Nos.287 and 288 of 1997, dated 02.02.1999]. It was thus contended that ignoring the aforesaid two judgments, the Sales Tax Appellate Tribunal, Madurai, has granted exemption and therefore, the same has to be reviewed.

2.8. The dealer/assessee filed a counter in the Review Application questioning the maintainability of the Review Application. It was contended that, the ground raised does not fall within the scope and ambit of Section 36(6)(a) of the TNGST Act. Only in case of discovery of new and important fact, which was not within the knowledge of the Department when the order was made, the power of the Tribunal to review the order under Section 36(6)(a) of the TNGST Act can be exercised. In the instant case, no new facts were discovered and two judgments cited will not fall under the ambit 'discovery of new and important facts'. The Review Application is an appeal in disguise and therefore, not maintainable.

2.9. To buttress the said submission, the dealer/assessee has relied upon the following judgments:-

(i) **Gollapudi Suryanarayana Chetty vs. State of Tamil Nadu** reported in **45 STC 227**

(ii) **Tamil Nadu Iron and Steel Co. Vs. State of Tamil Nadu** reported in **46 STC 293**

(iii) **State of Tamil Nadu Vs. Amburose Mary** reported in **83 STC 483**

(iv) **State of Tamil Nadu vs. Sri Gounder and Co.** reported in **83 STC 520**

2.10. On merits also, the Review Application was contested by the dealer stating that the dealer/assessee has purchased coffee seeds from unregistered dealers in Tamil Nadu on behalf of its Karnataka Branch and transported it to its Karnataka Branch. The payment for such purchase was paid by Karnataka Branch under bought voucher. It was at the instruction of the Karnataka Branch, the purchase has been effected and the same has been exported by the Karnataka Branch after processing. Therefore, it is a purchase in the course of export to a foreign country, which is exempted from levy of tax as per the Statutes and judicial pronouncements.

2.11. The assessee's contention was that the turnover to the tune of Rs.2,24,00,783/- fall within Section 5(3) of the CST Act, 1956 and such turnover is directly fall within the ambit of Section 6(1) of the Karnataka Sales Tax Act and will not fall under Section 7-A(1)(c) of the TNGST Act. The judgment in **Razack Trading Co.** [cited supra] is heavily relied upon by the assessee in support of their submission. However, the Sales Tax Appellate Tribunal entertained the Review Application and also set aside the exemption granted by the first Appellate Authority.

3. The copy of the order dated 20.01.2007, made in the Review Application C.T.S.R.A.No.2 of 2006, was communicated to the assessee on 02.08.2007. The same is challenged before this Court on the ground of maintainability and misapplication of Section 7-A(1)(c) of the TNGST Act.

4. The following judgments are relied by the learned counsels for the petitioner and the respondents and taken up for consideration to decide the question of law whether the Review Application filed by the State under Section 36(6)(a) of the TNGST Act is maintainable? and if yes, whether the turnover of Rs.2,24,00,783/- is only a stock transfer not liable for tax?

(i) **Tamil Nadu Iron and Steel Co. vs. The State of Tamil Nadu** reported in **46 STC 293**

(ii) **Gollapudi Suryanarayana Chetty vs. State of Tamil Nadu** reported in **45 STC 227**

(iii) **State of Tamil Nadu vs. Sree Gounder & Co.,** reported in **83 STC 520**

(iv) **State of Tamil Nadu vs. Amburose Mary** reported in **83 STC 483**

(v) **Co-operative Sugars (Chittur) Ltd. vs. State of Tamil Nadu** reported in **90 STC 1**

(vi) **State of Tamil Nadu vs. Sivanandam Mills Limited** reported in **106 STC 383**

(vii) **State of Karnataka vs. B.M.Ashraf & Co.** reported in **107 STC 571**

(viii) **Razack Trading Co. Vs. State of Tamil Nadu, Deputy Commercial Tax Officer, Ariyalur and others** reported in **MANU/ST/0007/1999** [T.C.R.Nos.287 and 288 of 1997, dated 02.02.1999].

5. The main contention by the dealer apart from maintainability of the Review was that, the purchase was on instruction from its Karnataka Branch and without any break, goods were transferred, for it to be exported.

6. At this juncture, it is relevant to extract Section 36(6)(a) of the TNGST Act:-

> ***"36.Appeal to the Appellate Tribunal.-***
>
> *(6)(a) the appellant or the respondent may apply for review of any order passed by the Appellate Tribunal under sub-section (3) on the basis of the discovery of new and important facts which after the exercise of due diligence were not within his knowledge or could not be produced by him when the order was made:*
>
> *Provided that no such application shall be preferred more than once in respect of the same order."*

7. The sequence of events leading to filing of this Tax Case can be re-capitulated as below:-

For the assessment year 2001-2002, the dealer has been assessed to tax by the Assessing Authority taking into account his total turnover including the turnover of Rs.2,24,00,783/-, which claim to be the purchase value of coffee seeds meant for export through the dealer's branch at Karnataka. The said levy of tax on Rs.2,24,00,783/- with penalty was in view of applying Section 7-A(1)(c) of the TNGST Act. The said provision reads as below:-

> *"**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 of 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 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, –*
>
> *(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*

According to the learned Additional Government Pleader representing for the Department, the registered dealer has purchased raw seeds within the State of Tamil

Nadu from unregistered dealers. In normal course, the same is liable to be taxed. If the dealer establishes that the purchase effected by him in the course of export, then, such sale is exempted from tax under Section 5(3) of the CST Act, 1956. In this case, purchase was effected by the dealer at Karaikudi, Tamil Nadu to its Branch at Kushal Nagar, Karnataka. Admittedly, the purchase was done from unregistered dealers. The said purchase has been brought on record and goods were transported to Kushal Nagar, Karnataka, accompanied with Form-F. If the same is not liable for tax and the penultimate sale was meant for export by the Branch Office, the same should have been transported with such declaration accompanied with appropriate Form-H under the Act. Whereas, the dealer at Tamil Nadu for the purchase within Tamil Nadu from unregistered dealer and subsequent transfer of goods to its Branch Office, has not produced agreement or order for or in relation to such export, which is mandatory for giving exemption from tax under Section 5(3) of CST Act, 1956. Instead, the goods were transferred accompanying Form-XX and Form-H only.

8. Per contra, the learned counsel for the dealer/assessee submitted that the dealer does not claim any exemption under Section 5(3) of CST Act, 1956 and Section 7-A of the TNGST Act have no role in this assessment. In **Cooperative Sugars (Chittur) Ltd., Vs. State of Tamil Nadu** reported in **1993 (90) STC 1 (SC)**, the Hon'ble Supreme Court has clearly held that so long as the movement of the goods was an incident of the sale/purchase, it amounted to an inter-State

sale/purchase. It was also not necessary that the contract of sale had to expressly provide for the movement of goods. It was sufficient if the movement of goods was implicit in the sale. Further, in **State of Karnataka Vs. B.M.Ashraf and Co.** reported in **(1997) 8 SCC 468**, the Apex Court has clarified that *situs* is not relevant as regards the being in the course of export. A sale deemed to be in the course of export under Section 5(3) of the CST Act, 1956 cannot be regarded as an intra-State sale. Merely because the passing of title or sale takes place in a State that would not detract from its character as an inter-State sale or export sale.

9. The learned counsel for the dealer/assessee relied on the judgment in **State of Haryana and others vs Nipha Exports Pvt. Ltd.** reported in **2007 (8) VST 466 (SC)** and emphasised the movement of raw coffee seeds purchased from unregistered dealer in Tamil Nadu by the Head Office to Kushal Nagar, Karnataka Branch Office for export outside India cannot be construed as sale between the Head Office and Branch Office.

10. On review the Tribunal has found that the reasoning given by the Appellate Authority is incorrect and the judgment cited by the dealer and relied by the Appellate Authority are not relevant. It held that the Appellate Authority has come to an erroneous conclusion that the purchase within the State of Tamil Nadu and transport of the coffee seeds to Karnataka are not two distinct acts of the dealer and it has to be considered as inseparable continuous action.

11. The Tribunal has taken note of the fact that the dealer has raised purchase bills while procuring coffee seeds from the planters in Tamil Nadu and thereafter, the goods were transported to the Branch Office at Kushal Nagar, Karnataka, under Form-XX Delivery Note issued to the dealer in the State of Tamil Nadu. Therefore, the contention of the dealer as well as the reasoning of the Appellate Authority was held to be factually incorrect. The dealer has admitted that the raw seeds were procured within the State of Tamil Nadu and transported to Karnataka and the same was processed at the Karnataka Unit. A portion of the processed seeds was sent back to Tamil Nadu for sale, another portion was sold in Karnataka and major portions were exported to the foreign countries. The actual portion of the raw seeds procured in Tamil Nadu, transported to Karnataka and thereafter, exported to foreign after processing, has not been specifically stated under Form-H, which would reflect the quantum of the seeds procured actually transported to the foreign countries. In the absence of purchase order from the Karnataka Branch and export order from foreign buyer or contract between foreign buyer and Karnataka Unit, exemption cannot be granted to the dealer.

12. The Tribunal further held that it was a transfer of goods from Tamil Nadu as first sale to its Branch at Karnataka and not an incidental transfer based on the purchase order from foreigners. The dealer has not produced Form-H to prove that entire stock transfer was for export only. In fact, portion of the goods sent to

Tamil Nadu along with Form-F. Thus, goods transferred to Karnataka not sold in entirety to foreign. Thus, for the said reason, the order of the Appellate Authority setting aside the levy of tax on a turnover of Rs.2,24,00,783/- under Section 7-A(1)(c) of the TNGST Act and the levy of penalty of Rs.26,88,093/- under Section 12(3)(b) of TNGST the Act was reversed.

13. The said order of the Tamil Nadu Sales Tax Appellate Tribunal, Coimbatore, under Section 36(6) of the Act came to be passed on 20.01.2007, in C.T.S.R.A.No.2 of 2006 after verifying the CST files of the dealer. In the CST files, the new fact that the dealer has disclosed its turnover for the year 2001-2002 as Rs.1,46,73,661/- and declared Nil Taxable turnover has come to light.

14. The impugned order says that verification of the Form-1 return, namely the return under the CST Act, it is seen that the dealer had claimed exemption on the transfer of goods otherwise than by way of sale as against under Section 6-A of the CST Act and the value of the goods transferred to the assessee's place of business in other State had been mentioned for all the months from 01.04.2001 to 31.03.2002. So, it is very clear that the dealer himself had disclosed the turnover of Rs. 2,24,00,783/- as branch transfer coming under Section 6-A of the CST Act and the verification of the assessment order under the CST Act which had been passed by the Assessing Authority on 29.08.2003 revealed that the dealer had claimed exemption

on a turnover of Rs.1,46,73,661/- and the Assessing Authority had determined the total turnover that was being the stock transfer of Coffee Seeds to the Branch at Karnataka as Rs.2,24,00,783/- and the exemption claimed was allowed by the Assessing Authority on the ground that the dealer had produced Form-F under the documents and the exemption claimed by the dealer was in order and he had allowed it. As seen from the factual position of the case, it is very clear that the dealer himself had disclosed a turnover as stock transfer and it had also been assessed by the Assessing Authority under Section 6-A of the CST Act, for which, the liability and the taxable turnover under Section 7-A(1)(c) of the TNGST Act is attracted.

15. Thus, on considering the order passed in Review Appeal, we find that a new fact on verifying the CST files of the assessee, the inconsistent stand of the assessee under the State Act and the Central Act has come to light. This is not a case of intra-State transaction or transfer of goods uninterrupted to the exporter, based on specific agreement for export. The legal position of transaction of this nature is well explained by the Tamil Nadu Taxation Special Tribunal in **Razack Trading Co. Vs State of Tamil Nadu** reported in **MANU/ST/0007/1999** in the following words:-

> *"14. It is to be noted that while dealing with Section 5(3) of the TNGST Act in the commentaries of the CST law by Shri S. Srinivasan, in the first edition 1998 at page 88 in the second and third paras it has been clearly explained as follows :*

"Where a tax on purchases (and not sales) is leviable under the State law, the first purchase before export, which will be by the exporter himself, will be eligible for the benefit of this sub-section and not any preceding purchases. When a dealer purchased such goods in the State where there was a levy on the last purchases in the State and sold them to an exporter, the benefit of this section was denied to the former as it was held admissible only to the latter : Mohammed Ishaq & Sons v. Commissioner of Commercial Taxes in Karnataka [1992] 87 STC 36 (Kar).

By declaring the penultimate sale or purchase in the State as a sale in the course of export, the powers of the State Legislature to tax the transactions completed within its territory was taken away and to this extent, this sub-section infringes on these powers. The validity of Sub-section (3) of this section was upheld by the apex Court in Consolidated Coffee Ltd. v. Coffee Board [19801 46 STC 164 at page 175 on the ground that this sub-section does not create a legal fiction but only lays down a principle of general applicability in accordance with Article 286(2) and hence it is valid.

This view has been based upon the principles laid down in the above cited decisions. The first transaction, namely, purchasing chillies from the agriculturists is preceding to the last sale within the State or preceding to a sale in the course of export (second transaction). So now we are concerned only with the first transaction for which purchase tax has to be necessarily levied under Section 7-A of the TNGST Act, 1959." "

16. Therefore, this Court holds that the Review by the Tribunal in exercise of the power under Section 36(6) of TNGST Act is maintainable, since important facts has come to light after verification of CST files and it was not been brought to the notice of the Tribunal when the order dated 18.10.2004 in M.T.S.A.No.382 of 2004 came to be passed.

17. Regarding the application of Section 5(3) of CST Act, 1956, reads as below:-

"**5. When is a sale or purchase of goods said to take place in the course of import or export.**— *(3) 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."*

18. It is clear that for exemption from levy of tax, the dealer is bound to furnish the agreement or order for or in relation to the export. In this case, the dealer has failed to furnish any agreement or order. The transfer of goods from Tamil Nadu to Karnataka done only by furnishing Form-XX and not by furnishing Form-H. Therefore, on facts also, the dealer cannot seek exemption from tax liability for its turnover of Rs.2,24,00,783/-.

19. In the result, the Tax Case is dismissed. No costs.

[G.J., J.] [K.K.R.K.., J.]
23.02.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
SMN2
To

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and
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SMN2

PRE-DELIVERY ORDER MADE IN
Tax Case (MD)No.61 of 2009

DATED : 23.02.2023