Rajasthan Tax Board, Ajmer

Appeal No. 2320/2008/SGNR

Appeal No. 2323/2008/SGNR

Commercial Taxes Officer,
Anti Evasion, Sri Ganganagar ...Appellant

VERSUS

M/s Stride Multitrade Pvt. Ltd.,
Sri Ganganagar .....Respondent

D.B.

SHRI RAJEEV CHAUDHARY, MEMBER

SHRI OMKAR SINGH ASHIYA, MEMBER

Present :

Anil Pokharna, for Appellant
Dy. Govt. Advocate

Shri Alkesh Sharma, Advocate for Respondent

Dated : 12/10/2018

JUDGMENT

1. These appeals have been filed by the appellant department (hereinafter called the "appellant"), against order of the Deputy Commissioner (Appeals), Commercial Taxes Department, Bikaner (hereinafter called the "appellate authority") who has accepted the appeals filed by the respondent dealer (hereinafter called the "respondent" or "assessee") against order of the Commercial Taxes Officer, Anti- Evasion, Sri Ganganagar (hereinafter called the "assessing officer" or "AO") as passed under section 29(6), 64 and 65 of the Rajasthan Sales Tax Act, 1994 (hereinafter called the "RST Act") and section 9 of the Central Sales Tax Act, 1956 (hereinafter called the "CST Act"), details thereof is given as under:

Appeal No.	A.Y.	Appellate Authority's order Details		Assessing Authority's order Details			
		Appeal No.	order dated	order dated	Tax	Interest	Penalty
2320/08	2004-05 CST	185/CST/Sri Ganganagar/ 2007-08	29.05.2008	26.09.2007	78,093	2,36,080	11,74,402
2323/08	2004-05 RST	184/RST/Sri Ganganagar/ 2007-08	29.05.2008	26.09.2007	2,89,997	41,021	5,79,997

2. Brief facts leading to the present appeals are that the business premises of the respondent were surveyed on 19th, 20th & 21st October, 2004 and it was found that he is doing inter-state sale of mustard oil and has not included in the sale value the expenses relating to freight, insurance and packing charges though charged in the bills. As these charges pertain to the expenses prior to delivery of the goods, therefore, it would be a part of the sale price. Secondly, the respondents purchased tin plates for manufacturing of containers to be used for packing of oil and availed benefit of the notification dated 09.07.1998. The AO held that the respondent was not eligible to avail benefit of the notification as there is no entry in Registration Certificate of the respondent about manufacturing of tin containers. He also came to the conclusion that based on the oil extraction ratio of 35% of the oilseed used in manufacturing of oil, the stock was found to be short and treated this shortfall as 'concealed sale' and levied tax, interest and penalty. The AO also imposed a penalty on wrongful availment of partial exemption under notification dated 22.03.2002.

3. Aggrieved of this imposition the respondent preferred appeals before the appellate authority who vide his impugned orders set aside the tax, interest and penalty and accepted appeals of the respondent. The revenue has preferred these appeals against orders of the appellate authority.

4. Learned Deputy Government Advocate appearing for the appellant Revenue submits that the AO has rightly calculated the oil extraction yield @ 35% whereas the assessee has shown

it to be 34.6% at appellate stage only. Secondly the respondent has wrongly availed benefit of the notification dated 09.07.1998 therefore, the penalty u/s 64 was rightly levied, and thirdly, for the expenses relating to insurance etc. and freight on behalf of the buyers, should be treated as pre-delivery expenses and such sale should be construed as F.O.R. sale. He therefore, requests that appellate orders be set-aside and AOs orders be restored.

5. The learned advocate appearing for the respondent submits that the AO has hypothetically taken the yield of oil extracted from the mustard seed at 35% whereas, as per actual manufacturing process and calculations, it comes to 34.6% only, therefore, the AO has erred to arrive at this conclusion and only due to this reason the difference in stock has cropped up and the AO has levied tax, interest and penalty on the stock found short treating the same as concealed and evaded turnover. Secondly, he submits that so far as the notification dated 09.07.1998 is concerned, there is no condition in it if the items so purchased should have been entered in the registration certificate of the purchasing dealer. So far as the imposition of penalty is concerned, he submits that year 2004-05 was first year of business of the respondent assessee in his business so on technical grounds no penalty should have been levied on any alleged misuse of declaration form, if at all it was. To support his arguments, he referred the following judgments:

1. Mewar Khaniz Udyog V/s CTO: (1994) 2 STO 384 (RAJ)
2. State of Karnataka V/s Bangalore Soft Drinks Pvt. Ltd.: (1998) U.P.T.C. 1096 (SC)
3. CTO V/s Indian Rayon & Industries Ltd.: (2008) 21 TUD 21 (RAJ)
4. A.C. V/s Rajasthan Cylinders and Containers Ltd. (RAJ)
5. Vinod Coal Syndicate V/s CST, U.P.: (1989) 73 STC 317 (SC)
6. CTO V/s D.K. Gwar Udyog: 44 TUD 206 (RHC)
7. R.S. Industries V/s CTO: STR No. 333/2008 D/o 23.11.2016
8. A.C. V/s Rajasthan Cylinders and Containers Ltd.: (STR No. 262/2008 D/o 08.01.2015)

In light of these arguments he submits to reject the appeals.

6. We have gone through the submission of both the parties and perused the relevant record. There are three issues to be decided, which are as under:

   i. Whether the AO was justified in treating the oil extraction yield @ 35% instead of 34.6% declared by the assessee as per his books of accounts and whether the appellate authority is correct to set aside the same;

   ii. Whether the assessee is entitled to purchase the tin plate under the notification dated 09.07.1998 for manufacture of 'tin containers' for use in packing of oil manufactured by him; and

   iii. Whether the AO was justified to treat the expenses relating to insurance and freight etc. on behalf of the buyers as pre-delivery expenses and to construe the sale as F.O.R. sale and levy tax on this component.

   iv. Whether the appellate authority was justified in setting aside the penalty for excess availment of set off/partial exemption under the notification dated 22.03.2002.

7. So far as the issue of oil extraction yield is concerned, the AO has not shown any reason as to why he is not accepting the calculation as appearing in the books of accounts of the assessee wherein the net yield comes to 34.6%. It is worth mentioning that the yield of agricultural products or the commodities derived out of that is not fixed in percentage terms and may vary owing to reasons ranging from weather conditions to adequacy of rain or irrigation to quality of seed etc., so the end product of any agriculture produce particularly in the case of oilseed to oil cannot be determined in a fixed ratio perpetually. So, we are of the considered view that the yield of the oil extraction cannot be determined at a pre-conceived fixed level and if the AO is not convinced of the yield declared by the assessee as per his books of accounts then cogent and

dependable reasons must be furnished to adduce his findings. As the AO has failed to do so on this count, therefore, the yield determined by him is not sustainable, hence the excess quantum of yield percentage (over and above 34.6%) and resultant shortfall in stock and levy of tax and penalty thereupon has rightly been set aside by the appellate authority.

8. From perusal of the survey record, it transpires that the respondent in his statements before the survey officer has declared the oil yield to be 35%. This yield percentage seems to be a general yield ratio which may vary year to year or from one manufacturer to another manufacturer depending upon various factors. So on AO's part to stick to this statement of 35% yield and to treat it as 'Gospels truth' is somewhat illusionary. The year 2004-05 is the first year of operation of the respondent, therefore, the AO should have arrived at the yield ratio on the basis of production figures and also the yield figures of the similarly situated oil manufacturing units of the area could have been taken for further support the yield percentage of the respondent.

9. It is also evident from the record that in his reply dated 15.02.2005 (available on page 102 of the case file), the assessee has not mentioned the so called yield ration of 34.6% but has mentioned that "the yield of oil never remains constant and it varies from 33% to 35% owing to quality difference such as moisture, production area, time gap between date of production and crushing of Oil Seed, design of crushing machines and fluctuation of electricity during production". Since, the year 2004-05 is the first year of business of the respondent and no previous reference of yield percentage is available, so looking into the whole factual matrix, we consider it proper to remand the matter back to AO to redetermine the yield ratio from the manufacturing/production record of the

assessee for the year 2004-05 and then re-calibrate the production and stock position based on the yield percentage arrived so. After arriving at this production figures, if any variation is found in stock position then the AO would be at liberty to assess the tax and levy interest on stock found short/excess and may also levy penalty if any concealment of sale is found or same goods are found in excess of the stock position.

10. Another issue pertains to the availment of the benefit of purchase of 'tin plate' in light of the notification no. F.4 (14) FD/ Tax Divn/ 98-19 dated 09.07.1998. To decide this issue, first we have to peruse the said notification, which is reproduced hereunder:

> *"S.O. 117.-In exercise of the powers conferred by S.15, RST Act, 1994, and in supersession of this department notfn No. F.4(1)FD/Tax Divn/97-106 dated 12.03.1997 [S.No. 1079], the State Government hereby exempts from tax, sale to or purchase by a registered dealer of tin plate to the extent to which the rate of tax exceeds 1% on the condition that such tinplate is purchased against declaration from ST 17 and is used as raw material* ***for the manufacture of tin containers in the State for sale by him within the State or in the course of inter-State trade or commerce.***"

On plain reading of the above notification, it transpires that the main condition to avail benefit under the said notification is that the tin plate purchased so, is used (i) as raw material for manufacture of tin containers in the state, (ii) for sale by him within state or in the course of inter-State trade or commerce.

11. This fact is not in dispute that the tin plate purchased by the respondent has been used as raw material for manufacture of tins. The main objection of the AO was that the said manufacturing activity of making tins was not mentioned in registration certificate of the respondent assessee, but on bare perusal of the notification, no such condition is found to have existed to take benefit under the said notification. Now this has

to be ascertained if the goods so manufactured were used for sale by him or not and for that purpose the definition of the term "Sale" as given in clause (38) of the section 2, is worthwhile to refer. The explanation given under the definition of 'sale' categorically states that where any goods are sold in packing, the packing material in such case shall be deemed to have been sold with the goods. For ready reference, the said explanation is reproduced hereunder:

> ***"Explanation I. Notwithstanding anything contained in this Act, where any goods are sold in packing, the packing material in such case shall be deemed to have been sold with the goods, unless otherwise proved by the dealer."***

12. In the present matter, the goods manufactured (i.e. tin containers) from the tin plate purchased under the notification dated 09.07.1998 were used by the assessee in packing of the oil manufactured by him, which was sold within the State or in the course of inter-State trade or commerce, therefore, in light of the explanation as mentioned above, the tins manufactured from the tin plate purchased at concessional rate against form ST-17 are held to have been sold and no violation is found of any condition of the said notification. So, on this premise, the decision of the AO is not found to be correct one and the appellate authority has thus rightly set aside the penalty as imposed by the AO. It is also worth mentioning that the AO has held that in Registration Certificate (RC) of the assessee, there is no mention of 'manufacturing of tin containers or packing material, so not only the assessee's purchases of tin plate at concessional rate was disallowed but a penalty was also imposed u/s 64 of the RST Act for misuse of declaration form ST-17. The non-mentioning of the manufacturing of tin containers is a technical violation and for this lapse the AO, at

best, could have levied penalty u/s 68 of the RST Act. So, on this issue the appellate order is confirmed.

13. Now coming to the question as to whether the appellate authority has rightly set aside the penalty levied by the AO for availing excess partial exemption as available under the notification no. F.4(30)FD/Tax Div/2002-186 dated 22.3.2002. In the CST assessment for the year 2004-05, the AO has held that assessee has claimed a set off of Rs. 1434617/- on sale of oil on the oilseed purchased and used in manufacture of oil on which sales tax amounting to Rs. 1850819/- was paid and accordingly the set off amount has been worked out at Rs. 925409/-. Accordingly, an excess claim amounting to Rs. 509108/- was found to have been claimed by the assessee contrary to provisions of the notification and this amount was held to be recoverable alongwith a penalty u/s 65 of the act being Rs. 1018216/-. The appellate authority has though confirmed the demand of excess benefit of partial exemption availed so far, but has set aside this penalty citing the reason that this year (2004-05) is the first year of business of the assessee and that he was not well versed with the procedure and law and moreover, the transactions were recorded in the books of accounts of the assessee, therefore, penalty should not have been levied. On this count, we agree with the finding of the learned appellate authority and confirm the setting aside of the penalty as imposed u/s 65 of the RST Act.

14. Another issue under challenge is that the assessee collected freight charges, packing charges in form of 'husk charges on sales', agmark charges and insurance charges etc. amounting to Rs. 3904639/- on sale of goods in the course of inter-State trade and commerce but did not include these receipts as part of the sale price. The AO levied CST @ 2% i.e. Rs. 78093/- and also imposed penalty u/s 65 of the RST Act, Rs. 156186/-. The appellate authority while referring the explanation-II to clause (39) of section 2 of the RST Act as well as section 2(h) of the CST Act, held that if the expenses are separately charged then these

shall not become part of the 'sale price' and has set aside the levy of tax and penalty. The definition of 'sale price' as given u/s 2(h) of the CST Act provides that where the cost of freight or delivery is charged separately, the same shall not form part of the 'sale price'. This definition is as under:-

> *"'Sale price' means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged."*

On the basis of this definition and the judgments referred by the respondent, the freight charges which have been separately charged in the bills, are held to be allowable because there is no material on record to prove that delivery of the goods was on F.O.R. basis. However, the insurance charges, Agmark charges and the packing expenses shown in the bills as 'Husk charges on sales', which seem to have borne by the respondent, shall form part of the 'sale price' because the respondent has taken 'marine insurance policy' to cover the risk while the goods are under transit. Similarly, the packing expenses mentioned as "husk charges on sales" and "agmark charges" as shown in the bills, shall also form part of the sale price. The respondent could not show any documentary evidence during the course of the hearing if these expenses were incurred on behalf of the buyers/consignees as a result of any agreement between them.

As discussed above, no tax is leviable on the freight component charged separately in the bills, but the other expenses i.e. packing expenses mentioned as 'husk charges on sales'; 'Agmark charges' and 'insurance charges' shall form part

of the sale price and tax is leviable accordingly on these charges. So, for segregation of the freight charges from other charges the matter deserves to be remanded back to the AO to recalculate the quantum of charges excludible and includible in the sale price and to levy the tax and interest. However, no penalty shall be imposed looking into the authoritative judicial pronouncements of the Hon'ble Supreme Court, Hon'ble High Court(s) and the Rajasthan Tax Board as the transactions in question are duly accounted for and it was only interpretational issue as to whether the expenses/charges in question would form part of the sale price or not.

15. As discussed above, the impugned appellate order is :

i) confirmed on the issue of setting aside of tax and penalty on alleged misuse of declaration forms/violation of the conditions of the notification dated 09.07.1998;

ii) confirmed on the issue of setting aside of the penalty levied for excess availment of partial exemption in light of the notification dated 22.03.2002;

iii) confirmed on the issue of setting aside the levy of tax, interest and penalty on the freight component as separately charged in the sale bills. However, on the issue of other charges i.e. packing expenses mentioned as 'husk charges on sales'; 'Agmark charges and insurance charges, the appellate order is reversed and AO's order is restored for levy of tax and interest; and

iv) set aside on the issue of levy of tax and penalty on the concealed sale/evaded turnover arrived at on the basis of stock-taking and production figures based on yield percentage of oil extraction from the oilseed. On this issue, the matter is remanded back to the AO to adjudicate the matter as per the directions given here-in-above.

16. Resultantly, the appeals of the revenue are partly accepted, and the matter is remanded back to the AO to pass fresh orders as directed hereinabove. The respondent shall appear before the AO on 27.11.2018 with relevant record. **The AO shall finalize the assessment orders before 31.03.2019 positively.**

17. Order pronounced.

12.12.2018

(Omkar Singh Ashiya)
Member

12/12/18

(Rajeev Chaudhary)
Member