IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

ORDER

::

S.B. Sales Tax Revision No. 966/1999

Assistant Commissioner, Commercial Taxes
Department, Special Circle, Ajmer

Versus

M/s. Shree Cement Limited, Beawar

::

Date of order :: July 31, 2007

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. Vinay Goyal for the petitioner-Revenue
Mr. Vivek Singhal for the respondent-assessee

REPORTABLE

BY THE COURT:

1. This revision petition field by the Revenue, is directed

against the order of the Tax Board dated 20.03.1998, whereby the appeal of the Revenue was dismissed upholding the order of the learned Deputy commissioner (Appeals) dated 19.03.1994, which allowed the assessee's appeal against the penalty order passed under Section 17 of the RST Act by the assessing authority on 27.05.1992, wherein the learned assessing authority imposed the penalty under Section 5-C (2) of the RST Act, 1954 (old RST Act of 1954) amounting to Rs. 9,93,330/- on the respondent assessee.

2. The original assessment order was passed by the assessing authority on 25.03.1991 for the Assessment Year 1987-88 without imposing any such penalty under Section 5-C (2) of the old Act and the concessional rate of tax, at which the assessee purchased diesel for generating power through D.G. Sets, was allowed by the assessing authority in the said original assessment proceedings. However, by issuing a notice under Section 17 of the Act, which empowers the assessing authority to rectify the mistake apparent on the face of the record in the

assessment, the assessing authority after giving a show cause notice and hearing the objections of the assessee on the said account, arrived at the conclusion that the assessee had purchased energy from the RSEB as well as generated power from the D.G. Set and looking to the total requirement of units of power consumed by the assessee for the total production during the said period, even if the entire purchase of energy from RSEB is deducted, the assessee presumably consumed 6283731 units of power which was generated by D.G. sets using the diesel purchased at the concessional rate. This converted by the average consumption of diesel, the assessing authority computed that the assessee consumed 1598914 liters of diesel for generation of power used in manufacture of goods, which were transferred on stock transfer basis without payment of any tax to the State and thus, there was a misuse of declaration against which the assessee purchased the said diesel at concessional rate under Section 5-C of the old Act and therefore, the assessee was liable to pay the penalty to the extent of 125% of difference of tax between full rate and

concessional rate and thus, levied the penalty. The explanation of the assessee before the assessing authority that in fact, during the said year, the assessee purchased 2263000 liters of diesel as ST paid goods within the State after payment of tax to the State, was not believed by the assessing authority and the contention of the assess that applying the Prudent Man's theory, namely that one would arrange his affairs in accordance with the principles of commercial prudence in such a manner so as to avoid any tax liability or penalty, should be applied in the present case and thus, the assessee contented that the stock of such ST paid diesel should be deemed to have been used for generation of power used to manufacture cement, which was sent on stock transfer basis by the assessee and since the said quantity was in excess of even the quantity of 1598914 liters of diesel computed by the assessing authority in the impugned order under Section 17 of the Act, therefore, there was no misuse of declaration and no violation of conditions stipulated in Section 5-C (1) of the Act and hence, the penalty in question could not be imposed. Despite the fact

that the copies of bills showing purchase of the ST paid diesel were produced before the assessing authority in Section 17 proceedings, those were rejected by the assessing authority as “afterthought” and “new evidence”, which he did not entertain. The learned Deputy Commissioner (Appeals) applying the aforesaid Prudent Man's theory, allowed the appeal of the assessee and set aside the penalty. The appeal field by the Revenue before the Tax Board also failed and thus, two appellate authorities concurrently held that it was not a fit case for imposition of penalty under Section 5-C (2) of the Act.

3. The Revenue has field the present revision petition being aggrieved by the said order of the Tax Board.

4. I have heard the learned counsels and perused the record and the cited case law at the Bar.

5. It appears that firstly there was no justification for the assessing authority to resort to Section 17 of the Act in the

present case. It could not be said to be a mistake apparent from the face of the record if in the original assessment order passed by the assessing authority under Section 10(3) of the RST Act on 25.03.1991, the assessing authority allowed the purchase of diesel at the concessional rate and did not choose to impose any penalty under Section 5-C (2) of the Act in the original assessment proceedings though all the relevant facts and figures of consumption, sales and sales outside the State were before the assessing authority. Therefore, the narrow and limited scope of rectification of apparent mistakes from the face of the record could not be invoked so as to impose a penalty under Section 5-C (2) of the Act branding it to be a mistake apparent from the face of the record. This was a clear misuse of power under Section 17 of the Act, which could not be broadened and exalted to the power of reassessment in the case of escaped assessment of tax.

6. The manner in which the assessing authority has computed the consumption of diesel on the basis of production of

cement by the assessee and bifurcation of units purchased from RSEB and units of energy generated by D.G. sets in which the diesel in question was used, is also rather curious. Such mathematical equations and calculations of consumption of diesel can hardly furnish any basis for imposition of even tax much less penalty for the alleged misuse of declaration. The consumption of diesel depends upon a number of factors and in the absence of separate accounts being maintained for the production out of energy purchased from the RSEB and energy produced by D.G. sets, such bifurcation, as done in the present case, was hardly called for.

7. Moreover, the rejection by the assessing authority of the evidence produced before him of the ST paid diesel purchased by the assessee during the assessment year in question, was also unsustainable. The assessing authority being first fact finding authority, if it invoked the jurisdiction to impose the penalty in question, the giving of notice to the assessee and taking its reply or explanation alongwith evidence on record,

was the minimum compliance with the principles of natural justice, which the assessing authority was expected to undertake. Rejection and brushing aside of the evidence brought by the assessee on record, merely by calling it to be "an afterthought" or "new evidence", as has been done by the assessing authority in the impugned order, casts serious doubt on the manner in which the assessing authority sought to comply with the principles of natural justice. It is the bounden duty of the assessing authority to take evidence on record, scan and weigh it by allowing full opportunity to the assessee to prove its case and it is only by reasoned order that such evidence could be held to be not proving the case of the assessee. Brushing aside the very evidence which could rebut the case of the Revenue under Section 17 of the Act, takes away the very foundation of the impugned order under Section 17 of the Act. Biased and pro-Revenue approach of quasi-judicial authorities while passing the assessment orders ignoring the defence, evidence and explanation of the assessee, cannot be said to be fair and just exercise of powers

vested in them. The assessing authorities under the Act have powers of civil courts also to summon witnesses and evidence and enforce production of documents. They act as quasi courts or quasi-judicial tribunals and therefore, ignoring the evidence produced by the assessee by the assessing authority, cannot be sustained in the eye of law.

8. This court also finds that there was no reason to reject the Prudent Man's theory sought to be applied by the assessee in the present case, namely that the ST paid diesel should be deemed to have been consumed for manufacture of cement which was sent outside the State on stock transfer basis, in preference over the diesel which was purchased at the concessional rate of tax under Section 5-C (1) of the Act. Once the assessing authority wanted to invoke the jurisdiction under Section 17 of the Act to impose the penalty for alleged misuse of declaration under Section 5-C (2) of the Act, it was incumbent upon him to first consider as to whether such quantity of diesel alone was available to be used for power generation to be used in production of cement which was sent

outside the State on stock transfer. Unfortunately, the evidence which came before the assessing authority was brushed aside by the assessing authority without any valid reason.

9. Section 5-C (1) and (2) of the Act are reproduced hereunder for ready reference:-

> *"5C. <u>CONCESSIONAL RATE OF TAX FOR RAW MATERIALS</u>*
> *(1) Notwithstanding anything contained in this Act, but subject to such restrictions and conditions as may be prescribed, the rate of tax payable on the sale to or purchase by a registered dealer of any raw material for the manufacture in the State of (goods other than exempted goods for sale by him) within the State or in the course of inter-state trade or commerce shall be at a concessional rate of (3%) of the sale or purchase price of such raw material (or in the course of export outside the territory of India.)*
>
> *(EXPLANATION - For the purpose of this sub-section "exempted goods" means (i) goods exempted under sub-section (i) of section 4, and (ii) goods liable to additional excise duty under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and which are exempt from the payment of tax by or under the provisions of this Act.)*

(2) Where any raw material purchased by a registered dealer under sub-section (1) is utilised by him for any purpose other than purpose specified therein, such dealer shall be liable to pay as penalty, such amount, not less than the difference between the amount of tax on the sale of such raw material at the full rate applicable thereto under section 5 and the amount of tax payable under sub-section (1) but not exceeding one and one quarter times the amount of tax at such full rate, as the assessing authority determine, having regard to the circumstances in which such use was made."

10. Learned counsel for the assessee relied upon a Division Bench judgment of Hon'ble Madras High Court in *S. Rathinaswamy Chettiar Vs. The State of Madras* reported in (1962) 13 STC 419, wherein the Hon'ble Madras High Court held as under:-

"Held, that although the assessee had not maintained a separate account, such an account would be only a make-believe one. What the law required was that there should be no escape of tax. As the quantity of bullion sold by the assessee exceeded the quantity purchased from other dealers, the natural presumption arose that a person engaged in a transaction would presumably follow that course which took him out of the taxable category rather than otherwise. Therefore the turnover of Rs. 3,80,918 should, under the law, be deemed to relate to the quantity of gold which the assessee had

purchased from other dealers and it was exempt from tax as turnover representing second sales of bullion."

11. As against this, Mr. Vinay Goyal, learned counsel for the Revenue tried to support the said penalty order under Section 17 of the Act and submitted that the learned appellate authorities had erred in setting aside the penalty.

12. Considering the rival submissions, this court is of the opinion that there is no force in this revision petition and the Tax Board as well as the learned Deputy Commissioner (Appeals) were justified in setting aside the penalty under Section 5-C (2) of the Act. As aforesaid, the learned assessing authority seriously erred in brushing aside the additional evidence brought before it to the effect that there was adequate stock of ST paid diesel available with the assessee for manufacture of cement in question, which was sent on stock transfer basis outside the State. Since the quantum of diesel on which the penalty under Section 5-C (2) of the Act was imposed by the assessing authority, was much less than the said stock of ST paid diesel, the assessing authority was bound

to apply the Prudent Man's theory in the present case and thus, there would not have been any cause for misuse of diesel purchased at concessional rate under Section 5-C (1) of the Act and the said penalty also cannot be sustained in view of the fact that the non-imposition of penalty in the original assessment order could not be held to be mistake apparent from the face of the record enabling the assessing authority to invoke jurisdiction under Section 17 of the Act.

13. Consequently, for all the aforesaid reasons, the present revision petition of the Revenue is found to be devoid of merit and the same is accordingly dismissed with no order as to costs.

(Dr.VINEET KOTHARI),J.

Pramod
Item No. 63