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(2003) 05 AP CK 0008

Andhra Pradesh High Court

Case No: TRC No''s. 138 of 1997 and 12, 82 and 83

Arun Ispat Udyog		APPELLANT
	Vs	
State of A.P.		RESPONDENT

Date of Decision: May 1, 2003

Citation: (2003) 4 ALD 45 : (2004) 135 STC 140

Hon'ble Judges: S. Ananda Reddy, J; Bilal Nazki, J

Bench: Division Bench

Advocate: B. Srinivas, for the Appellant; Government Pleader for Taxes, for the Respondent

Final Decision: Dismissed

Judgement

S. Ananda Reddy, J.
These Tax Revision Cases arc filed by the dealer-assesses aggrieved by the orders of the Sales Tax Appellate Tribunal, Hyderabad (for short, ''the Tribunal'') in not granting the relief of set off on the finished products in terms of G.O. Ms. No. 763 Revenue dated 21.8.1990.

2. The dispute relates to the assessment years 1991-92, 1992-93 and 1993-94. All the dealers are registered under the provisions of the A.P. General Sales Tax Act, 1956 (for short, ''the Act'') as traders, apart from carrying on the business of manufacture of re-rolled finished products. They purchase M.S. scrap within the State as well as outside the State; part of the scrap purchased by them was resold to other registered dealers while the other part was converted into finished products. In the assessment proceedings, the dealers claimed set off of the tax said to have suffered on the raw material purchased by the dealers and the said set off was granted by the Assessing Officer while computing the tax due on the finished products. However, the revising authority i.e., the Deputy Commissioner, (CT), holding that the said assessment orders are erroneous and prejudicial to the interest of the revenue, invoking the revisional power, issued show-cause notices to the dealers-assessees proposing to deny the benefit of set off on the ground that the raw material

purchased by them did not suffer any tax. In response to the said show-cause notices, the dealers filed their explanations. After considering the explanations, the revising authority came to the conclusion that the M.S. scrap purchased by the dealers was taxable under Entry 2A of III Schedule to the Act and not as claimed by the dealers under Entry 2(xvi) of the said schedule where tax is payable on the first sale whereas under Entry 2A tax is payable by the last purchaser in the State. The revising authority also enumerated the items of raw material purchased and thereafter denied the benefit of set off and recomputed the amount of tax due from the dealers for the respective assessment years. Aggrieved by the said order of revisional authority, the dealers-assessees carried the matters in appeal to the Tribunal.

3. Before the Tribunal, the dealers contended that what was purchased by them was only defectives, rejects, cuttings and end pieces, which are enumerated in Entry 2(xvi) of the III Schedule to the Act and hence the tax is payable only on the first sale, that they are not the first purchasers as they have purchased the same from registered dealers and hence they are not liable to the tax. They further contended that they are also entitled to the benefit of set off as contemplated under the Government Orders where the benefit of set off was provided in respect of the tax payable on the finished products. The Tribunal accepted the contention of the dealers that the raw materials purchased by them falls under Entry 2(xvi), but not under Entry 2A. The Tribunal also took into account the amendment that was made to Entry 2A of the III Schedule to the Act, which came into force with effect from 8.2.1996 under which Clause (xvi) of Entry 2 was shifted and made as Clause (iii) of Entry 2A. Therefore, according to the Tribunal those items are liable to tax on the last purchases only with effect from the date of the said amendment and nor prior thereto. The Tribunal, thus, concluded that the scrap purchased by the dealers-assesses is liable to tax on the first sale. The Tribunal further held that as the dealers-assessees have purchased the scrap from registered dealers, they are entitled to the benefit of, set off, but however, remanded the matter to the Assessing Authority for verification whether tax was levied in the hands of the first seller of the raw material and to grant set off if tax was levied on the first seller. It is also stated in the said order that if the first seller was not levied any tax, no set off shall be given to the dealers-assessees. Aggrieved by that portion of the order of the Tribunal, the dealers have come up with the present Revision Cases.

4. The learned Counsel for the dealers-assessees contended that the Tribunal has committed an error in remanding the matter to the Assessing Authority for verification of the fact as to the payment of tax and held that the dealers would be entitled to the benefit of set off if tax is paid by the first seller. According to the learned Counsel, when once the present dealers have purchased the raw material from an identifiable dealer, then the burden is not on the dealer to prove that tax was paid by the first seller and it is for the department to proceed and recover tax from such sellers. The learned Counsel also referred to and relied upon various

orders of the Government under which the benefit of set off was provided on the tax payable on the finished products in respect of tax that was paid on the raw material. The learned Counsel also contended that irrespective of the payment of tax by the first seller, as the first seller is an identifiable person being a registered dealer, the dealers-assessees are entitled to the benefit of set off in respect of tax payable on the finished products. In support of his contentions, the learned Counsel relied upon the decisions of this Court in Apex Steel Re-Rolling Mills v. Deputy Commissioner of Commercial Taxes, Hyderabad (1992) 87 STC 32, and State of A.P. v. Thungabhadra Industries Limited, (1986) 62 STC 71.

5. Sri Bhaskar Reddy, learned Special G.P. for Commercial Taxes, on the other hand, contended that in fact the items, which the dealers have purchased, are not items which are enumerated by the Tribunal, as the Tribunal gave a finding without reference to the material on record as to the purchases made by the dealers. The learned Government Pleader also contended that the issue whether M.S. scrap is liable to tax under Entry 2(xvi) or under Entry 2A is no more res integra as a Division Bench of this Court in Arun Ispat Udyog, Secunderabad v. The Commissioner of Commercial Taxes, Hyderabad, Spl. Appeal No. 37 of 1994 dated 10.1.2003, (in the case of one of the petitioners) held that M.S. scrap purchased by the dealers falls under Entry 2A and is liable to tax on the last purchases as contemplated under the schedule when purchased by an electric arc furnace unit, or an induction furnace unit in the State at the point of purchase by such unit and in all other cases at the point of purchase by the last dealer in the State. The learned Government Pleader, therefore, submitted that admittedly the dealers are the last purchasers in the State as they have converted the raw material into re-rolling finished products and, therefore, they are liable to pay tax on the purchase of the raw material and as such tax was not paid by them, they are not entitled for the benefit of set off in terms of the Government Order as claimed by them. The learned Government Pleader also referred to the order of the Revisional Authority where the items of purchase were enumerated and contended that what was found by the appellate Authority was different than the one found by the Revisional Authority and that the appellate Authority i.e., the Tribunal gave a finding without reference to the material on record. The learned Government Pleader further contended that it is not the case of the Tribunal that the finding given by the Revisional Authority is perverse or not based on any material. The learned Government Pleader also relied upon a decision of the Supreme Court in Collector of Central Excise, Vadodra v. Dhiren Chemical Industries (2002) 126 STC 122, for the proposition that the claim of exemption would be available on the finished products only if the raw material suffered tax, but not otherwise and it is absolutely necessary for the dealers to prove that the raw material purchased by them have suffered tax and then only they are entitled for the benefit of set off. The learned Government Pleader contended that there is absolutely no merit in the T.R.Cs. and they are liable to be dismissed.

6. From the above rival contentions, the issue to be considered is whether the dealers are entitled for the benefit of set off as claimed by them in respect of the tax payable on the finished goods in terms of the Government Orders.

7. The answer to the above question depends upon the answer to the question whether the raw materials purchased by the dealers would fall under Entry 2(xvi) or 2A of the III Schedule to the Act. Though the said question was decided in favour of the dealers by the Tribunal, the matter was remanded to the Assessing Officer for verification whether the purchases made by the dealers had suffered tax and on verification if it is found to have suffered tax, then the dealers are entitled for the benefit of set off. As already stated earlier," a Division Bench of this Court in Arun Ispat Udyog case (supra) held that M.S. scrap purchased by the dealers would fall under Entry 2A and not under Entry 2(xvi) of the III Schedule to the Act and, therefore, it is liable to tax at the point of last purchase in the State made either by the electric arc furnace unit or induction furnace unit or by any dealer in the State. Admittedly, in the present case, the dealers-assessees are the last purchasers of the M.S. scrap as they have converted the scrap into finished products such as bars, angles, flats etc., in respect of the sale of which the dealers are claiming set off of the tax which was alleged to have been levied on the raw material.

8. Though the said issue is not the subject-matter of the Tax Revision Cases, but as the said issue is interconnected to the relief sought for, we are inclined to consider the same.

9. Before proceeding further to consider the issue, it is appropriate to refer the relevant Entries.

Entry 2(xvi) reads as follows :

SI.	Description of the goods	Point of levy	Rate of tax
2:	Iron and Steel, that is to say:- (13002)	At the point of first sale in the State	4 paise in the rupee.
	(i) X X X		

(ii)	X X X	
(iii)	X X X	
(xvi)	defectives, rejects, cuttings end pieces of any of the above categories.	-do- -do-

Entry 2A reads as follows:-

2.A.	Iron & Steel Scrap that is to say		When purchased by an electric arc furnace unit or an induction furnace unit in the State, at the point of purchase by such unit and in all other cases at the point of purchase by the dealer who buys in the State
	i.	Iron scrap, cast iron scrap, runner scrap, and iron skulls scrap.	
	ii.	Steel melting scrap in all forms including steel skull, turnings and borings.	

It would also be appropriate to refer to the items of raw materials purchased, as enumerated by the Revisional authority. The Revisional Authority, after verification from the purchase bills, enumerated the description of the goods recorded by the selling dealer as follows:-

1. Scrap rails

2. M.S. Rail scrap

3. Scrap steel tyre

4. M.S.Spring place pieces

5. M.S. Condemned Engg. Cut pieces

6. Condemned scrap

7. Scrap

8. M.S. Scrap

9. M.S. Wheel rerolling scrap

10. Rail scrap.

Thus, it can be seen from the above that none of the above items would come within the description of defectives, rejects, cuttings, end pieces of any of the categories enumerated in Clauses (i) to (xv) of Entry 2 of the III Schedule to the Act. However, the Tribunal proceeded on the assumption that what was purchased by the dealers was only the items enumerated in Entry 2(xvi) of the III Schedule to the Act. The said finding arrived at by the Tribunal, the final fact-finding authority, is clearly not supported by any material. The description of the above items of raw material purchased by the dealers clearly shows that they are all used material and sold as scrap. Therefore, it would fall only under Entry 2A and not under Entry 2(xvi) of the III Schedule to the Act as claimed by the dealers-assessees. In that view of the matter, the purchasers of those raw materials are liable to tax at the last purchase within the State.

10. Apart from this, the verification of the sale bills also go to show that the sellers have claimed exemption on the ground that they are the items enumerated under Entry 2A of the III Schedule to the Act and are exempt from tax under the first and subsequent sales except the last sale. The petitioners/dealers, being the last purchasers within the State, are liable to pay tax on the purchase of raw material.

11. In the background of the above facts, let us proceed to consider the decisions relied upon by the learned Counsel for the dealers/assessees. In Apex Re-Rolling Mills case (supra), the dealer questioned the notice issued by the Department on the premise that it is not for the assessee to prove that the raw material purchased by the assessee had already suffered Sales Tax. A Division Bench of this Court, while declining to go into the merits of the matter, as it was only a show-cause notice, made the following observations-

"we are in agreement with the learned Counsel for the Petitioner that it is not necessary for the Petitioner to further establish that the sellers of the raw material actually paid sales tax provided that there is acceptable evidence regarding the purchases affected and the identity of the sellers."

12. In Tungabhadra Industries'' case (supra), the assessee claimed that he was the second seller of groundnut oil in the State of Andhra Pradesh and, therefore, he is not liable to tax, as the groundnut oil is exigible to tax under the Act on the first sale within the State. The dealer claimed exemption on the ground that he was the second seller and mentioning the names of the registered dealers from whom he

had purchased the groundnut oil. A show-cause notice was issued with Annexure thereto giving the names of the persons from whom the Petitioner-dealer claims to have purchased groundnut oil within the State and on that basis claimed exemption. The Assessing Authority granted exemption claimed by the assessee, holding that the turnover related to the second sales of groundnut oil within the State. The Deputy Commissioner, however, revised the said assessment order holding that certain dealers from whom the Petitioner-assessee claims to have purchased are fictitious and the alleged first sale was not subjected to tax. The matters were earned in appeal to the Tribunal by both the Department and the Assessee and the Tribunal, applying the two tests laid down by this Court in B. Rajendra Oil Mills Refinery v. State of Andhra Pradesh, TRC No. 17 of 1978 dated 22-11-1982, disposed of the matters against which TRCs were filed. A Division Bench of this Court dismissed both the T.R.Cs. following the decision of this-Court in B. Rajendra Oil Mills Refinery case (supra), where the two tests were laid down. The two tests applicable are (i) that the first seller should be a real and identifiable seller within the State, and (ii) that mere non-payment of tax by the first seller within the State does not shift the liability to pay the tax on the second seller.

13. In view of the above decisions, the learned Counsel for the dealers-assessees contended that as the dealers/assessees purchased the scrap items from real and identifiable dealers, who are registered dealers, they are not liable to prove that those dealers have paid the tax. This contention of the learned Counsel cannot be accepted. The above two decisions relied upon by the learned Counsel for the dealers can be distinguished on facts. In the present case, the very liability to pay tax, whether on the first sale or on the last purchase, was in dispute. The Petitioner''s claim is that the raw material is exigible to tax at the point of first sale which is contrary to sale bills produced by the dealers where the sellers claimed exemption on the ground that the same is exigible to tax on the last purchases in the State. As per the decision of this Court in. Arun Ispat Udyog case (supra), (in one of the Petitioner''s case) the scrap, which the dealers have purchased is liable to tax on the last purchase within the State and not on the first sale. In that view of the matter, the dealers/ assessees have to pay the tax on the purchase of raw material, since admittedly they are the last purchasers within the State.

14. The Petitioners are claiming benefit of set off under the Government Order. The relevant G.O. Ms. No. 763 Rev (CT.II) dated 21.8.1990, on which reliance was placed by the dealers/assessees reads as follows:-

"In exercise of the powers conferred by Sub-section (1) of Section 9 of the Andhra Pradesh General Sales Tax Act, 1957 (Andhra Pradesh Act No. VI of 1957) and in partial modification of the Notification No. 1 issued in G.O. Ms. No. 575 Rev. (CT.II) Department, dated the 9th June, 1989 and published in Part-1 Extraordinary of the A.P. Gazette No. 231 dated the 15th June 1989, the Governor of Andhra Pradesh hereby directs that wherein respect of the sale or purchase inside the State of Iron

and Steel ingots/ billets including scrap in sub-item (xvi) (used for melting or re-rolling) referred to in Item 2 or Iron and Steel Scrap referred in item 2-A of the Third Schedule to the said Act has met tax under the said Act on the sate the amount of tax paid on such Ingots/ Billets including scrap (used for melting or re-rolling) (item 2) or such scrap (item 2-A) shall be reduced from tax payable under the said Act on the sale inside the State of the re-rolled finished products manufactured from out of such Ingots/Billets including scrap (used for melting or re-rolling) (item 2) or such scrap (item 2-A) by Steel Re-Rollers, Electric Arc Furnace-cum-Re-Rollers, and Induction Furnace-cum-Re-Rollers situated within the State of Andhra Pradesh."

A reading of the above G.O. also shows that the benefit of set off against tax payable on the finished goods would be available only if the raw material has met the tax, which implies payment of tax on raw material.

15. In Dhiren Chemical Industries case (supra), relied upon by the learned Government Pleader for Commercial taxes, the Apex Court had an occasion to consider similar issue of exemption under the provisions of the Central Excise Act. The issue came up to be considered by a Constitution Bench in view of the conflicting views of the three Judge Benches of the Apex Court in Collector of Central Excise, Patna Vs. Usha Martin Industries, etc., , and in Motiram Tolaram v. Union of India (1999) 6 STC 375. In that case, a notification under Rule 8(1) of the Central Excise Rules, 1944 granted exemption from excise duty on "iron or steel products falling under sub-item (i-a) of item 26-AA made from any of the following materials or a combination thereof, namely: (i) fresh unused re-rollable scrap on which the appropriate amount of duty of excise has already been paid." The Apex Court after taking into account the purpose and the intendment of such exemption, as it was only to reduce the cascading effect on the cost of the finished product, held that for the purpose of getting the benefit of the exemption under the notification the goods must be made from raw material on which excise duty had, as a matter of fact, been paid, and had been paid at the "appropriate" or correct rate and that unless the manufacturer had paid the correct amount of duty he was not entitled to the benefit of the exemption, and reversed its opinion in Usha Martin Industries'' case (supra). The relevant observations of the Apex Court in para 8 reads as follows:
"An exemption notification that uses the said phrase applies to goods which have been made from duty-paid material. In the said phrase, due emphasis must be given to the words, "has already been paid." For the purposes of getting the benefit of the exemption under the notification, the goods must be made from raw material on which excise duty has, as a matter of fact, been paid, and has been paid at the "appropriate" or correct rate. Unless the manufacturer has paid, the correct amount of excise duty, he is not entitled to the benefit of the exemption notification."

If we examine the issue in question in the light of the decisions rendered by this Court relied upon by the learned Counsel for the assessees as well as the decision of

the Apex Court, it is clear that the ratio laid down by this Court in the decisions referred to above may not be applicable to the facts of this case. Apart from that, in the light of the Judgment of the Apex Court in Dhiren Chemical Industries'' case (supra), unless there is evidence showing that the raw material had already suffered tax, the assessee is not entitled to the benefit of exemption. Therefore, we do not find any error in the order of the Tribunal in directing the Assessing Officer to grant the benefit of exemption, if it is found that tax has been paid on the raw material. Though the Tribunal directed the Assessing Officer to verify whether the first sale of the raw material had suffered tax, but in view of the decision of this Court referred to above, with which we concur, as sales tax is exigible on the last purchases made within the State, it is for the assessee to prove that the raw material had already suffered tax, and if it is so proved, then only the dealers are entitled to the benefit of set off in respect of the tax payable on the finished products.

16. In the result and for the foregoing reasons, we dismiss the T.R.Cs. No costs.