M.M. Udyog. Vs. the Additional Commissioner of Commercial Taxes.

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Court : Karnataka

Decided On : Jun-11-2012

Judge : D.V. Shylendra Kumar; B. Manohar, Jj.

Acts : Value Added Tax Act 2003 - Section 66, 39(1), 72(2), 36, 64.

Appeal No. : STA Nos.5 of 2010 And 107-117 of 2012

Appellant : M.M. Udyog.

Respondent : The Additional Commissioner of Commercial Taxes.

Advocate for Def. : S. Sujatha, Adv.

Advocate for Pet/Ap. : K.J. Kamath And Kamath, Advs.

Judgement :

(Prayer: These appeals filed U/s. 66(1) of the Value Added Tax Act, 2003 against the revision order dated 31.10.2009 passed in ZAC-1/DVO-IV/SMR-67/09-10 on the file of the Addl. Commissioner of Commercial Taxes, Zone-I, Bangalore, confirming the proposal made at para 5 in notice under Sec.64(1), setting aside the appeal order and accordingly restored the orders passed by audit officer under Sec.39(1) Sec.72(2) and Sec.36 and concluding the revisional proceedings and etc.)

D.V. SHYLENDRA KUMAR, J.

1. These appeals under section 66 of the Karnataka Value Added Tax Act, 2003 (for short the Act) are by the dealer who was amongst other goods buying and selling what is known as artificial flower petals apart from acrylic yarn, M.F. Yarn, thread, paper bags.

2. The dealer is in appeal questioning the correctness of the order dated 31.10.2009 passed by the Additional Commissioner of Commercial Taxes, Zone I, Bangalore, exercising his suo motu revisional powers under section 64 of the Act and setting aside the appellate order passed by the Joint Commissioner of Commercial Taxes and restoring the assessment order passed by the Assessing Authority, being of the view that the appellate order was erroneous and prejudicial to the interest of the revenue.

3. In these appeals, we are concerned with only the rate of tax at which the subject goods, namely, artificial flower petals which was being bought and sold by the appellant dealer was required to be taxed.

4. The bone of contention between the dealer and the Department is that while the dealer claimed that the particular goods which the dealer was trading in, is an item that is covered by Entry-78 of Schedule III to the Act and reading as under:

78. Readymade garments, clothing accessories and other made up textile articles:-

(1) Clothing accessories including socks, stockings, gloves, shawls, scarves, mufflers, mantillas, veils, ties, bow-ties, knitted or crocheted.

(2) Clothing accessories, not knitted or crocheted, including hand-kerchiefs, shawls, scarves, mufflers, mantillas, veils, ties, bow-ties, cravats, gloves-headbands

(3) Blankets and traveling rugs

(4) Bed linen, table linen, toilet linen and kitchen linen and other made ups.

(5) Curtains (including drapes) and interior blinds; curtain and bed valances

(6) Other furnishing articles

As it was in the nature of clothing accessory, the stand on the part of the Revenue and as indicated by the Assessing Authority and the Revisional Authority is that the particular item or product which the dealer was buying and selling in fact does not fit into any of the entries in the Schedule III to the Act and therefore is liable to be taxed in general as indicated in Section 4[1][b] of the Act as it stood at the relevant point of time and the rate of tax in general in respect of goods which attract levy of tax being at 12.5% for the relevant period between 1.4.2005 to 31.3.2006.

5. The assessee dealer being aggrieved by the revisional order passed by the Commissioner and restoring the order as passed by the Assessing Authority is in appeal before us.

6. Notice had been issued to the respondent revenue who is served and represented by counsel.

7. We have heard Sri. K. J. Kamath, learned counsel for the appellant dealer and Smt. S. Sujatha, learned Additional Government Advocate appearing for the respondent Commercial Taxes Department.

8. The facts in brief are that the appellant is a dealer who is essentially a trader, who buys and sells several goods such as acrylic yarn, M.F. Yarn, thread, paper bags, artificial flower petals and even exempted goods like kumkum etc.

9. It appears that the dealer has purchased these artificial flower petals which are without any dispute is made up of textile, but cut into shape to present itself in the form of artificial flower petals and which according to Mr. Kamath, learned counsel for the appellant is used as a decorative accessory to enhance the appearance and look of readymade garments and it is also used as a substitute for natural flower in all such situations where natural flowers could have been used.

10. The assessment had been concluded based on the monthly returns as filed by the dealer who had claimed that being an item No.78 figuring in III Schedule and the assessee had indicated that it was liable to tax at the rate of 4% of the value of

the goods.

11. On the other hand, the Assessing Authority was of the view that the returns as had been filed and as had been accepted was not proper during the course of inspection by the audit department who had visited the premises of the assessee on 26.7.2006 and had occasion to examine the books of accounts and goods in stock etc.

12. It is thereafter that the Assessing Authority had issued notice to the dealer under section 39(1) of the Act indicating that the commodity known as artificial flower petals does not fit into any of the entries in III Schedule and therefore it necessarily has to be taxed at the general rate of 12.5% and not at 4% as had been claimed by the dealer.

13. The assessee dealer had responded affirming is claim that the subject artificial flower petals necessarily comes within Entry-78 as it fits into description of other clothing accessories or other made up textile articles and had asserted that it has to be taxed only at 4%.

14. The Assessing Authority have rejected this claim of the Assessee dealer and proceeded to adjudicate the show cause notice opining that the subject goods known as artificial flower petals has to be taxed only as an item not covered under III Schedule, but is only which is taxable in general in terms of section 4[1][b] of the Act.

15. The assessee being aggrieved by this order had preferred an appeal to the Joint Commissioner of Commercial Taxes [Appeals] and met with success. The assessees claim that it is an item coming within the scope of Entry-78 of Schedule-III to the Act was accepted by the Joint Commissioner and in terms of his order dated 21.6.2008 allowed the appeal.

16. The appellate authority opined that even on an examination of the sample produced before the appellate authority, it was found that the subject item was one made up of textiles, cut into shape and size of flowers and in different colours. The appellate authority also noticed that there was no stitching on the flower petals to

bring it to that shape and that they are used to attach the same on frocks, pants, t-shirts etc., to enhance the appearance of the readymade garments and is also used to create a trend in fashion and therefore the appellate authority found that such cut pieces of textiles which are utilized in making readymade garments or in improving their appearance are nothing but clothing accessories fitting into Entry-78 and the Assessing Authority has not examined the manner of bringing into existence artificial flower petals and its application etc.; that just because it is described as artificial flower petals, the assessing authority had proceeded to examine that no such entry is found in the schedule and therefore it is not one fitting into Schedule-III to the Act forgetting that it is nothing but a clothing accessory etc.

17. The Additional Commissioner of Commercial Taxes however took up the matter for exercise of suo motu revisional jurisdiction being of the opinion that the Joint Commissioner of Commercial Taxes has committed an error in taking the view that item is covered under Entry-78 of Schedule-III to the Act on a detailed examination and after putting the assessee on notice and after hearing assessees representative opined that the assessing authority had taken the right view; that the Joint Commissioner of Commercial Taxes [Appeals] had not understood the entry in its proper perspective and on making a comparative study and analysis of entries figuring in schedules to the Act, opined that the description of clothing accessory in the entry was only such articles which were being directly used or worn on the human body either for the purpose of protecting the body or for giving a better appearance etc., and therefore the item artificial flower petals being not one which is capable of being used directly as an accessory along with other garments opined that it does not fit into this description and rejected the claim of the assessee and set aside the view taken by the Joint Commissioner of Commercial Taxes [Appeals] and opined that the appellate order was erroneous and therefore revised the same and restored the assessment order.

18. It is in this background, the present appeals by the dealer.

19. We have heard extensive arguments of Sri. Kamath, learned counsel for the appellant and Smt. S. Sujatha, learned Additional Government Advocate

appearing for the respondent revenue.

20. Sri. Kamath, learned counsel for the appellant has raised a preliminary objection on the validity of the order on the premise that the authority who has passed the order on reopening lacked jurisdiction, particularly, on a reference made by the Joint Commissioner of Commercial Taxes [Appeals] who had authorized the visiting officials to the premises of the assessee and the person who had passed the reassessment order had not been authorized by the Commissioner to become a prescribed authority in terms of the provisions of the Act; that it was only the Commissioner who had the competence to nominate a prescribed authority and admittedly the Commissioner not having assigned the function of passing a reassessment order, it was only at the instance of the Joint Commissioner of Commercial Taxes [Appeals]; that the very reassessment order was one without jurisdiction and therefore not sustainable etc.

21. Though this would have become a debatable issue and the question whether the authority who has passed the reassessment order is one within the description of competent authority having been so authorized or nominated by the Commissioner, could have been examined, but Smt. S. Sujatha, learned Additional Government Advocate, has countered the preliminary objection to contend that it is not open to the assessee to raise such preliminary objection relating to jurisdiction at this stage; that in terms of section 67 of the Act reading as under:

67. Objections to Jurisdiction

No objection as to the territorial or pecuniary jurisdiction of any prescribed authority shall be entertained or allowed by any Court, Tribunal or authority in an appeal or revision, unless such objection was taken before the prescribed authority at the earliest possible opportunity.

Objections to the jurisdiction should be raised before the first authority and if not so raised cannot be raised later either before the appellate authority or revisional authority and therefore subjects it is not open to the assessee to put forth such contention in these appeals before this court.

22. We find submission of Smt. S. Sujatha, learned Additional Government Advocate, appearing for the respondent is a valid one and therefore in the wake of statutory provisions of section 67 of the Act, reject the preliminary objection and proceed to examine the merits of the matter.

23. Mr. Kamath, learned counsel for the appellant has taken us through the scheme of the charging section, schedules to the Act, particularly, Schedule-III and has also drawn our attention to sample piece of the very flower petal which had been perhaps produced before the assessing authority or the appellate authority.

24. Submission of Sri. Kamath, learned counsel for the appellant is that one has to look into the nature of the item and examine the question as to whether it can fit into the particular description of an entry and that the authorities cannot go by the end user of the product or the item to say that it is covered within the scope of one of the entries in the schedule or otherwise.

25. Sri. Kamath has also submitted that artificial flower petals are basically from out of textile material and is only a piece of a textile material cut into pieces in the shape of a flower petal and therefore it has lost the character of textiles and has become a different product, but nevertheless, base is textile and a reading of entry 78 in Schedule-III to the Act indicates that it only contains such of those items which are made out of textile material, particularly, readymade garments and other described items such as clothing accessories like handkerchiefs, shawls, scarves, mufflers etc., in Entry-78 and therefore submits that the description being not exhaustive but including other made up textile articles which is made from out of textile material artificial flower petals, traded by the assessee is covered within Entry-78 and submits that view taken by the Commissioner is not correct to opine that the artificial flower petals do not fit into the entry.

26. Mr. Kamath also submits the fact that the artificial flower petals are also used for preparing badges and labels is also a circumstance to indicate that it is one which fits into Entry-78 though these items have been introduced as SI.No.7 of the description of the goods, mentioned in Entry-78 by way of amendment to the Act in terms of Act No.4/2006 and has come into effect only on and after 1.4.2006, but

the amendment was more clarificatory in nature; that even without the addition of items woven labels, badges, goods such as artificial flower petals fitted into Entry 78 being a product of textile and also being used in combination with other items mentioned in Entry 78 and therefore submits it cannot be taken out of Entry 78 of third schedule to the Act.

27. On the other hand, Ms. S. Sujatha, learned government advocate, has very strongly countered these submissions and supported the order passed by the revisional authority. It is submitted that if any particular goods has to be brought within the scope of any of the entries in any of the schedules, it should necessarily fit into that entry in all respects to the description of the goods given in the entry; that in interpreting an entry in the schedule, court has to adopt a strict construction view, and until and unless the product by itself fits into the description of the goods, it cannot be included in the particular entry either by way of analogy or by a process of reasoning; that the commissioner has examined this aspect in some detail; that it is neither a readymade garment nor a clothing accessory, though claimed as such, as the user of artificial flower petals is not demonstrated and on the other hand does not fit into the description of any of the items mentioned in Entry 78 of third schedule; that even assuming for arguments sake, rule of ejusdem generis can be applied in understanding like articles for the purpose of interpreting clothing accessories in the entry any and every goods cannot be fitted into this, but it should be one which can fit into the family or group of goods which are expressly described in clause (2) of Entry 78; that in this regard, the commissioner has examined the question from this angle and having noticed that the described goods or article such as handkerchiefs, shawls scarves, mufflers, mantillas, veils, ties, bow-ties, cravats, glove-headbands, are independently used as such on the body of human beings and such being not the user in the case of artificial flower petals, it cannot be brought into this entry and therefore submits that there is absolutely no need to disturb the order passed by the revisional authority restoring the order of the assessing authority.

28. We have perused the orders of the appellate commissioner and the revisional authority. We have been taken through the relevant portions of the orders by the learned counsel for the parties. We have also looked into the records and perused

a sample item of artificial flower petals available as part of the record of the case and have bestowed our consideration to the submissions made at the Bar.

29. Descriptive item No.7 in Entry 78, which is only woven labels, badges and the like, which leaves the scope for fitting into this item goods like artificial flower petals is by way of an amendment in terms of Act No.4 of 2006 and which has come into effect only from 1-4-2006 and therefore we do not propose to examine the present appeals with reference to this item in Entry 78. Arguments advanced are not per se examined by taking into consideration this item No.7 in Entry 78.

30. Assessee is a dealer who buys and sells this item as assessee is not one manufacturing this item or in any way using this for producing any other goods by himself. Assessee is a trader in the item. Assessee purchases this goods from outside the state and in the name of artificial flower petals and sells it with the same description. So, there is no dispute between the assessee and the revenue that the item is known as artificial flower petals. We have also seen some such artificial flower petals being sewed on badges.

31. Under the scheme of the Act, the charge in respect of any goods is to be worked out by a combination of Sections 3 and 4 of the Act, reading as under:

3. Levy of tax.-

(1) The tax shall be levied on every sale of goods in the State by a registered dealer or a dealer liable to be registered, in accordance with the provisions of this Act.

(2) The tax shall also be levied, and paid by every registered dealer or a dealer liable to be registered, on the sale of taxable goods to him, for use in the course of his business, by a person who is not registered under this Act.

4. Liability to tax and rates thereof:-

(1) Every dealer who is or is required to be registered as specified in Sections 22 and 24, shall be liable to pay tax, on his taxable turnover,

(a) in respect of goods mentioned in, -

(i) Second Schedule, at the rate of one per cent,

(ii) Third Schedule, at the rate of four per cent, and

(iii) Fourth Schedule, at the rate of twenty per cent.

(b) in respect of other goods, at the rate of twelve and one half per cent.

(c) in respect of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract specified in column (2) of the Sixth Schedule, subject to Section 14 and 15 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956), at the rates specified in the corresponding entries in column (3) of the said Schedule.

(2) Where goods sold or purchased are contained in containers or are packed in any packing material liable to tax under this Act, the rate of tax applicable to taxable turnover of such containers or packing materials shall, whether the price of the containers or packing materials is charged for separately or not, be the same as the rate of tax applicable to such goods so contained or packed, and where such goods sold or purchased are exempt from tax under this Act, the containers or packing materials shall also be exempt.

(3) The State Government may, by notification, reduce the tax payable under sub-section (1) in respect of any goods subject to such restrictions and conditions as may be specified in the notification.

(4) Notwithstanding anything contained in sub-section (1), subject to such conditions as may be prescribed, a registered dealer, if he so elects, may pay tax on the sale of goods specified in Sl.No.60 of the Third Schedule, on the maximum retail price indicated on the label of the container or pack thereof or on such maximum retrial price reduced by an amount equal to the tax payable.

32. The assessee being a registered dealer, liability is on the assessee in respect of any taxable turnover and the rate at which a particular goods is taxed as given in Section 4 of the Act. Section 5 of the Act indicates that the goods specified in the first schedule and any other goods so notified through a notification issued by

the state government, is exempt from tax payable under the Act.

33. Charging Sections 3 and 4 indicate that in respect of goods mentioned and figuring in second, third and fourth schedules levy is at different rates of tax as is stipulated and if any goods does not fit into any one of these three schedule and is also a goods not figuring in first schedule, which are exempted goods, it necessarily attracts tax at the general rate of tax as indicated in Section 4(1)(b) of the Act, which rate of tax was 12.5% at the relevant point of time.

34. In so far as the question of understanding and interpreting entries is concerned, general rule of interpretation is if any particular item or goods fits into any one of the entries mentioned or figuring in any of the schedules, it necessarily remains there and does not get into the residuary clause or goods of general description in respect of which a uniform rate of tax viz., 12.5% becomes applicable.

35. It is because goods figuring in third schedule to the Act attract tax at lower rate than general rate, a dealer or an assessee will be keen to get into any one of the entries if is possible and remain there, as tax liability is lower. A mere desire or inclination is not the criterion, but it is the nature of the goods and the description of the goods as figures in the schedule.

36. In the present case, it is of some significance to notice that in entry 4 of first schedule to the Act, all varieties of textiles and fabrics, produced or manufactured in India, including declared goods, but other than those specified elsewhere in third schedule or notified by the government, are all exempted from payment of tax in terms of sub-section (1) of Section 5 of the Act. In the present case, artificial flower petals is a goods owing its origin to textiles and fabrics and it is not in dispute that it is manufactured in India. If a particular item which can possibly fit into entry 4 of first schedule is the subject matter of examination, then there is no tax payable under the Act, being exempted, but if it figures as an item in third schedule, exemption is lost and the entry gets into third schedule to the Act. Entry though relates to textile and fabrics, artificial flower petals though, per se, is not marketed as textile or fabrics, is, nevertheless, a product of textiles or fabric and a perusal of Entry 78 of third schedule to the Act indicates that this entry contains

products of textile such as readymade garments, clothing accessories and other made up textile articles. No doubt, illustrations in items 1 to 6 of this entry is a possible indication as to what are those readymade garments or clothing accessories and other made up textile articles.

37. A perusal of the items mentioned therein and the manner in which the very entry is mentioned indicates that the entry is of a general nature to include all readymade garments in general or clothing accessories or even made up textile articles and not exhaustive by the description. If the particular product which is having its origin in textiles or fabrics, but is marked in the shape of artificial flower petals is not so either shaped or marked, but sold as fabric and it remains as an exempted item. But, it has lost its characteristic of cloth and fabric or textile, because of being marketed as artificial flower petals and in a particular shape, though made of textiles or fabric.

38. In this background and with Entry 78 being so worded to include such items or goods which can possibly fit into general description and not to understand illustrations given in items 1 to 6 as exhaustive. It is in this background, a submission is made on behalf of the assessee that it could be taken as clothing accessory etc.

39. Items mentioned in Entry 78(2), which is clothing accessories, not knitted or crocheted including handkerchiefs, shawls scarves, mufflers, mantillas, veils, ties, bow-ties, cravats, glove-headbands, does give an impression that the goods mentioned in the entry are clothing accessories but not necessarily exhaustive.

40. Submission of Mr. Kamath was that artificial flower petals was exclusively used and applied as a decorative item on readymade garments and other clothing accessories. Readymade garments are also made up of fabrics and textiles. It is, therefore, proper to understand the entry 78 as one inclusive of such items which are also in the nature of accessories for being used as accessories along with one of the items mentioned in entry 78 or in general usage of clothing. Clothing is necessarily used in making of readymade garments and therefore if artificial flower petals are used for enhancing the appearance or look or quality or even as a brand figuring and as a trendy fashion etc. and it can be fit into textile and clothing

accessories.

41. In the absence of any supporting materials on record, though we did examine the need for remanding the matter at one stage of hearing of these 0appeals, having realized that a particular item or goods is one which has its origin in textiles or fabrics, which is an exempted goods and with entry 78 being an exception to entry 4 in first schedule to the Act by a combined reading and understanding of the charging Section and first and third schedules, an item if has to go out but which otherwise can fit in entry 4 of the first schedule to the Act, it has to be found as an item figuring in third schedule.

42. In the present case, the assessee himself having claimed that it is an item fitting into entry 78 figuring in third schedule, we find no need to remand the matter but proceed to accept the submissions and the stand taken by the assessee that the item known as artificial flower petals is used extensively in readymade garments.

43. In the wake of our examination as above, we find that artificial flower petals having its origin in textile or fabrics, necessarily fits into the description of clothing accessories figuring as item No.2 in entry 78 of third schedule to the Act.

44. The amendment which has come into place and which is operative from the year immediately following the accounting period if at all it is another circumstance to support the stand of the assessee, as one another possible user of artificial flower petals like usage in badges and the like, is now expressly figuring as item No.7 in entry 78, though it was not so earlier. Legislative intent is to bring within the scope of entry 78 all such items which can possibly be described as clothing accessories, in the sense that it has its origin in textile and fabric and is a product of it and is further used either by itself or in combination under different names, figuring in entry 78.

45. It is, therefore, we accept the submissions of Mr. Kamath, learned counsel for the appellant-assessee that artificial flower petals of the type which is being traded by the appellant-assessee is an item that fits into entry 78 as clothing accessories and therefore necessarily to be taxed at 4% and not at 12.5% as was arrived at by

the assessing authority and restored by the revisional authority in setting aside the appellate order of the joint commissioner.

46. In the result, these appeals are allowed, order passed by the revisional authority is set aside and the order passed by the joint commissioner is restored.