

(1991) 03 GUJ CK 0043
In the Gujarat High Court

Case No : Sales Tax Reference No. 41 of 1980

Rohit Pulp and Paper Mills Ltd.

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-03-1991

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 13(B), 16, 16(1), 32, 44

Citation : (1991) 03 GUJ CK 0043

Hon'ble Judges : S.D. Shah, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : R.D. Pathak, for the Appellant; K.A. Mehta, AGP, for the Respondent

Judgement

S.D. Shah, J.—By this reference made at the instance of the applicant u/s 69(1) of the Gujarat Sales Tax Act, 1969, the Gujarat Sales Tax Tribunal has referred the following question of law for our decision :

"Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in not allowing the applicant to raise the plea of set-off under rule 42 of the Gujarat Sales Tax Rules, 1970, in respect of the amount of tax which it had paid on the purchase of the relevant raw and processing materials and consumable stores which it was found to have used in the manufacture of paper as taxable goods for sale and which it has sold locally or in the course of inter-State trade and commerce."

2. The facts giving rise to the present reference, shortly stated, are as under :

(i) The applicant is a limited company carrying on its business of manufacturing and selling of paper. It is a registered dealer under the provisions of the Gujarat Sales Tax Act, 1969. It held recognition certificate u/s 32 of the said Act which enabled it to purchase raw and processing materials and consumable stores for use in the manufacture of paper as taxable goods for sale. u/s 13(1)(B) it is, inter alia, provided that there shall not be deducted from the turnover of sales, sales of goods to a recognised dealer unless the recognised dealer certifies under

the prescribed form that the goods purchased by him are used by him as raw and processing materials, or as consumable stores in the manufacture of taxable goods for sale by him. The form which is prescribed under the Rules is form No. 19 which is in the nature of certificate issued by the recognised dealer purchasing the goods. The applicant being a recognised dealer purchased raw and processing materials and consumable stores between 6th May, 1970 to 31st March, 1971 and he issued certificate in form No. 19 and thereby he was not required to prepay the tax. The applicant had also purchased certain other quantity of said goods locally from registered dealers on payment of tax during the said period. The said raw and processing materials and consumable stores are used by the applicant in the manufacture of paper as taxable goods for sale.

(ii) Having manufactured paper from such goods, i.e., goods purchased without and with payment of tax, the applicant sold a part of manufactured paper locally and in the course of inter-State trade and commerce, and he had sold some of it outside the State of Gujarat on consignment basis. In view of the provisions of section 16 the applicant having purchased the goods without paying tax against form No. 19 for the purposes of using the same for manufacturing the taxable goods he was required to comply with the terms and conditions of certificate in form No. 19. If the applicant fails to use the goods purchased against form No. 19 in the manufacture of paper or after having manufactured paper as taxable goods for sale if he sells any of those goods outside the State of Gujarat he commits breach of certificate issued in form No. 19, and in that eventuality, he would be liable to pay tax on the purchase price of goods purchased against form No. 19 as prescribed by section 16(1) of the Act. Since the applicant had purchased the raw and processing and other consumable stores both against form No. 19 and also locally and since he has sold the manufactured paper as taxable goods outside the State of Gujarat on consignment basis, his liability to pay purchase tax u/s 16 was required to be determined. It was for the applicant to establish the necessary identification and/or correlation between the goods purchased against form No. 19 without payment of tax and used in the manufacture of finished goods which it had sold either locally or in the course of inter-State trade or commerce and the goods purchased on payment of tax and used in the manufacture of finished goods which were sold outside the State of Gujarat on consignment basis. It was the case of the applicant that the manufactured goods which it had sold outside the State of Gujarat on consignment basis were manufactured by it exclusively out of raw and processing material and consumable stores which it had purchased locally from the registered dealer on payment of tax. It was the further case of the applicant that it had not sold any part of finished goods which it had manufactured out of raw and processing material or consumable stores which it had purchased against certificate in form No. 19 without payment of any tax outside the State of Gujarat. Shortly, according to applicant, he has not committed breach of form No. 19 and therefore he was not liable to pay purchase tax u/s 16.

(iii) The Sales Tax Officer assessed the applicant by judgment and order dated

7th January, 1976. He found that the applicant has purchased raw and processing material and consumable stores like caustic soda and pulp both on payment of tax locally as well as without payment of tax on the strength of recognition certificate. He also found that out of total sales some sales were effected locally or in the course of inter-State trade and commerce which he described as qualified sales. However, some sales were effected on the basis of consignment outside the State of Gujarat which he described as qualified sales. He worked out the ratio between the two as 72 percent/28 percent, i.e., 72 percent as qualified sales and 28 percent as unqualified sales. For these unqualified sales he levied the purchase tax.

(iv) Being aggrieved by the said order of the Sales Tax Officer the applicant preferred appeal to the Assistant Commissioner, Sales Tax, u/s 65 of the said Act in respect of 28 per cent of the price of the goods which he paid for purchases against form No 19. The Assistant Commissioner in his order confirmed the finding of fact of the Sales Tax Officer that the applicant has failed to establish the necessary identification and/or correlation between the goods purchased against form No. 19 without payment of tax and then used in the manufacture of finished goods and the goods purchased on payment of tax and then used in the manufacture of finished goods and ultimate sale of such goods either locally or in the course of inter-state trade or commerce or outside the State of Gujarat on consignment basis. Because of failure of the applicant to correlate and identify the use of raw and processing material for manufacturing salable goods which were sold locally or in the course of inter-State trade and commerce, the Assistant Commissioner confirmed the order. While confirming the order the Assistant Sales Tax Commissioner incidentally referred to rule 42 of the Gujarat Sales Tax Rules which deals with claim of drawback, set-off or refund of tax for the goods purchased by the manufacturer. However, it must be stated that before the Assistant Sales Tax Commissioner no specific claim of set-off under rule 42 was made.

(v) Being aggrieved by the order of the Assistant Sales Tax Commissioner the applicant referred Appeal No. 196/77 before the Tribunal and in the memo of appeal before the Tribunal admittedly the applicant did not make any claim regarding set-off of tax under rule 42. However, it appears that in the course of oral submissions before the Tribunal the advocate appearing for the applicant made two submissions and the second submissions related to the claim of set-off of tax under rule 42 of the said Rules in respect of tax paid on purchase that had gone into the manufacture of goods sold locally or in the course of inter-State trade and commerce. However, when confronted with the question as to whether such a claim of set-off of tax was made before the Sales Tax Officer or the Assistant Commissioner of Sales Tax, the advocate appearing for the applicant fairly conceded stating that such claim has not been raised, and therefore, the Tribunal did not permit the applicant to raise the claim of set-off under rule 42. As regards the submission on merits about the levy of purchase tax u/s 16 of the Act on account of breach of declaration in form No. 19, the Tribunal confirmed

the decisions of lower authorities. That part of the decision of the Tribunal is not under challenge before us.

3. However, the applicant preferred application u/s 69(1) of the Act to the Tribunal calling upon the Tribunal to refer the question of law for the decision of this Court contending that the lower authorities have, in fact, found that the applicant had used only 28 per cent of the goods purchased with payment of tax in the manufacture of finished goods which were sold on consignment basis outside the State of Gujarat, and therefore, by necessary inference the remaining goods representing about 72 percent were the tax-paid goods which were used in the manufacture of finished goods which were either sold locally or in the course of inter-State trade and commerce. On these findings of fact of lower authorities it was urged before the Tribunal that the applicant was entitled to claim set-off of tax under rule 42 of the said Rules even though claim of Set-off of tax was not specifically raised at any time before the lower authorities. He also urged that the requisite material to work out actual amount of set-off was there on record already and that no new material was required to be produced or no evidence was required to be adduced nor was the department going to be taken by surprise if the claim of the applicant for set-off was permitted to be raised. According to the applicant on the basis of material on record only the amount of admissible set-off of tax was to be worked out. He further pressed into service the decision of the Division Bench of this Court in the case of *Prabhat Solvent Extraction Industries Pvt. Ltd. v. State of Gujarat* reported in [1982] 49 STC 322 to convince the Tribunal to refer the question to this Court because the interpretation placed on rule 42 of the said Rules by the Tribunal prior thereto was reversed by this Court by the said decision, and therefore, according to the applicant his claim for set-off of tax was required to be examined in the light of interpretation which this Court has placed on rule 42 of the said Rules. The Tribunal granted the application for reference and as stated hereinabove referred the question of law reproduced hereinabove for our opinion.

4. Mr. R. D. Pathak, learned Advocate appearing for the applicant, referred to provisions of section 13(1)(B), section 16(1) and form 19 and rule 42 of the said Rules and Act. He submitted that in the reassessment proceedings the Sales Tax Officer, for the first time, found as a matter of fact, that it could not be presumed that the goods purchased against form No. 19 were exclusively used towards final manufacture of goods which were sold locally or in the course of inter-State trade or commerce. He also found that it also could not be assumed that the purchase of raw and processing material and consumable stores effected against form No. 19 was solely for the purpose of manufacture of goods which were ultimately sold locally or in the course of inter-State trade or commerce. He found that it is likely that some purchases on form No. 19 must have been utilised in the manufacture of goods which were ultimately sold on consignment basis outside the State of Gujarat. He also found that the applicant-assessee was not in a position to identify the goods or to correlate or inter-link the purchased goods and ultimate disposal of the manufactured goods, and he therefore,

applied the theory of proportion and found that 72 percent were qualified sales while 28 percent were unqualified sale and based thereon the liability for purchase tax on unqualified sales was fastened. Mr. Pathak, therefore, submits it was only when such liability was fastened that the right to claim set-off under rule 42 accrued to assessee for 78 percent of the goods. He, therefore, submits that the claim for set-off under rule 42 could not have been raised prior thereto, and such claim could not have been enforced.

5. We do not accept this submission of Mr. Pathak for the simple reason that the claim of set-off of tax could have been alternatively pleaded by the applicant before the Sales Tax Officer. It is required to be noted that the proceedings before the Sales Tax Officer were the proceedings of reassessment u/s 44 of the Act. Therefore, in such proceeding the applicant-assessee could have wholly disputed the liability to pay purchase tax or could have in the alternative contended that in case it was found that part of the goods were covered towards the qualified sales, he was entitled to set-off of tax against such qualified sales. Mr. Pathak, therefore, is not right in contending that the assessee could have made the claim of set-off of tax only after the method of proportion was applied by the Sales Tax Officer.

6. However, in view of the fact that the lower authorities have reached a categorical finding that the applicant has used only 28 per cent of the goods purchased without payment of tax in the manufacture of finished goods which were sold on consignment basis outside the State of Gujarat, and therefore, by necessary inference remaining goods representing about 72 per cent were tax-paid goods which were used in the manufacture of finished goods which were either sold locally or in the course of inter-State trade and commerce, we are of the opinion that there was on record before the lower authorities material based on which the claim for set-off of tax under rule 42 of the said Rules could have been entertained. Simply because the assessee has failed to raise claim for set-off in the alternative it could not be said that the assessee lost his right to claim set-off. From the facts and material on record and on the basis of findings reached by the lower authorities the claim for set-off under rule 42 could have been entertained and decided by the lower authorities. Therefore, in the interest of justice, the Tribunal ought to have permitted the applicant to raise the claim of set-off of tax under rule 42 of the said Rules, and we are of the opinion that the Tribunal was not justified in rejecting the said claim of set-off of tax especially when granting or non-granting of the claim did not necessitate any enquiry into fresh facts or fresh evidence. We hold that the Tribunal was not right in law in not allowing the applicant to raise plea of set-off of tax under rule 42 of the Rules in respect of the amount of tax which it had paid on the purchase of raw and processing material and consumable stores which was found to have been used in manufacture of paper as taxable goods for sale and which it had sold locally or in the course of inter-State trade and commerce. The Tribunal could have, at least, remanded the matter to the Sales Tax Officer especially when the Tribunal itself was of the opinion that the claim of set-off of tax under rule 42 could have

been decided on the basis of evidence and material already on record without necessitating any further enquiry into fresh facts or evidence. However, the Tribunal did not permit the applicant to raise the plea of set-off of tax solely on the ground that the said plea was not raised before the lower authorities and, as stated hereinabove, the stand taken by the Tribunal was not just and proper in the facts and circumstances of the present case.

7. We, therefore, answer the question referred to us in the negative by holding that the Tribunal was not right in law in not allowing the applicant to raise the plea of set-off of tax under rule 42 of the Gujarat Sales Tax Rules, i.e., in favour of the assessee and against the department. Reference is answered accordingly. There shall be no order as to costs.

8. Reference answered in the negative.