

(1999) 09 KL CK 0029
In the High Court Of Kerala
Case No : W.A. No. 770/99

Apar Ltd.

APPELLANT

Vs

Asst. Commissioner (Assessment) and Another

RESPONDENT

Date of Decision : 06-09-1999

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 10, 5(2A)

Citation : (1999) 09 KL CK 0029

Hon'ble Judges : A.R. Lakshmanan, Acting C.J.; S. Sankarasubban, J

Bench : Division Bench

Advocate : N. Muraleedharan Nair and R. Muraleedharan, for the Appellant; R.K. Muraleedharan, Addl. Govt. Pleader (Taxes), for the Respondent

Judgement

S. Sankarasubban, J.—The above Writ Appeal is filed against the judgment in O.P. No. 2878/96. Petitioner is the Appellant. The first prayer in the Original Petition was to quash Ext. P-1 notification to the extent it levied turnover tax on goods received by consignment or branch transfer. The second prayer was for a writ of certiorari to quash Ext. P-2 notification to the extent it states that the turnover tax already paid shall not be refunded and the third prayer was to quash Ext. P-4 assessment order to the extent it levied turnover tax collection, turnover tax on goods received by way of branch transfer and for forfeiture of turnover tax paid by mistakes of law and for other reliefs.

2. Ext. P-1 notification is dated 29th October, 1992. It is a notification issued u/s 10 of the Kerala General Sales Tax Act. By that notification, the Government of Kerala made an exemption in respect of turnover tax payable on the turnover at the first point of sale in the State by dealers coming under Sub-clause (g) of Clause (i) Sub-section (2A) of Section 5 of the above Act except on the turnover relating to goods received on consignment and/or branch transfer. Ext. P-2 is the notification dated 9th March 1993 by which it was notified that Ext. P-1 notification is deemed to have come into force on first April, 1992. There is a proviso added that the turnover tax, if any, paid shall not be refunded.

3. E, P-4 is the assessment order in favour of the Petitioner for the year 1992-93. The assessment was completed on the basis of Ext. P-1 notification. A Division Bench of this Court in the decision reported in *Assistant Commissioner v. Associated Cement Companies Ltd.* 1997 (1) KLT 802 held that the exclusion from Ext. P-1 notification with regard to branch transfer and goods received on consignment was arbitrary and unconstitutional. The learned Single Judge following the above decision, has granted the first prayer. The second prayer is with regard to the refund of the amount of tax already collected. In this connection, it is to be noted that Ext. P-2 notification is dated 9th March 1993. Ext. P-1 notification is dated 29th October 1992. So, after 29th October 1992 those persons who were exempted under Ext. P-1, were not bound by law to pay turnover tax. Learned counsel for the Petitioner contended that his client is also entitled to get the benefit of Ext. P-1 from 29th October 1992, in so far as it has now been held that the exclusion from Ext. P-1 notification of persons like the Petitioner is unconstitutional. In Ext. P-2, there is a proviso that the turnover tax paid, shall not be refunded. That was why by Ext. P-2, Ext. P-1 was brought into force from first April, 1992, whereas Ext. P-1 is dated 29th October 1992. So, from 1st April 1992 upto 29th October 1992 all the dealers including those who were exempted under Ext. P-1 were paying turnover tax. Thus, the Petitioner cannot claim any refund of tax up to 29th October 1992.

4. The question is whether the Petitioner is entitled to refund of the turnover tax paid after the date of Ext. P-1 notification. The learned Single Judge declined to grant this prayer on the ground that Ext. P-2 notification applies to all dealers without any discrimination. Further, the learned Judge observed that all those who had paid tax, might have taken into account the said payment while fixing the price structure of the commodity dealt with by them. So far as the finding of the learned Single Judge regarding discrimination is concerned, we are of the view that the learned Judge is not completely correct in holding that there is no discrimination. After the date of Ext. P-1 notification, viz., 29th October 1992, all those who were exempted under Ext. P-1 notification, did not pay the turnover tax. But the persons like the Petitioner were compelled to pay tax, because they were excluded from exemption. It was only after approaching this Court that they got the benefit of exemption in their favour also. Hence, from 29th October 1992, they were compelled to pay the turnover tax illegally. Hence, the learned Single Judge is not correct in holding that all those who had paid turnover tax were not entitled to get refund of the same. The difference is that upto 29th October 1992 the turnover tax was collected legally and after that it was collected illegally from the Petitioner, this Court held that the collection of turnover tax from the Petitioner is illegal and unconstitutional.

5. In the case reported in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, at page 632, it is observed thus:

Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a

claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition.

Again at page 633, it is observed as follows:

A claim for refund, whether made under the provisions of the Act as contemplated in proposition (i) above or in a suit or writ petition in the situations contemplated by proposition (ii) above, can succeed only if the Petitioner/Plaintiff alleges and establishes that he has not passed on the burden of duty to another person or other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on....

Thus, the Petitioner/Appellant is entitled to refund, if he has shown that he has (not) passed on the burden of the duty to a third person. In paragraph 4 of the Original petition, it is stated thus:

Respondents are not authorised to forfeit the turnover tax paid by the Petitioner as the same is not a collected tax. Forfeiture of tax can be done only if the same is collected tax. There is specific mention in the relevant section relating to turnover tax that the turnover tax payable by the assesses should not be collected from the customers. Accordingly the Petitioner has not collected, turnover tax from its customers. Therefore, the turnover tax is paid by the Petitioner out of its profit and not by collecting the same from the buyers.

There was no counter-affidavit at the time when the Original Petition was pending. At the appellate stage, a statement was filed by the State. In paragraph 2 of the statement, it is stated thus:

Therefore, the Petitioner's contention that the turnover tax paid after 29th October 1992 is liable to be refunded to the Petitioner is not sustainable in view of the fact that the Petitioner might have taken into account the said payment while fixing the price structure of the commodity dealt with by them.

The Appellant filed a reply to the statement. In paragraph 4 of the reply, it is stated as follows:

It is submitted that the Appellant and others were similarly placed as to payment of turnover tax prior to the date of Ext. P-1 notification. On the other hand no turnover tax is paid by dealers specified in the notification after Ext. P-1 whereas the Appellants and similarly placed dealers have paid turnover tax. This payment has not reflected in the price structure as found by the learned Single Judge. This can also be verified by the 1st Respondent from the assessment records.

The first Respondent has not denied this. In view of the above facts, we are of the view that the Petitioner/Appellant is entitled to refund of the turnover tax paid after 29th October 1992 for the assessment 1992-93. We are fortified by the view taken in the decision of the Supreme Court in Deputy Commissioner etc. Vs. Consumer Cooperative Stores Ltd., Learned Government Pleader relied on

the decision reported in M/s Raj Sheel v. Commercial Tax Officer, Hyderabad AIR 1999 S.C. 1580. That was a case where sales tax was realised from the customers and it was included in the turnover of the applicant. Collections made from the customers were paid to the State. When the question of refund came, the Supreme Court held that the State can forfeit the amount so collected and the relief was not granted. That case stands on a different footing.

6. In the above view of the matter, we modify the judgment of the learned Single Judge and direct the Respondents to refund of the turnover tax paid by the Appellant from 29th October 1992. The refund shall be made within six months from the date of receipt of a copy of this judgment.

Writ Appeal is disposed of as above.