

(2007) 12 KL CK 0022
In the High Court Of Kerala
Case No : O.P. No. 3502 of 2003 (P)

Argus International

APPELLANT

Vs

Assistant Commissioner (Assessment) and Others

RESPONDENT

Date of Decision : 14-12-2007

Acts Referred:

Central Sales Tax Act, 1956 — Section 3

Kerala General Sales Tax Act, 1963 — Section 19(2), 19(3), 19(4), 19B

Citation : (2008) 14 VST 171

Hon'ble Judges : C.N. Ramachandran Nair, J

Bench : Single Bench

Advocate : V.P. Sukumar and Bejoy Cheriyan, for the Appellant; P. Ravindra Babu, Government Pleader, S.K. Devi, M. Raj Mohan, Santhosh P. Abraham, Frankur D. Jayan, Deepsur D. Jayan, K.P. Pradeep, Shanmugham D. Jayan and P.K. Maya Devi, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—Petitioner is challenging exhibits P15 and P16 orders of assessment issued by the first respondent u/s 19B of the Kerala General Sales Tax Act, 1963. The petitioner is a manufacturer of "Cuticura" brand of talcum powder for the brand name holder M/s. Mullar & Phipps (India) Limited, the third respondent herein. The petitioner's factory is located at Madras wherefrom the product is stock transferred to Kerala and sold to the brand name holder for marketing in the State. The first respondent found that as against the normal margin of 15 per cent in the nature of wholesale trade of the product, the brand name holder resold the item after purchase from petitioner at a gross profit of 55.05 per cent. The first respondent, therefore, rejected petitioner's sales consideration and made assessment u/s 19B of the KGST Act. The turnover adopted for first sale by petitioner is 85 per cent of the sales turnover of the brand name holder, i.e., by providing a margin of 15 per cent towards gross profit. In fact, the original assessment orders were subjected to appeals and the impugned orders are issued after remand by the appellate

authority once.

2. I heard learned Counsel for the petitioner and learned Government Pleader. In order to appreciate the contentions, the relevant section under which assessments are made has to be looked into. Therefore, Section 19B of the KGST Act is extracted hereunder:

19B. Assessment in case of undervaluation.-(1) If the assessing authority is satisfied that a dealer has, with a view to evade the payment of tax, shown in his accounts, sale or purchase of any goods at prices lower than the prevailing market price of such goods, it may estimate the value of each goods, on the basis of the prevailing market price and assess or reassess the dealer to the best of its judgment, after making such enquiry as it may consider necessary and after affording the dealer a reasonable opportunity of being heard.

(2) The provision of Sub-sections (2) to (4) of Section 19 shall apply to the assessment or reassessment under Sub-section (1).

3. The contention of the petitioner is that Section 19B provides for assessment of actual sale proceeds received, and there is no justification to add another dealer's margin to the turnover of the petitioner. The learned Counsel for the petitioner relied on two Division Bench decisions of this Court, one of which is in Deputy Commissioner of Sales Tax (Law) v. Kerala Distilleries & Allied Products (P.) Ltd. reported in [1993] 89 STC 58(SC) and another in C.O. Devassy v. State of Kerala reported in [1991] 81 STC 2(SC). The learned Government Pleader has relied on the judgment in S. T. Rev. No. 227 of 2003 dated January 5, 2004 wherein a Division Bench of this Court has held that in the case of tax evasion, the assessing officer will be entitled to make assessment u/s 19B, and submits that the petitioner's case is clearly covered by the said decision. The first case, above referred, relied on by the petitioner pertains to manufacture and sale of product by a dealer in Kerala to the brand name holder, which is also within Kerala. So far as the second decision of this Court is concerned, it has nothing to do with the product with a brand name.

4. The case herein is one of a clear scheme of evasion of tax practised by the brand name holder with the assistance of the petitioner because the petitioner, not being the brand name holder, is not entitled to market the product anywhere in the country. The entire production is admittedly in the brand name of the brand name holder, which alone is entitled to market the product, and so much so, in the normal course, product should have been sold and delivered by the petitioner at the factory itself to the brand name holder or at least consigned on inter-State sale by the petitioner to the brand name holder in Kerala for marketing the product in Kerala. This would have led to a case of first sale by the brand name holder in Kerala and payment of tax on the actual turnover. On the other hand, the petitioner helped the brand name holder to evade tax on the product by transferring goods to Kerala and by making first sale within the State to the brand name holder. In fact since goods manufactured by the petitioner

were for sale only to the brand name holder, inter-State movement of goods by the petitioner to Kerala is under contract of sale and therefore sale though subsequently made is actually an inter-State sale u/s 3(a) of the Central Sales Tax Act, 1956 taxable in Tamil Nadu. The petitioner escaped CST assessment in Tamil Nadu because Tamil Nadu sales tax authorities would not have seen the contract under which goods are manufactured and sold by the petitioner.

5. However, this is clearly a scheme of evasion of tax practised by the petitioner and the brand name holder. The Supreme Court has in two decisions in *The Commissioner of Income Tax, Madras Vs. Sri Meenakshi Mills Ltd., Ors.*, and *McDowell and Co. Ltd. Vs. Commercial Tax Officer*, held that courts should not approve colourable devices or dubious methods adopted by parties for evading payment of tax legitimately due to the State. These decisions were considered by the Division Bench in the unreported decision above referred. In fact, I am of the view that this is a fit case for considering penalty on the petitioner as well as on the brand name holder for attempting evasion of tax. However, on account of the officer's diligence, evasion has not taken place because he made assessment by invoking Section 19B. In the circumstances, probably, the assessing officer did not consciously invoke penalty provisions against the petitioner and the third respondent. In view of the above findings, the impugned order is upheld and the original petition is dismissed as devoid of any merit. Order on C.M.P. No. 6202 of 2003 dismissed.