

(1991) 06 KAR CK 0052
In the Karnataka High Court
Case No : S.T.R.P. No. 16 of 1986

B.M. Ashraf and Co.

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 03-06-1991

Acts Referred:

Central Sales Tax Act, 1956 — Section 4, 4 (2), 5, 5 (1), 5 (3)
Karnataka Sales Tax Act, 1957 — Section 6

Citation : (1992) 84 STC 394

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : M.N. Shankaregowda, for the Appellant; H.L. Dattu, High Court Government Pleader, for the Respondent

Judgement

This Judgment has been overruled by : State of Karnataka Vs. B.M. Ashraf and Co., (1997) 8 JT 458 : (1997) 6 SCALE 425 : (1997) 8 SCC 468 : (1997) 4 SCR 520 Supp : (1997) 107 STC 571

K. Shivashankar Bhat, J.—The question pertains to the assessment year 1978-79 under the provisions of section 6 of the Karnataka Sales Tax Act, 1957 ("the Act", for short). The assessee is a registered dealer; the assessee purchased fish oil from unregistered dealers in this State and sold the same to M/s. Kalbhavi Venkat Rao & Bros. (for short "Kalbhavi"), for the purpose of compliance with the export orders procured by the latter. There is no dispute that Kalbhavi purchased these goods from the assessee and exported them to comply with Kalbhavi's contracts with foreign buyers. Thus the sale by the assessee to Kalbhavi was the penultimate sale, i.e., the last sale preceding the sale occasioning the export of the goods, referred in section 5(3) of the Central Sales Tax Act, 1956 (for short "the CST Act" hereinafter). The following are thus undisputed facts :

(1) The purchase transactions under which the assessee purchased these taxable goods were under circumstances in which no tax u/s 5 of the Act was leviable.

(2) After purchase, the assessee sold the goods within the State of Karnataka to Kalbhavi, and

(3) Kalbhavi exported the goods to places outside India for the purpose of complying with the agreement or order in relation to those exports.

Thus, by virtue of section 5(3) of the CST Act read with article 286 of the Constitution the sale by the assessee to Kalbhavi was not taxable and similarly, the export sales effected by Kalbhavi were also not taxable under the Act. In those circumstances, the State proceeded to levy purchase tax u/s 6 of the Act, on the purchases made by the assessee. Whether section 6 is attracted to these purchases, is the question for consideration.

Section 6 of the Act reads :

"Levy of purchase tax under certain circumstances. - Subject to the provisions of sub-section (5) of section 5 every dealer who in the course of his business purchases any taxable goods in circumstances in which no tax u/s 5 is leviable on the sale price of such goods, and

(i) either consumes such goods in the manufacture of other goods for sale or otherwise (or consumes, otherwise) or disposes of such goods in any manner other than by way of sale in the State, or

(ii) dispatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce,

shall be liable to pay tax on the purchase price of such goods at the same rate at which it would have been leviable on the sale price of such goods u/s 5 :

Provided that this section shall not apply -

(i) in respect of sale or purchase of goods specified in the Fourth Schedule, -

(a) which are taxable at the point of purchase; and

(b) which have already been subjected to tax under sub-section (4) of section 5;

(ii) in respect of sale or purchase of goods specified in the Second Schedule which have already been subjected to tax under clause (a) of sub-section (3) of section 5."

2. The contention of the State is that, by virtue of section 5(3) of the CST Act, the sale effected by the assessee to Kalbhavi is deemed to be in the course of export (i.e., to a place outside India) and therefore by the said sale the assessee despatched the goods to a place outside the State; since this dispatch is not as a direct result of sale in the course of inter-State trade or commerce, the dispatch falls directly within clause (ii) of section 6 of the Act. It was further argued that the purpose of the Act is to impose tax on a sale or purchase transaction, at least, at one stage in the State; any construction of the Act which defeats this scheme of the Act should not be adopted.

3. The question is short, but not free from difficulty, in view of the impact of section 5(3) of the CST Act on the sales of the assessee to Kalbhavi. Since these sales are deemed to be sales in the course of export, one possible view is to hold that such sales are not local sales at all; if so, the sales are to be considered as dispatches by the assessee to a place outside the State falling within clause (ii) of section 6. The consequences of section 5(3) of the CST Act is related back to govern the immediate status of the assessee's action in effecting the said deemed export sales.

4. The rival view with which we agree, is that, the sales effected by the assessee were completed in the State and therefore those are entirely local sales; the assessee has not despatched the goods anywhere to a place outside the State; the dispatches were effected only by Kalbhavi; article 286 prohibits the imposition of tax on a sale, which "takes place" in the course of the export of the goods "out of the territory of India"; to that extent only section 5(3) of the CST Act governs the fact situation and prevents the State from imposing the sales tax on the sale effected by the assessee to Kalbhavi; but article 286 does not in any manner declares the situs of the actual sale as having taken place outside the State, nor section 5(3) declares such sale as having occurred outside the State; purpose of article 286 of the Constitution read with section 5(3) is a bar to the State from taxing these penultimate sales also; that purpose does not extend to confer any other status on these transactions. In fact the location of sale is relevant for the purposes of article 286 of the Constitution and this is identified by applying section 4 of the CST Act. If section 4 of the CST Act is applied, there is no doubt that, the goods were inside the State at the time of assessee's sales to Kalbhavi and by virtue of section 4(2) of the CST Act, the said sales are to be deemed to take place inside the State. A harmonious construction of article 286(1)(a) and (b) of the Constitution, as well as section 4 and 5(3) of the CST Act, results in section 5(3) of the CST Act being an exception to section 4(2) of the said Act.

5. Section 5(3) was introduced in the CST Act, with effect from 1st April, 1976, to get over some of the practical problems resulting from the decision of the Supreme Court in *Serajuddin and Others Vs. The State of Orissa*, wherein the Supreme Court held that similar penultimate sales were taxable and are not protected by article 286 of the Constitution, read with section 5(1) of the CST Act. Thus, even though these penultimate sales are sales having taken place within the State, they are deemed to be "in the course of export" for purposes of article 286 of the Constitution.

6. During the relevant period, explanation III(a)(i) to section 2(t) of the Act stated that the sales or purchases of specific or ascertained goods should be deemed to have taken place in the State if the goods were within the State at the time of contract of sale or purchase was made (irrespective of the place of contract of sale or purchase). This explanation, deems these transactions as sales having taken place within the State for the purposes of the Act. By virtue of

this explanation, again, the sales effected by the assessee to Kalbhavi were sales made within the State; and if so, there is no scope at all to levy the tax u/s 6.

The decision of the Supreme Court in *Murli Manohar and Co. and Another Vs. State of Haryana and Another*, has a strong bearing on the instant case. The Supreme Court was concerned with the leviability of purchase tax u/s 9(1) of the Haryana General Sales Tax Act; the said Act had undergone several amendments and the relevant provisions of section 9(1) applicable were there prior to the amendment of section 9(1), by Act 1 of 1988. During the relevant period, the said section 9(1) in substance, inter alia, levied a purchase tax on a dealer liable to pay tax under the said Act who purchases goods and uses them in the State in the manufacture of any other goods and either disposes of the manufactured goods in any manner otherwise than by way of sale in the State or dispatches the manufactured goods to a place outside the State in any manner otherwise than by way of sale in the course of inter-State trade or commerce or in the course of export outside the territory of India within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956. Therefore as per section 9(1) of the Haryana Act, when the dealer purchases goods and uses them in the State in the manufacture of any other goods, purchase tax on the initial purchase is attracted, (a) when the said dealer disposes of the manufactured goods in any manner otherwise than by way of sale in the State (i.e., if he sells them in local sales in the State, purchase tax is not attracted) or (b) the tax is leviable when the dealer dispatches the manufactured goods to a place outside the State in any manner otherwise than (i) by way of inter-State sale or (ii) in the course of export within the meaning of section 5(1) of the CST Act. Thus rendering of local sales, exempted the prior purchases made in the State. Despatching the manufactured goods to a place outside the State attracted the levy u/s 9(1); however, this despatch should not fall within any one of the two categories of sales, viz., (i) dispatch by way of inter-State sale; or (ii) dispatch in the course of export within the meaning of section 5(1) of the CST Act.

7. dispatch in the course of export, as deemed u/s 5(3) of the CST Act, was not mentioned as excluding the levy. The penultimate sale (prior to the actual export sale) which is also deemed as a sale in the course of export u/s 5(3) of the CST Act was not treated on par with the export sale falling within section 5(1) of the CST Act.

8. In the above background, the Haryana dealers questioned the levy of purchase tax on them, even though, they purchased raw materials in Haryana and used them to manufacture other goods and then sold them to other traders in the State, who in turn exported them to a place outside India. In otherwords, even though the sales effected by these Haryana dealers (assesseees before the Supreme Court) were the penultimate sales falling u/s 5(3) of the CST Act, they were in reality local sales only. However, the State contended that, since those penultimate sales were sales effected in the course of export, these dealers had

to pay purchase tax u/s 9(1). The State argued that, these penultimate sales to the actual exporters - though their sales were "penultimate sales" falling u/s 5(3) of the CST Act - were not excluded from the levy u/s 9(1), unlike the sales falling u/s 5(1) of the CST Act. The Supreme Court accepted the State's contention that, since section 9(1) did not refer to the penultimate sales falling u/s 5(3) of the CST Act, for exclusion from the levy of purchase tax as in the case of sales defined u/s 5(1) of the CST Act, section 5(3) of the CST Act, had no bearing on the construction of section 9(1). However, the Supreme Court held that, those penultimate sales are actually local sales and therefore, purchase tax on the raw materials out of which the goods sold locally to the exporters, was not leviable.

At page 91, the Supreme Court referred to the State's contention :

".... the assesseees purchased raw materials inside the State of Haryana but paid no tax thereon, as they were registered dealers and furnished the declaration forms prescribed u/s 24. Their sales of the manufactured goods are to persons who have exported the goods outside India and so, they claim, they are not liable to pay the tax sought to be imposed on them u/s 9(1). The department, however, has denied the relief on the short ground that the sales effected by the appellants are not sales in the course of export outside India within the meaning of section 5(1) of the Central Sales Tax Act. They are only "penultimate" sales; they may be deemed to be "export sales" because of the fiction created u/s 5(3) of the Central Sales Tax Act but that is not enough to escape from the clutches of the charge in section 9(1)."

Thereafter at page 93, it was held :

"..... For the purposes of this argument we shall assume that the sales made by the assesseees were "penultimate sales" which would fall within the purview of section 5(3) of the Central Sales Tax Act. The argument on behalf of the Revenue, which was found favour with the High Court, is that section 9(1) exempts only sales made in the course of export within the meaning of section 5(1) of the Central Sales Tax Act but not those u/s 5(3) of the said Act. After careful consideration we think that this argument was rightly accepted by the High Court. In the first place there is no dispute before us that section 5(3) covers a category of cases which would not otherwise have come within the purview of section 5(1), as explained in *Serajuddin and Others Vs. The State of Orissa*, . The language of section 9(1)(a)(ii) - later 9(1)(b) - using the words "within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956" has to be given full meaning; in other words, the exemption u/s 9(1) has to be restricted only to export sales falling within the scope of section 5(1). It seems clear, from the circumstances referred to below, that the Legislature deliberately used these words and intended to give a restricted operation to section 9(1)(a)(ii) and (b)."

Therefore, it was held that the High Court was right in concluding that the assessee was not entitled to the exemption u/s 9 because the sales made by him

were not sales in the course of export falling within section 5(1) of the CST Act. Then, the Supreme Court considered the alternative contention of the assessee that those penultimate sales were local sales and accepted the same. At page 94 :

"Shri Rajaram Agarwal, learned counsel for the assessees, raised a new contention before us, which we have already referred to as an alternative contention. This contention which really seems to be unanswerable appears to have been missed at the stage of the High Court but this contention is purely one of law and merits consideration. The point made by him was this. There is no dispute that the assessees have transferred the manufactured goods by way of sale and that these goods have been despatched to various ports of India. The exact terms of dispatch are not clear and there are no facts on record which will help us to understand the course of transactions in the several cases before us. But Shri Agarwal submitted that the sales made by the assessees can only fall within one of three categories. They are either local sales or inter-State sales or export sales. Each of the assessees has sold its goods to another dealer. If that dealer is also a resident of Haryana and has taken delivery of the goods in Haryana and exported them thereafter, the assessees' sales would be local sales. If the purchasing dealer of the manufactured goods is in some other State and the goods have been moved out of Haryana in pursuance of that sale, they would be inter-State sales. The goods which have been sold by the assessee must have been delivered to the dealer in pursuance of the sale either within the State or outside the State in India. In either event, it would be a sale covered by the exceptions in section 9(1). It would be a local sale or inter-State sale. The only third possibility is that the assessee sold the goods to a dealer outside India and exported the goods in pursuance of that sale in which event it would be a sale within the meaning of section 5(1) of the Central Sales Tax Act.

We think Shri Agarwal is right in saying that any sale effected by the assessees in the circumstances, which have been set out by us earlier, must fall in one of three categories. We are unable to conceive of a fourth category of sale, which could be neither a local sale nor an inter-State sale nor an export sale. Shri Gupta, on behalf of the State, contended that the goods might have been directly moved by the assessee to a port for shipment abroad in pursuance of an export contract entered into by the dealer who purchased from the assessee. Even in such a case if the transport of goods from the assessees' place of business to the port is in pursuance of the terms of the sale, the movement of the goods would be occasioned by the sale made by the assessee and would be an inter-State sale. If, on the other hand, the goods were sent to the port by the assessee subsequent to and independent of the sale made by him, then, for the purpose of that transport, the assessee would only be an agent of the purchaser and the movement of the goods in pursuance of the contract of sale entered into by the purchaser and would be one in the course of export within the meaning of section 5(1) of the Central Sales Tax Act. As pointed out by Shri Agarwal, even in *Serajuddin and Others Vs. The State of Orissa*, , although the exemption claimed

for the sales as export sales was denied, the conclusion of the High Court that the sales to S.T.C. were inter-State sales chargeable under the Central Sales Tax Act was upheld. We are, therefore, of the opinion that this alternative contention urged by the learned counsel for the assesseees has to be accepted and it has to be held that, since the sales effected by the assesseees fall within one of the three exempted categories set out in section 9(1)(b), there can be no levy of purchase tax u/s 9(1) of the Act."

9. The Supreme Court did not by necessary implication accept the contention that the differentiation between the two kinds of sales - one falling u/s 5(1) and the other u/s 5(3) of the CST Act - would contravene article 286 of the Constitution, and therefore such a differentiation should not be made, while construing section 9(1). The Supreme Court held that section 9(1) should be construed with reference to the language used therein and the fiction created by section 5(3) of the CST Act has no relevancy to the construction of section 9(1) of the Haryana Act; language of section 9(1), "deliberately used" therein had to be given effect to.

10. From the above, it is clear that, for the purposes of purchase tax u/s 6 of the Act, the fiction created by section 5(3) of the CST Act has no relevancy so long as the said purchase tax is not levied on the actual sale transaction covered by section 5(3) of the CST Act.

11. If these penultimate sales are local sales, then, the factual position is that, the assessee before us purchased the goods and sold them locally to Kalbhavi, who in turn despatched the goods in the course of export. The sale effected by the assessee to Kalbhavi gets the protection of section 5(3) of the CST Act, as penultimate sale prior to the actual export sale but that does not mean, the assessee dispatches the purchased goods to a place outside the State.

12. The principle stated in section 5(3) is to regard the sales effected by the assessee as a sale in the course of export; but this principle does not convert the action of the assessee as an act of despatching the goods to a place outside the State.

13. Section 6 uses the word "dispatch" deliberately. Full effect should be given to its meaning. The question is, whether the assessee dispatches the goods to a place outside the State, when he sells them locally to an exporter (Kalbhavi). No exercise is required to say that, factually, the assessee delivers the goods to Kalbhavi within the State and therefore that is not an act of despatching the goods to a place outside the State. The word "dispatches" is also spelled as "dispatch"; the meaning is "to send off or away with promptness".

14. P.P.M. Thangiah Nadar Vs. The State of Tamil Nadu, is a decision of the Madras High Court rendered on 19th November, 1979. The assessee therein purchased senna leaves from unregistered dealers and exported them, during the year 1969-70. The sale transaction under which assessee purchased the goods were not taxable under the main provision of the Tamil Nadu General

Sales Tax Act; hence section 7-A(1)(b) was invoked to impose tax on the assessee's purchase turnover, i.e., the dealer having purchased the goods "disposes of such goods in any manner other than by way of sale in the State". The High Court held that the actual export sale occurred within the State and thus was a local sale for the purposes of the said Act. If so, section 7-A was not attracted to impose the tax because, the assessee had disposed of the goods by way of sale in the State (though the sale was in the course of export). At page 71, the Bench held :

"It may be that due to the constitutional prohibition against taxing an export sale the State Government would not be in a position to tax the sale. But so long as the definition provision read with section 7-A showed that it was only a local sale, it would follow that for the purpose of clause (b) of sub-section (1) of section 7-A also, it would be a local sale. In other words, as there was a local sale in the State under the provisions of the Act, then section 7-A would not be attracted. The fact that it occasioned the export would be irrelevant in this context. The result is that, in the present case, the assessee was not liable to be taxed on the purchases under consideration"

15. On 22nd November, 1979, the same Bench decided Ponnu Saw Mills Vs. The State of Tamil Nadu, The assessee purchased goods from unregistered dealers and exported them. Question was whether u/s 7-A, purchase tax was leviable on the assessee's purchases. The State relied on section 7-A(1)(c) of the Act, wherein purchase tax was levied on the purchases of goods if the purchaser dispatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce. At page 293, while accepting this contention the Bench held :

"Clause (c) of sub-section (1) of section 7-A of the Act contemplates dispatches of the goods to a place outside the State. So long as the goods leave the boundaries of the State, then whatever be their destination, they will fall within clause (c). Where the sale or purchase takes place in the course of inter-State trade or commerce, then there could be no purchase tax. That is a specific category excluded from purchase tax levy. The export sales as here have not been so excluded."

Again at page 294, while concluding, it was observed :

"... But, in the present case, clause (c) of sub-section (1) of section 7-A of the Act contemplates only one State. The expression used is "dispatches them to a place outside the State". The word "State" has been defined under the Act as meaning the State of Tamil Nadu. Therefore, as soon as it is found that there was a despatch to a place outside the State of Tamil Nadu, clause (c) of sub-section (1) of section 7-A of the Act would be satisfied. We have already seen that the exception is only in favour of a transaction in the course of inter-State trade or commerce. This is not such a sale. The result is that the present transaction would fall within the scope of section 7-A of the Act and, therefore, it was rightly

brought to tax under the said provision."

16. In the said case, the goods were despatched by the assessee, after purchasing the same, unlike the case before us. In the case before us, the dispatch is done by Kalbhavi and not by the assessee; thus there is a difference in the fact situation. However, the Bench has not referred to its decision rendered three days earlier, in P. P. M. Thangiah Nadar's case [1980] 46 STC 67 SC obviously because, in the said case, section 7-A(1)(c) was not relied. At page 69 P.P.M. Thangiah Nadar Vs. The State of Tamil Nadu, the Bench specifically observed that, "it is not in dispute that clauses (a) and (c) do not apply here" and tax was sought to be levied by applying clause (b). Therefore, it cannot be held that the Bench took conflicting views at all; obviously, the State experimented by relying on different clauses of section 7-A(1) and in the second case Ponnu Saw Mills Vs. The State of Tamil Nadu, succeeded in roping in the purchases for taxation. However, in both these cases, the exports were effected by the purchaser himself and not by a third dealer, who purchased the goods locally from the original purchaser-assessee. The two decisions of the Kerala High Court reported in (1) Deputy Commissioner of Sales Tax v. S.K. Arts [1987] 64 STC 411 Mad and (2) Deputy Commissioner of Sales Tax v. Indian Oil Corporation Ltd. [1987] 64 STC 160 Mad were cited by the learned Government Advocate.

17. In the view we have already taken about the scope of section 5(3) of the CST Act, it is unnecessary to discuss these decisions. Further, the decision of the Supreme Court in Murli Manohar and Co. and Another Vs. State of Haryana and Another, is subsequent to these decisions.

Our conclusions are :

Section 5(3) of the CST Act does not affect the identification of the situs of the sale; the purpose of section 5(3) is to enumerate a principle that the penultimate sale prior to the actual export of goods, also is a sale in the course of export. Section 6 of the Act, has to be understood in the light of its language read with the definition of sale under the Act. Since the penultimate sale, i.e., the sale by which the assessee transferred the goods to Kalbhavi is a local sale, it cannot be equated to despatching the goods to a place outside the State by the assessee; hence the levy u/s 6 is not attracted.

Consequently this revision petition is allowed and the order of assessment u/s 6 of the Act is set aside. No costs.

18. Petition allowed.