
(2008) 10 KL CK 0010
In the High Court Of Kerala
Case No : T.R.C. No. 211 of 2002

BPL Telecom Limited

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 07-10-2008

Acts Referred:

Central Sales Tax Act, 1956 — Section 5(2), 9(2)
Kerala General Sales Tax Act, 1963 — Section 29(2), 29A(4), 41
Kerala General Sales Tax Rules, 1963 — Rule 35A(4)

Citation : (2009) 23 VST 264

Hon'ble Judges : H.L. Dattu, C.J.; A.K. Basheer, J

Bench : Division Bench

Advocate : Anil D. Nair and A.K. Jayasankar Nambiar, for the Appellant; Vinod Chandran, Special Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

H.L. Dattu, C.J.—The order passed by the Sales Tax Appellate Tribunal, Thiruvananthapuram, in T.A. No. 643 of 1999 dated November 2, 2001, is the subject-matter of this sales tax revision case filed u/s 41 of the Kerala General Sales Tax Act, 1963.

2. The petitioner is a company incorporated under the provisions of the Companies Act, 1956 and also a dealer registered both under the provisions of the Kerala General Sales Tax Act, 1963 and the Central Sales Tax Act, 1956.

3. The facts as narrated by the petitioner is as under:

The petitioner has imported goods after entering into contract with ONGC, Karaikkal for setting up "Radio Communication Systems" for awarder at their site at Karaikkal. The goods so imported was cleared by the petitioner through Customs House at Thiruvananthapuram. The goods imported was transported by the petitioner to the site of the buyer outside Kerala, that is, ONGC, Karaikkal under Pondicherry Administration. During the course of such transport, the

vehicle was intercepted by Sales Tax Inspector, Sales Tax Check-post, Amaravila. He suspected the genuineness of the transport and detained the goods after issuing notice. The goods thereafter was released to the petitioner on furnishing bank guarantee.

4. The Sales Tax Officer (Enquiry) after conducting an enquiry, has confirmed the proceedings initiated by the Sales Tax Inspector and also has confirmed the levy of penalty of Rs. 18,97,000.

5. The petitioner being aggrieved by the said order has filed a statutory appeal before the Appellate Commissioner, Thiruvananthapuram, who after hearing the petitioner has rejected the claim of the petitioner that the transaction is one coming u/s 5(2) of the CST Act and was not entitled for exemption. However, being of the opinion that the penalty levied is excessive, has reduced the penalty to Rs. 6,06,982.

6. The petitioner, not being satisfied with the aforesaid order, has filed second appeal before the Sales Tax Appellate Tribunal in T. A. No. 643 of 1999. The Tribunal by its order dated November 2, 2001, while rejecting the tax claim of the petitioner that the transaction in question is one coming u/s 5(2) of the CST Act, has sustained the penalty order passed by the first appellate authority. It is the correctness or otherwise of the said order, which is the subject-matter of this revision petition.

7. The petitioner has framed the following questions of law for our consideration:

(i) In the facts and circumstances of the case ought not the Tribunal have held that the transaction in question is one coming u/s 5(2) of the CST Act more so in view of the judgment of the Supreme Court in State of Maharashtra Vs. Embee Corporation, Bombay, ?

(ii) In the facts and circumstances of the case ought not the Tribunal have cancelled the levy of penalty imposed u/s 29A(4) read with Rule 35A(4)(b) of the Kerala General Sales Tax Rules, 1963 after holding that the transaction under question is one coming u/s 5(2) of the CST Act and hence exempt?

8. We have heard Sri Anil D. Nair, learned Counsel for the petitioner and Sri Vinod Chandran, learned Government Advocate. The learned Counsel Sri Anil D. Nair would contend that for the penalty imposed under the Act, there must be a finding that there was an attempt to evade payment of tax under the Act; assuming that there are technical defects in the documents produced which are accompanying the consignment, the imposition of maximum penalty is unwarranted; Section 29A(4) of the Act sets out the measure of penalty which is a maximum of double the tax sought to be evaded, and not on the value of the goods as has been done in the present case. The learned Counsel would further contend that the contract in the instant case would be complete only after installation, erection and commission of the imported goods and since the claim would fall u/s 5(2) of the CST Act, there is no evasion of tax in Kerala, and

therefore, no penalty could be levied under the KGST Act.

9. Per contra, Sri Vinod Chandran, learned Government Advocate, would urge that it is BPL Telecom, Palakkad, which had placed the purchase order with a foreign seller, and bill of entry is in the name of BPL, Palakkad. The import comes to an end after the delivery of goods was taken at Trivandrum by BPL, Palakkad and the movement of goods from BPL, Palakkad to ONGC, Karaikkal requires to be accompanied with documents prescribed u/s 29(2) of the Act, and since the person in-charge of the goods vehicle did not tender those documents at Amaravila Check-post, the authorities under the Act were justified in detaining the vehicle and imposing penalty u/s 29A(4) of the Act, since there was an attempt to evade payment of tax due to the State.

10. The undisputed facts are, the petitioner had procured purchase order from ONGC, Karaikkal for supply, installation and commissioning of telecommunication equipment. The petitioner has imported the telecommunication equipments from a foreign supplier and got it cleared from the Customs Department at Trivandrum, en route to Karaikkal. The goods were detained by the check-post authorities at Amaravila Check-post. It was the contention of the petitioner before the authorities under the Act and also before the Appellate Tribunal that there is no taxable event in the State of Kerala, as the transaction is coming u/s 5(2) of the CST Act. The authorities have not accepted the claim of the petitioner and have levied penalty u/s 29A(4) of the KGST Act, on the premise that there is no concluded sale and therefore, the benefit u/s 5(2) of the CST Act is not available and since the person in-charge of the goods vehicle did not produce the relevant documents as prescribed u/s 29(2) of the Act, there is an attempt to evade tax due to the State.

11. Section 5(2) of the CST Act prescribes two conditions for a sale or purchase of goods to be deemed to have taken place in the course of import of the goods into the territory of India, if the sale or purchase either occasions such import or is effected by transfer of documents of title to the goods before the goods have crossed the customs frontiers of India. In the instant case, we need to examine only whether the transaction falls under the first limb, as it is not the case of the Revenue that it would fall under the second limb of Section 5(2) of the CST Act.

12. For a transaction to fall under the first limb, it is essential that there must be an inextricable link or a back-to-back transaction in the sale or purchase occasioning such import. To ascertain whether there exists such an inextricable link in the transaction, we need to understand the purchase order placed by ONGC, Karaikkal with BPL, Palakkad and BPL's corresponding order on Nokia and Nokia's despatch of the goods and if we come to a conclusion that there is clear nexus between the transaction, it can be said that the import of the goods is incidental to the contract of sale and the goods have entered the import stream and such import would fall within the expression "sale occasions import". This is in keeping with various judgments which have laid down the principles for determining the transactions that can fall u/s 5(2) of the CST Act. If the

transaction fails to establish any nexus between the parties to the transaction in question, then the sale within the country will definitely fall u/s 9(2) of the CST Act.

13. Let us now see the purchase order placed by ONGC with BPL, Bangalore. The purchase order is dated February 19, 1997 and the items ordered to be imported are Microwave system, Nokia Model Digital Microwave Radio operating in the frequency band 2.4/2.4835 GHZ, etc., telecommunication equipment 5-channel trunking system base, fixed remotes, mobiles and portables, telecommunication equipment AL-72 Teleadapter from Nokia Finland and coaxial cables from RFS, Hannover, Germany. Pursuant to this purchase order from ONGC, Karaikkal, the BPL has placed orders with Nokia, Finland on July 1, 1997. Pursuant to this purchase order, Nokia Finland has supplied the ordered equipments under different invoices dated July 9, 1997. A comparison between the orders placed by the ONGC on BPL and BPL's order on Nokia Finland and Nokia's despatch clearly shows that there is an inextricable nexus between the transactions. It was the purchase order of ONGC that occasioned the import by BPL from Nokia, Finland.

14. The goods being telecommunication equipment and to the specification of ONGC, it would not have been possible for BPL to divert the specific goods to any other customer. Moreover, the purchase order of ONGC stipulates import of goods from Nokia, Finland. This is evident from the annexure to the purchase order of ONGC. Annexure 1(b) of the purchase order of ONGC specifies the details of the list of imported items of bill of material furnished to facilitate making application for essentiality certificate to avail of concessional customs duty. Annexure 1(c) gives an idea of "make and model" of the equipment required to be imported from Nokia, Finland. The purchase order also specifies the value of imported items to be Rs. 7,55,89,999 (landing cost including customs duty). This value corresponds with the two customs documents produced by the learned Government Advocate at the time of hearing of the petition. The fact that the purchase order too contemplates import of specific make and model of the goods, and the importing country, it is beyond doubt that the transaction falls u/s 5(2) of the CST Act. Further, in view of the purchase orders placed by ONGC with BPL and BPL with Nokia, Finland, the goods in question could not possibly be diverted and sold to any other customer. Therefore, from the facts narrated by us and the documents available in the records produced by the other side, the only inference that can be drawn is that, these are specific goods to the specification of ONGC. The movement of goods from Nokia, Finland would not have been occasioned but for the order of ONGC on BPL. Hence it can be safely said that the transaction in question has all the ingredients necessary for the purpose of Section 5(2) of the CST Act, as explained by the apex court in *The State of Bihar and Another Vs. Tata Engineering and Locomotive Co. Ltd., and K. Gopinathan Nair and etc. Vs. State of Kerala*, .

15. The first appellate authority while confirming the findings of the Sales Tax Officer (Enquiry) in his order, apart from others, has stated the following reasons

to reject the claim of the assessee. They are, the contract between BPL Telecom Ltd., and foreign supplier terminates as and when the goods reach Trivandrum; BPL is acting as the principal as far as the sale in question is concerned and they are not mere agents of ONGC, the purchaser; there is no privity of contract between ONGC and the foreign seller; the ONGC has no right to reject the goods; the delivery taken by BPL constitutes an inter-State sale from Kerala to Karaikkal and lastly, a sale or purchase can be treated to be in the course of import, if there is a direct privity of contract between the Indian importer and the foreign exporter and the intermediary through which such import is effected merely acts as an agent or a contractor for and on behalf of the Indian importer.

16. In our considered opinion, there is fallacy in the findings and conclusions reached by the first appellate authority. We say so for the following reasons, by referring to each one of the points raised by the first appellate authority.

17. The first appellate authority has noticed that the contract between BPL and the foreign supplier terminates as and when the goods reach Thiruvananthapuram. In our view, just because BPL has taken delivery of the goods it does not follow that BPL can deliver the goods to any other customer. The purchase order of ONGC states that the details of list of imported items of bill of material is furnished to BPL in order to facilitate BPL to make application for the essentiality certificate to avail of concessional customs duty. Hence, it follows that though BPL has taken delivery of the goods, it is in pursuance to a contract for sale with ONGC.

18. The second point raised is that, BPL is acting as the principal as far as the sale in question is concerned, and they are not mere agents of ONGC, the purchaser. In our view, the transaction in question is not whether BPL has acted as a principal or as an agent. The issue that requires to be considered is, whether the transaction in question has occasioned the criteria set out in Section 5(2) of the CST Act, which can be deemed to have taken place in the course of import.

19. The third point that was considered was, that there is no privity of contract between ONGC and the foreign seller. In our view, this is not a necessary pre-condition u/s 5(2) of the Act. However, the fact that purchase order of ONGC indicates that the goods have to be sourced from the foreign seller, establishes that ONGC knew the source of supply and the rates were also pre-decided.

20. The fourth issue is, the right to reject the goods by ONGC. In our view, the agreement of ONGC with BPL specifies this right to reject the goods. There is an inherent right to the consumer to reject, if the goods are not to the specification or damaged, but this will not alter the nature of transaction as being u/s 5(2) of the Act.

21. The fifth issue is that, the delivery taken by BPL constitutes an inter-State sale from Thiruvananthapuram to Karaikkal. In our view, it is not the delivery of the goods that determines whether the transaction is a local sale, inter-State

sale or a sale in the course of import. The transaction has to be looked into in its entirety. In order to come within Section 5(2), it must be seen whether there existed a contract which occasioned the import. In the instant case, as we have already explained, there are three stages in the entire transaction: firstly, the purchase order of ONGC with BPL, purchase order of BPL with Nokia, Finland, and the despatch of Nokia to BPL. It is clear that at each level in the transaction, there is progress or process of import and hence though there appears to be two sale transactions, they are so integrally connected that they dovetail into one composite transaction whereby the movement of goods ordered by ONGC and executed by BPL was imported from Nokia, Finland, and the conduct of ONGC with BPL itself stipulated that goods have to be imported from Nokia, Finland.

22. The sixth point raised by the first appellate authority is that, a sale or purchase can be treated to be in the course of import, if there is a direct privity of contract between the Indian importer and the foreign exporter and the intermediary through which such import is effected merely acts as an agent or a contractor for and on behalf of the importer. In our view, even this finding is difficult to accept. This is not the true intent of Section 5(2) of the CST Act. If for every import, the Indian buyer has to make a direct contract with the foreign seller, then the industry can come to a halt, since it would not be possible for a dealer to go through a process of sourcing the goods and placing the order and all the risk and expenditure associated with it. It is to remove this difficulty, the term "deemed" appearing in Section 5(2) makes it possible for one to engage another agency to do the import. As long as there is a link, such as the purchase order of the Indian buyer specifying that the goods have to be imported from the pre-determined foreign supplier, the goods imported and if it is completely in relation with the ultimate Indian buyer's purchase order, the transaction can be said to be one falling u/s 5(2) of the CST Act. In the instant case, the import can be traced to the purchase order of ONGC and the purchase order specifies the quantity, model and other technical details. The imported goods answers all these requirements including the value of the goods imported being almost the same as the value mentioned in the purchase order of ONGC. The fact that the invoice number is defective and this has led to the conclusion that, there is manipulation, is not sufficient to treat the transaction as not being in the course of import. The fact that the two customs documents on record show that in which the goods have been cleared establishes that the goods cleared by BPL are the same goods ordered by ONGC.

23. Lastly, it is stated by the first appellate authority that ONGC does not come into picture with the foreign seller at any time during the course of import of the goods. In our view, the ONGC need not come into the picture directly with the import. ONGC can be the "deemed" importer, if there is sufficient evidence to comply with the requirement of Section 5(2). The contents of the agreement and the purchase order of ONGC with BPL have clearly occasioned the movement of the goods from the foreign supplier. The purchase order of ONGC, therefore, falls under the category "deemed" import.

24. The Appellate Tribunal while concurring with the findings of the first appellate authority has observed that, since ONGC has not come into the picture with the foreign supplier at any time during the course of import, it cannot be a transaction u/s 5(2) of the CST Act. The Tribunal has further observed that the petitioner had attempted to manipulate the records to establish that the transactions are well within the scope of Section 5(2) of the CST Act. This, in our view, is mere presumption and surmise by the Tribunal and not supported by any material. The transaction matrix shows that the transaction between the parties are inextricably linked with each other with each knowing their part of the transaction. We do not see any attempt of manipulation, since the two customs-duty-paid documents establish that the goods imported are the same goods ordered by BPL as a back-to-back order of ONGC. All the other so-called "mistakes" do not appear to affect the true nature of the transaction being one falling u/s 5(2) of the CST Act.

25. In our opinion, reference to the copious case laws cited by the learned Counsel on either side is unnecessary for the disposal of this revision petition, since we have tried to answer the issue raised by the petitioner primarily based on the factual matrix of the case pleaded by the parties to the lis.

26. In view of the above discussion, revision petition filed by the assessee requires to be allowed and accordingly it is allowed and the impugned orders passed by the authorities under the Act and the Appellate Tribunal is set aside. In the facts and circumstances of the case, we direct the parties to bear their own costs.