(1961) 07 KL CK 0036

In the High Court Of Kerala

Case No : O.P. No''s. 866 of 1958 and 774 and 1230 of 1959

Brilliant Traders Ltd. APPELLANT

Vs

Board of Revenue and Another RESPONDENT

Date of Decision : 18-07-1961

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala General Sales Tax Act, 1963 — Section 11(1), 11(2)

Citation : AIR 1962 Ker 132 : (1962) 13 STC 176

Hon'ble Judges : T.C. Raghavan, J;M.S. Menon, J;C.A. Vaidialingam, J

Bench : Full Bench

Advocate : P. Govindan Nair, P.K. Kurian, G. Balagangadharan Nair, V. Desikan, K. Sukumaran and C.K. Viswanatha Iyer, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

Vaidialingam, J.—In all these three writ petitions, the respective petitioners challenge the attempt of the Revenue to recover from them amounts on the basis of Sub-section (2) of Section 11 of the Travancore-Cochin General Sales Tax Act -- Act XI/1125.

2. According to the Revenue, notwithstanding the contention raised that the amounts may not have been properly collected by the petitioners from the various parties, nevertheless, in view of the clear provisions of Sub-section (2) of Section 11 of the Act there is liability on the part of these petitioners to pay over the Government all amounts collected by them, if they are in excess of the tax, if any, paid by them.

3. As we mentioned at the beginning of this Judgment, in the main the State relics upon the provisions of Sub-section (2) of Section 11 of the General Sales Tax Act, 1125.

4. Mr. P. Govindan Nair, learned counsel appearing for the writ petitioner in O. P.

866/58 and O. P. 1230/59 and Mr. C. K. Viswanatha Iyer, learned counsel appearing for the writ petitioner in O. P. 774/59 urged that the liability, if any, arising under Sub-section (2) must be, limited only to any tax that the assessees may have lawfully and legally collected from the various parties which alone they will be bound to pay over to the State, In these cases, the transactions in question are all of an inter-state character and as such not liable for payment of tax at all and therefore, the State has no jurisdiction either t0 levy or demand any tax in respect of those sales as such. No doubt, in some cases by way of abundant caution some amounts may have been collected by some of the petitioners and in some cases they may have also refunded to the parties when a claim was made On the ground that those parties are not liable to pay the tax. Therefore, by the mere fact that any collection may have been made unless it is a tax leviable under the statute, it is not liable to be paid over to the State under Sub-section (2) of Section 11 of the Act. Section 11 of the Act runs as follows:

"Collection of tax by dealers: (I) No person who is not a registered dealer shall collect any amount by way of tax under this Act; nor shall a registered dealer make any such collection except in accordance with such conditions and restrictions, if any, as may be prescribed:

Provided that Government may exempt persons who are not registered dealers from the provisions of this Sub-section until such date as may be prescribed.

(2) Every person who has collected or collects any amount by way of tax under this Act On or after the date prescribed under the proviso to Sub-clause (1) shall pay over to Government all amounts so collected by him if they are in excess of the tax, if any, paid by him for the period during which collections were made, and in default of such payment, the amounts may be recovered as if they were arrears of land revenue".

A reading of the said section clearly shows that Sub-section (1) consists of two parts namely,

(a) a person who is not a registered dealer in respect of whom there is a prohibition against collecting tax under the Act; and

(b) a registered dealer in respect of whom there is also a prohibition against collecting tax except in accordance with the conditions and restrictions as may be prescribed.

5. The proviso to Sub-section (1) enables the Government to exempt persons who are not registered dealers from the provisions of Sub-section (1) until such date as may be prescribed. The proviso clearly relates only to the granting of an exemption in respect of persons who are not registered dealers containing in the earlier part of Sub-section (1). That is, by virtue of the exemption, if any, granted by the State Government and till such date as may be prescribed, the bar imposed against a non-registered dealer regarding his right not to collect any tax, will cease to operate.

6. Sub-section (2) of Section 11 is to the effect that every person who has collected or collects any amount by way of tax under the Act on or after the date prescribed under the proviso to Sub-clause (1) is to pay over to the Government all amounts so collected by him, if they are in excess of tax, if any, paid by Mm for the period during which collections were made. Sub-section (2) in our opinion again really relates to a person in whose favour an exemption may be provided under the proviso to Sub-section (1) and who in turn, will have to be related to the first part of Sub-section (1) dealing with a non-registered dealer.

7. No doubt, the learned Government Pleader urged that the reference to the proviso to Subsection (1) in Sub-section (2) is only to fix the same period after which collections made will have to be paid over and it is also the further contention of the learned Government Pleader that Sub-section (2) when it states ''every person'' will take in both a non-registered as well as a registered dealer. Prima facie we are not inclined to agree with this contention of the learned Government Pleader and in our view, Sub-section (2), as pointed out earlier can relate only to a person who is exempted under tbe proviso until the date that may be prescribed and that proviso in turn, has relation only to the non-registered dealer dealt with in the first part of Subsection (1).

8. In this connection, it should not be missed that we have to interpret a fiscal statute and in that context the observations of Mr. Justice Shah, in C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, at p. 612) to the following effect have to be borne in mind.

"In interpreting a fiscal statute the Court cannot proceed to make good deficiencies it there be any; the Court must interpret the statute as it stands, and in case of doubt in a manner available to the tax-payer."

9. But it has become unnecessary in these proceedings to directly adjudicate regarding the persons in respect of whom Sub-section (2) will directly operate in proper cases. Therefore, it has also become unnecessary to consider the further question as to the liability of the persons against whom it may operate on the basis of Sub-section (2).

10. At any rate in these cases, it may also be stated that all the three petitioners are registered dealers and according to our prima facie view expressed earlier, Sub-section (2) may not take in case of a registered dealer.

11. But in these cases, the learned Government Pleader was prepared to accept the position that for the operation of Sub-section (2) the collection must be by way of tax under the Act ''''on or after the date prescribed under the proviso to Sub-clause (1)". The proviso to Sub-section (1) We have already indicated shows that the exemption may be given to non-registered dealers "until such date as may be prescribed". u/s 2 (h), "prescribed" means prescribed by rules made under the Act. Therefore we asked the learned Government Pleader to inform us as to whether any date has been prescribed by virtue of the proviso to Sub-section (1) which in turn, will apply also as the relevant date prescribed under

Subsection (2). The learned Government Pleader, after contacting the Department, has told us that no date as required under the proviso to Sub-section (1) has been prescribed in these matters. It is rather unfortunate that the respective officers, who have passed the various orders which are under attack in these proceedings have missed this very crucial and important point. Even accepting the contentions of the learned Government pleader that Sub-section (2) will apply to all persons both registered and non-registered dealers, unless a elate has been prescribed under the proviso to Sub-section (1) which alone will be again a date prescribed under Sub-section (2), there is no jurisdiction on tiie part of the Revenue to take action on the basis of Sub-section (2). In view of the statement made by the learned Government Pleader, it follows that the State or its officers have no jurisdiction to take any action against any of the petitioners in these cases.

12. The learned Government Pleader raised a subsidiary contention that in some cases the par ties have taken the matter in revision before the appropriate authorities. This by itself, in our view does not debar us from giving appropriate relief, if otherwise the petitioners are entitled to such relief. We have already held that the essential condition precedent to invoke the provisions of Sub-section (2) of Section 11 of the Act is totally absent in these cases and therefore, the fact that one or other of the officers in the hierarchy may have demanded or confirmed an order of demand, is of no consequence in law. Therefore, all the writ petitions are allowed and the various orders under attack in these writ proceeding are also quashed and set aside. Parties will bear their own costs.

