
(1967) 03 KL CK 0009
In the High Court Of Kerala
Case No : O.P. No. 1114 of 1966

C.M. Hamsa Haji

APPELLANT

Vs

Sales Tax Officer, Tirur

RESPONDENT

Date of Decision : 17-03-1967

Acts Referred:

Central Sales Tax Act, 1956 — Section 14
Kerala General Sales Tax Act, 1963 — Section 2, 5

Citation : AIR 1968 Ker 193 : (1967) 20 STC 470

Hon'ble Judges : M.U. Isaac, J

Bench : Single Bench

Advocate : K.P. Ramunni Menon, K. Ramakumar and P. Ramaranjan, for the Appellant; Govt. Pleader, for the Respondent

Judgement

M.U. Isaac, J.—The petitioner was assessed by the respondent, the Sales Tax Officer, Tirur under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as the State Act) for the year 1963-64, as per order Ext. P-5 dated 31-8-1965. Exts. P-6 and P-7 both dated 23-2-1966, are notices of final assessment and demand issued by the respondent to the petitioner for payment of sales-tax and surcharge payable under Ext. P-5. This Original Petition has been filed to quash Exts. P-5, P-6 and P-7 and for other incidental reliefs.

2. The taxable turnover of the petitioner was fixed in Ext. P-5 at Rs. 5,41,541-80. This includes a sum of Rs. 57, 684-04, which represents the value of the closing stock of the petitioner's business on 9-2-1964 plus 10 per cent thereon. The petitioner was carrying on a trade at Tirur and Calicut; and it is common case that he carried on this business only till 9-2-1964. On 10-2-1965, he formed a partnership with another person; and the whole stock in trade of his business was transferred to this partnership business. It is also not in dispute that the stock in trade thus transferred to the partnership formed part of his capital in the firm. The stock in trade thus transferred to the firm was valued at Rs. 52,440,04 in the books of the firm. The respondent treated this transfer as a

sale of the goods to the firm, and added 10 per cent thereto for fixing the sale price. Apparently, this 10 per cent was added on account of profit which the petitioner would have made, if he sold his goods in the normal course. The petitioner objected to the inclusion of the aforesaid sum in his taxable turnover, on the ground that the transfer of the stock in trade of his business to the firm as contribution of his capital did not involve any sale of goods. He also claimed that, if this amounted to sale within the meaning of the Act, he was entitled to deduction under Rule 9 (g) of the Kerala General Sales Tax Rules 1963 (hereinafter referred to as the Rules) The petitioner also raised another contention before the respondent, namely, the turnover as per his books of account consisted of sale price of certain goods, which are "oil-seeds" within the meaning of Section 14(vi) of the Central Sales Tax Act, 1956 (hereinafter referred to as the Central Act), and that he was not liable to tax on the sale of these goods, as he was not the first seller of the said goods in the State. He also contended that, u/s 15 of the Central Act, the tax on the sale of the said goods should not, in any event exceed 2 per cent of the turnover, "Oil-seeds" fall under Schedule II of the State Act; and they are liable to tax only at 2 per cent on the first sale in the State. Ext. P-5 shows that the respondent has given deduction in respect of some items for which the petitioner claimed exemption. In other respects, the aforesaid two contentions of the petitioner were not accepted by the respondent.

3. The learned counsel for the petitioner advanced before me the above two contentions for quashing the order of assessment, Ext, P-5. Regarding second contention, he confined his submission only to 3 items, namely, gingery seeds and mustard seeds. It may straightway be said that, even if the petitioner succeeds in his contentions, Ext. P-5 is not liable to be quashed as a whole, because they affect only the assessability of a minor part of the total turnover; and there is no dispute regarding the assessability of the remaining turnover

4. The first question for consideration is whether the value of the stock in trade of the petitioner's business, which was transferred into a partnership formed between the petitioner and another person, as contribution of the petitioner's capital in the firm, is "turnover" chargeable to tax under the State Act, Section 5 is the charging section; and it imposes the tax on the total turnover of a dealer for a year "Turnover" is defined in Section 2(xxvii) of the State Act as meaning the aggregate amount for which goods were either bought or sold, or supplied or distributed by a dealer. Section 2 (xxi) of the State Act defines "Sale" as follows:--

"2 (xxi) "sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods by any one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge". Section 2 (viii) of the State Act defines "dealer" as meaning any person who carries on the business of buying, selling, supplying or distributing goods. It

clear from the aforesaid provisions as well as from the scheme of the State Act that, what constitutes a "turnover" is only the aggregate amount for which goods are either bought or sold, and that the purchase or sale must be in respect of a "sale" as defined in the Act. In other words, only sales which take place in the course of trade or business are taken into account in determining the turnover under the State Act. The definition of the word "dealer" shows that every person, who buys or sells goods, is not a dealer, but only a person, who carries on the business of buying, selling, supplying or distributing goods. And the transaction must be in the course of his trade or business. Applying the above principles, it is hardly possible to say that the transfer of a man's business or stock in trade into a firm, of which he is a partner, as contribution of his capital therein amounts to a sale of goods in the course of trade or business as a dealer; such a transaction does not involve any sale of goods. The transferor does not part with property in the goods. He only shares his rights therein with the other partner under the contract of partnership. Even assuming there is a sale, it is not a sale in the course of trade or business, nor is it a transaction by a "dealer" as defined in the State Act. I, therefore, hold that the inclusion of Rs. 5,41,541-80 in the taxable turnover of the petitioner as the price of the stock in trade transferred to the partnership is not warranted by the State Act

5. The petitioner's learned counsel refer red me to a decision of the Allahabad High Court in Ram Sahai Vs. Commissioner S.T., . In this case, an assessee under the U. P. Sales Tax Act, 1948 closed his business and sold the same together with the stock-in-trade for a lump sum. The question arose whether the amount for which the business together with the stock-in-trade was sold was turnover assessable to sales tax. Their Lordships, after referring to the charging section, the definition of turnover and other relevant provisions in that Act, held that the amount for which a business is sold is not "turnover" chargeable to sales tax. Rule 44

(f) of the Rules made under the U. P. Sales Tax Act, 1948 contains a provision similar to Rule 9 (g) of the Rules; and it provides that, in determining the taxable turnover, "all amounts realised by a dealer on account of sale of his business as a whole" shall be deducted from the total turnover. Their Lordships also pointed out that this provision was unnecessary, as the amount realised by a dealer by sale of his business did not constitute turnover assessable to tax. I respectfully agree with the above views. This decision, however, contains the following observations (page 281 of STC) = (at p. 179 of AIR):-

"It may be accepted that when a business is sold along with stock in trade, that is, the goods remaining unsold, proceeds of the sale of the latter should be included in the turnover. In the present case, though the assessee has sold some stock in trade along with its business, the amount of the proceeds of the sale of it it not shown separately from the amount of the proceeds of the sale of the goodwill etc., and it is not possible to say that a particular portion of the proceeds of the sale of the business should be included in the turnover."

With great respect, I am unable to agree with the above observations. If goods are sold by a dealer in the course of trade or business, and the sale is taxable, it cannot escape the tax liability, for the reason that the price of the goods is not separately shown in the sale transaction, but it is shown composite with the price of other property or right sold along with the goods. The liability to be taxed cannot also depend on the question whether the stock in trade was sold along with the goodwill of the business or separately, or the fact that no value was fixed for the goodwill, while selling the business as a whole. Nor can I accept the proposition that when a business is sold along with the stock in trade, the proceeds of the sale of the stock in trade constitute "turnover" chargeable to sales tax. In such a case, as I stated earlier, the sale is not one "in the course of trade or business", nor is it a transaction by a "dealer" as such. In my view, the sale proceeds of the stock-in-trade of business as a whole are not, therefore, chargeable to sales tax.

6. The petitioner's learned counsel then relied on an observation contained in a decision of the High Court of Bombay in *Commissioner of Income Tax Excess Profits Tax, Bombay City Vs. Homi Mehta*, . That case was concerned with the transfer of certain shares, which a few persons held in an incorporated company, into another company which they formed. The question arose whether this transaction involved a sale. While holding that the transaction was no doubt a sale, the learned Judge observed that it was not a sale in the ordinary course of business as a business-man. The same appears to be the position, when a person either sells his business as a whole or transfers his business or the stock in trade thereof to a partnership for the purpose of forming a partnership and carrying on the trade in such capacity.

7. The next question for consideration is whether gingely seeds, mustard seeds are oilseeds within Section 14(vi) of the Central Act. The learned Government Pleader referred me to a decision in *State of Aadhra Pradesh v. Kajjam Ramachandraiah* 1961-12 STC 795 (AP) wherein a Division Bench of the Andhra Pradesh High Court laid down certain tests in determining whether a certain commodity is an oilseed within the meaning of the above provision. The learned Judges stated that the question is not whether oil can be extracted from the seeds, but whether they are known in this country in common parlance to be oil seeds within the contemplation of the legislature, Then their Lordships proceeded to examine the question whether the seeds are ordinarily used for the purpose of extracting the oil therefrom, and whether the oil extracted from the said seeds is used commercially or industrially or can be bought in the market. With great respect, I think that the way in which their Lordships proceeded to interpret Section 14(vi) of the Central Act is erroneous. Section 14(vi) reads as follows:--

"14 (vi) oil-seeds, that is to say, seeds yielding non-volatile oils used for human consumption, or in industry, or in the manufacture of varnishes, soups and the like, or in lubrication, and volatile oils used chiefly in medicines, perfumes, cosmetics and the like." The Legislature itself has in clear terms stated in the

above section what oil-seeds are. That being so, no question arises as to in what way, they are understood in common parlance. If a commodity satisfies the definition which the Legislature has given to the words "oil-seeds", it is an oil-seed within the meaning of the said provision.

8. In *Kasturi Seshagiri Pai and Co. v. Dy. Commissioner of South Kanara* 1961 12 STC 629 = (AIR 1962 Mys 1) a Division Bench of the Mysore High Court dealing with Section 14(vi) of the Central Act, pointed out that the meaning of the word "seed" is that it is a flowering plant's unit of reproduction or germ capable of developing into another such plant. This is the test which the learned Judges followed in deciding whether certain goods are seeds; and then they proceeded to consider whether the said seeds are "oil-seeds" u/s 14(vi) of the Central Act. The aforesaid decision was followed by our Court in *Sales Tax Officer. Kozhikode v. K.V. Moosa Koya* 1965 Ker LT 1223 when dealing with the question whether cocoanut and copra are oil seeds. Applying the above principles, I have no doubt that gingely seeds and mustard seeds are oil-seeds within the meaning of Section 14(vi) of the Central Act. The petitioner is, therefore, entitled to exemption in respect of the sale of gingely seeds and mustard seeds if he is not the first seller of these goods in the State, and is liable to be taxed only at two per cent if he is the first seller of these goods

9. In the light of my above findings, I direct the respondent to revise the order of assessment Ext. P-5 by not including the sum of Rs. 5,41,541-80, which he fixed as the value of the stock-in-trade transferred to the Partnership business, as taxable turnover, and in the light of his decision on the question whether the petitioner is the first seller in the State of gingely seeds and mustard seeds. Exts. P-5 and P-7 will be revised on the basis of the final order of assessment to be made by the respondent in the light of the above directions. This Original Petition is disposed of in the manner stated above. No order as to costs.