

**(1996) 07 KL CK 0037**

**In the High Court Of Kerala**

**Case No : Income-tax Reference No. 176 of 1991**

Commissioner of Income Tax

APPELLANT

Vs

A.M. Moosa

RESPONDENT

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**Date of Decision : 23-07-1996**

**Acts Referred:**

Central Sales Tax Act, 1956 — Section 5(3)  
Income Tax Act, 1961 — Section 143(3), 37(1), 41(1)  
Kerala General Sales Tax Act, 1963 — Section 5(3)

**Citation : (1997) 227 ITR 688**

**Hon'ble Judges : V.V. Kamat, J;P.A. Mohammed, J**

**Bench : Division Bench**

**Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; C. Kochunni Nair and Dale P. Kurian, for the Respondent**

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## **Judgement**

P.A. Mohammed, J.—This is a reference u/s 256(2) of the Income Tax Act at the instance of the Revenue. The assessment year in question is 1978-79, the relevant accounting period for which ended on March 31, 1978.

2. The assessee is engaged in the processing and export of sea foods. The original assessment was completed on September 25, 1981. The said assessment was set aside by the Income Tax Appellate Tribunal with a direction to redo the same. Consequently, a revised assessment order was made u/s 143(3) of the Act. While doing so, the Income Tax Officer disallowed the sum of Rs. 10,69,034 claimed by the assessee towards deduction from purchase tax liability. As against the said assessment, an appeal was filed before the Commissioner of Income Tax. The Commissioner by the order dated September 26, 1985, found that there was a liability to pay the purchase tax as on March 31, 1979, for which a provision had been made by the assessee. Accordingly, the Commissioner allowed the deduction towards the liability to pay purchase tax. As against the said order, the Revenue filed an appeal before the Income Tax Appellate Tribunal. The Tribunal by the order dated August 20, 1986, confirmed the order of the Commissioner of Income Tax deleting the disallowance made by

the Income Tax Officer. The Tribunal found that the question was covered by the decision of this court in the case of Commissioner of Income Tax Vs. K.A. Karim and Sons and Others, . The Tribunal did not interfere with the order of the Commissioner of Income Tax. Accordingly, the appeal filed by the Revenue was dismissed.

3. Thereafter, the Revenue filed an application for reference which was rejected by the Tribunal. Then the Revenue came before this court in O. P. No. 5196 of 1988 and this court by the order dated September 9, 1991, directed the Tribunal to draw up the statement of the case u/s 256(2) of the Act.

4. The question of law referred to us for decision is as follows :

" Whether, on the facts and in the circumstances of the case and in view of the fact that the assessee was not liable to pay purchase tax on prawns purchased for export and in view of the exemption from purchase tax for the relevant period and also in view of the total demand for the relevant year being Rs. 85 and the assessee's challenge against tax liability before courts, the assessee is entitled to claim deduction for the purchase tax provision of Rs. 10,69,034 ? "

5. We are compelled to observe that the above question has not been properly formulated. The question of law itself contains so many questions of fact. For instance, we will state the facts involved in the question of law formulated.

1. The assessee was not liable to pay purchase tax on prawns purchased for export.

2. There was exemption from purchase tax for the relevant period.

3. There was demand of tax for Rs. 85 only for the relevant year.

4. The assessee challenged the levy before the courts.

6. At the outset, we may state, the circumstances of facts pointed out as revealed from the question of law framed for decision are the circumstances which undoubtedly came into being after the liability to pay the purchase tax arose. It is difficult for us to conceive how those circumstances can be included in a question of law framed for decision.

7. Anyway, we will now advert to these circumstances one after other. u/s 5(3) of the Central Sales Tax Act in order to get exemption from payment of tax certain conditions will have to be satisfied. The question is at the time of filing the return under the Central Sales Tax Act or the general sales tax law of the State, the assessee is legally bound to show all the turnover either exempted or non-exempted. The filing of the return is an obligation or a duty arising under the provisions of the relevant Acts. When such an obligation or duty is found in a statute, the liability to pay the tax arises only on performing it. When there is such liability, the return to be filed by the assessee should contain all the exempted turnover due to compulsion of the statute. Therefore, the question is when did the purchase tax liability arise in the given case ? In this case, as

aforesaid, the said liability to pay tax arose as and when the returns were filed.

8. In this case as per the original assessment completed on September 25, 1981, the Income Tax Officer has ascertained the liability with some precision. An amount of Rs. 10,69,034 was fixed as the purchase tax liability in the assessment order by the Income Tax Officer which was completed on September 25, 1981. That quantification was made pursuant to the return filed by the assessee during the relevant period under the provisions of the Sales Tax Act. Therefore, the circumstance that the assessee was not liable to pay purchase tax on prawns cannot be said to be a concluded fact at that time.

9. As far as the second circumstance stated above, namely, that the exemption from purchase tax for the relevant period was available, the reference has to be made to the order passed by the Commissioner of Income Tax. The Commissioner in paragraph 13 of the order says thus ; "The relevant notification exempting the trade from purchase tax is dated March 29, 1977. That notification was received by the appellant much later. In the circumstances, there was a liability to pay purchase tax as on March 31, 1979, for which a provision has been made by the appellant". Whatever that be, since the assessee is a registered dealer under the Kerala General Sales Tax Act, he is legally obliged to show the exempted turnover also in the monthly returns. This turnover was also taken into consideration while fixing the tax liability. Therefore, the second circumstance referred to above cannot be said to be correct.

10. The third circumstance is there was a demand for Rs. 85 only. That is also a situation which was available only at a later stage. The question which is relevant is, what was the liability during the accounting period. While ascertaining the liability, the demand notice is irrelevant because the ascertainment of liability arises on filing the returns or fulfilling the obligations under the statute.

11. The fourth circumstance is that the assessee has challenged the levy of sales tax before the court. That also is not a relevant circumstance, which has to be taken note of while providing provision for tax liability. The question is whether during the relevant period the assessee has acted as a prudent businessman in making the provision for purchase tax liability while following the mercantile system of accounting.

12. The assessee claimed provision for payment of purchase tax liability in view of the decision of the Supreme Court in *The Kedarnath Jute Mfg. Co. Ltd. Vs. The Commissioner of Income Tax, (Central), Calcutta*, . He has also relied on a decision of the Full Bench of this court in *Commissioner of Income Tax Vs. K.A. Karim and Sons and Others*, and *ABAD FISHERIES Vs. COMMISSIONER OF Income Tax. (AND VICE VERSA)*, . In fact, the above Full Bench decision was relied on by the Commissioner of Income Tax and thus allowed the deduction which was confirmed by the Tribunal.

13. The Division Bench which considered the above Supreme Court and the Full Bench decision observed in *ABAD FISHERIES Vs. COMMISSIONER OF Income*

Tax. (AND VICE VERSA)., : "The principle emanating from the above discussion is that a provision in the accounts made by an assessee following the mercantile system of accounting, for liability to sales tax (though disputed), is yet liable to be allowed as business expenditure, if there was a bona fide reasonable apprehension on the part of the assessee that the amount will become payable." The above decision was again followed by us in I.T. R. Nos. 130 to 132 of 1991 Baby Marine Exports Vs. Commissioner of Income Tax, ). In that case also, in view of the ascertained character of the liability, the provision for purchase tax was allowed.

14. In the case of the same assessee this court while dealing with the fixation of net wealth under the Wealth-tax Act for the relevant accounting period, that is to say 1977-78, allowed a similar provision for a sum of Rs. 10,69,034 being an existing liability during the assessment year 1978-79. That would otherwise mean the assessee had no such income during the period. That being the position, we do not feel any justification to disallow the provision for purchase tax liability in the present case.

15. Finally, as an abundant measure, we reiterate the following observation of the Division Bench contained ABAD FISHERIES Vs. COMMISSIONER OF Income Tax. (AND VICE VERSA)., :

" The Department is not without its remedies in case it is ultimately found that the purchase tax was not payable. Section 41(1) enables assessment of such amounts to tax in any subsequent year in which the liability ceased to exist."

16. We add, the above observation will equally apply to the facts of this case too.

17. In view of the discussion hereinbefore, the question of law referred to us is answered in the affirmative, that is to say, against the Revenue and in favour of the assessee.

18. A copy of this judgment under the seal of this court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.