
(2003) 02 KL CK 0033
In the High Court Of Kerala
Case No : T.R.C. No. 208 of 1997

Deputy Commissioner (Law)	Vs	APPELLANT
Alappat Exports (P) Ltd.		RESPONDENT

Date of Decision : 10-02-2003

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 5A

Citation : (2003) 2 KLT 731 : (2004) 138 STC 520

Hon'ble Judges : J.M. James, J;G. Sivarajan, J

Bench : Division Bench

Advocate : Government Pleader, for the Appellant; Antony Dominic, A.K. Jayasankar Nambiar and Anil D. Nair, for the Respondent

Judgement

G. Sivarajan, J.—The Deputy Commissioner (Law), Board of Revenue (Taxes), Ernakulam, is the revision petitioner. The assessee is the respondent. The assessment year concerned is 1992-93. The respondent assessee is a company engaged in the export of gold jewellery. For manufacture of the gold jewellery for export, the assessee had purchased bullion from State Bank of India. The gold ornaments manufactured by using the said bullion was exported to outside India. For the assessment year 1992-93, the assessee, filed return under the Kerala General Sales Tax Act (for short "the Act"), declaring a total and taxable turnover of Rs. 2,36,25,714.65 and claimed exemption in respect of the entire turnover. There is no dispute that the assessee is entitled for exemption on the sales turnover of gold ornaments exported. We are only concerned with the levy of purchase tax u/s 5A of the Act on the purchase turnover of bullion, purchased from the State Bank of India.

2. The Government, in exercise of the power vested u/s 10 of the Act, had issued a notification, SRONo. 361/92 dated 31.3.1992, effective from 1.4.1992, making an exemption on the tax payable under the Act on the sale or purchase, as the case may be, of goods specified below payable by persons or units with regard to their turnover, subject to the condition specified therein, namely on the sale of

bullion and jewellery is made by non-resident Indians or Banks to registered dealers in jewellery of gold, subject to the condition that the seller should produce a certificate in the form appended thereto obtained from the purchaser. By virtue of this notification, the assessee did not have to pay tax on the purchase turnover of bullion at the point of sale of bullion by the State Bank of India, for the State Bank of India was exempted from the liability to pay tax in respect of its sale of bullion effected to the petitioner, who is a registered dealer, who satisfied the other requirements also. The assessing authority did not accept the return filed by the assessee, for, according to him, the purchase turnover of bullion is liable to be assessed u/s 5A of the Act, for the said turnover has not suffered tax u/s 5(1) of the Act at the point of sale effected by the State Bank of India in favour of the assessee. The 1st Appellate Authority confirmed the order of the assessing authority. The three member Bench of the Tribunal, however, by majority, has taken the view that since bullion was imported by the State Bank of India under an EXIM Policy, and the same was sold to the assessee for the specific purpose of manufacture and export of gold ornaments by the assessee, it must be held that the exemption granted for the sale of bullion, under the notification is total exemption, and therefore, there was no liability to tax u/s 5(1) of the Act in respect of the sale of bullion effected by the State Bank of India, which is an essential condition for the application of Section 5A of the Act.

3. However, in the descending order of the departmental member it was held that the exemption to the State Bank of India is not total exemption, and therefore, the provisions of Section 5A of the Act are attracted. The Department, being aggrieved by the majority view of the Tribunal, has filed this revision.

4. Learned Government Pleader appearing for the revision petitioner submits that the issue raised in this case, is squarely covered by the decision of this Court in *Deputy Commissioner of Sales Tax (Law) v. Supreme Boards* (1992 (111) STC 305). The Government Pleader also relied on the decision of the Supreme Court in *Asst. Commissioner (Intelligence) v. Handanam Construction Company* (1999 (7) KTR 651 (SC)).

5. Shri. Jayasankar Nambiar, learned counsel appearing for the assessee, on the other hand, submitted that the decision relied on by the Government Pleader is distinguishable on the facts of the present case. Counsel pointed out that the State Bank of India has come into the picture of the purchase and sale of bullion only because of the EXIM Policy introduced by the Government of India for the year, 1992-97. Counsel submitted that under the said policy, import of bullion was permitted only through a canalizing agent, and that too, with licence obtained from the competent authorities under the policy. During the year 1992-93, the State Bank of India was a canalizing agent. Under the said policy there was an obligation on the canalizing agent to affect sale of bullion so imported only to registered dealers, who are engaged in the manufacture and sale of gold ornaments, and that too, by casting an obligation on the purchasing dealers to export the gold ornaments manufactured out of the bullion purchased

from the State Bank of India. Counsel submits that it is in those circumstances the State Bank of India had sold bullion to the respondent/assessee, who is engaged in the manufacture and export of gold ornaments and the assessee had manufactured gold ornaments by using the bullion so purchased and exported the same to outside India. Counsel also submits that the notification, SRO. 361/92 was issued only to promote export and to benefit the exporters of gold ornaments like the assessee. Counsel, on the basis of this factual situation, submits that so far as the bullion, which is dealt with by the State Bank of India under the EXIM Policy, is concerned, it must be treated as a separate category, different from the bullion, which are available inside the State. Counsel submits that the exemption granted to the State Bank of India, in the present case, is total. In that view of the matter, one of the requisite conditions for application of Section 5A, viz. that the bullion sold by the State Bank of India and purchased by the assessee is liable to tax u/s 5(1) of the Act has not been satisfied is the submission.

6. We have considered the rival submissions. In order to appreciate the rival contentions, it is necessary to refer to the relevant portion of Section 5 A and the notification SRO. 361/1992. Section 5A(1) of the Act reads thus:

"5A. Levy of purchase tax: - (1) Every dealer who, in the course of his business, purchases from a registered dealer or from any other person any goods, the sale or purchase of which is liable to tax under this Act in the circumstances in which no tax is payable under Sub-sections (1), (3), (4) or (5) of Section 5 and either:

(a) consumes such goods in the manufacture of other goods for sale or otherwise; or

(b) uses or disposes of such goods in any manner other than by way of sale in the State; or

(c) despatches them to any place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce; shall, whatever be the quantum or the turnover relating to such purchase for a year, pay tax on the taxable turnover relating to such purchase for the year at the rates mentioned in Section 5."

The relevant portion of the notification SRO. 361/92 reads thus:

"SRO. No. 361/92:-..... hereby make an exemption in respect of the tax payable under the said Act on the sale or purchase as the case may be, of goods specified below payable by persons or units with regard to their turnover subject to the conditions specified therein, namely:-

XXX XXX XXX (4) On the sale of bullion and jewellery by non-resident Indians or Banks or registered dealers in jewellery of gold, silver and platinum group of metals subject to the condition that the seller should produce a certificate in the appended form, obtained from the purchaser."

7. In order to attract the provisions of Section 5A(1) of the Act, the following conditions have to be satisfied: (1) there must be a purchase by a dealer in the course of his business from a registered dealer or from any other person any goods; (2) the sale or purchase of the said goods is liable to tax under the Act; (3) no tax is payable under Sub-sections (1), (3), (4) or (5) of Section 5; and (4) consumes such goods in the manufacture of other goods for sale or otherwise. The rest of the conditions are not dealt with herein as they are not relevant for the purpose of this case. In the present case, bullion is liable to tax u/s 5 of the Act. The seller of bullion, viz. the State Bank of India, is not liable to pay tax on its sales turnover in view of the notification SRO. 361/92. There is no dispute that the bullion so purchased by the assessee was used in the manufacture of gold ornaments, Thus, all the conditions necessary to attract Section 5A(1) of the Act, so far as the purchase turnover of bullion is concerned, is satisfied in the present case. The only other question to be considered in view of the peculiar circumstances pointed out by counsel for the assessee is whether it could be said that there is a total exemption with regard to the sale of bullion by the State Bank of India, so as to say that the sale of bullion is not liable to tax u/s 5(I) of the Act, which is a necessary condition for the application of Section 5A of the Act. For that we have to look into the notification SRO. 361/92, which we have already extracted herein above.

8. SRO. 361/92 makes an exemption in respect of the tax payable under the Act on the sale or purchase, as the case may be, of goods specified in Clauses 1 to 4 therein, payable by persons or units with regard to their turnover subject to the conditions specified therein. Clause (4) of the notification is relevant for the purpose of this case. It provides that there is exemption in respect of tax payable under the Act on the sale of bullion and jewellery by non-resident Indians or Banks to registered dealers in jewellery of gold, subject to the condition that the seller should produce a certificate in the form appended to that notification, obtained from the purchaser. Export of the gold jewellery made out of the bullion so purchased is not a condition for grant of exemption under the notification, nor is there any obligation to sell the bullion to an exporter. Bullion is a commodity available in the market for sale or purchase and the sale or purchase of the same is liable to tax u/s 5(I) of the Act, at the rate specified in the 1st Schedule. thereto. However, by virtue of this notification, exemption is granted on the sale of bullion by non-resident Indians or Banks, if it is made to registered dealers in jewellery of gold. For getting the benefit of exemption from payment of tax, the selling dealer has to obtain a certificate prescribed in the appendix to the said notification from the purchasing dealer. Thus, it is clear from Clause 4 of the notification that the exemption is a limited one, available only to non resident Indians or Banks, subject to satisfying the conditions, viz. the sale must be to registered dealers in jewellery of gold, and the production of the certificate prescribed therein. The contention of the learned counsel for the assessee, as we have already noted, is that having regard to the fact that the bullion sold to the assessee was imported one, and that too, imported under the EXIM Policy

available for the years 1992-97, and the import and the sale of bullion was subject to the fulfillment of certain conditions both by the importer and by the purchaser, the exemption granted under the notification must be understood as a total exemption.

9. We are unable to agree with such an interpretation on the wording of Clause (4) of the notification. As already noted, exemption is not in respect of bullion dealt with by the State Bank of India alone, nor by a canalizing agent alone. The exemption is granted to all banks, which effect sale of bullion to any registered dealer in jewellery of gold. For availing the exemption under this clause, it is not necessary that the bullion must be one imported by the Bank as canalizing agent, with licence under the EXIM Policy. Nor is there any obligation to the registered dealers to purchase the said bullion for export of the same under the notification. Having regard to the plain meaning of the notification, it is only to be understood that the sale or purchase of bullion is liable to tax u/s 5(1) of the Act, but if the sale of bullion is effected by a Bank or by non-resident Indians to registered dealers in jewellery of gold, subject to the production of the certificate specified in the appendix to the notification, the selling dealer is entitled to exemption. This exemption, according to us, is not a total exemption on the sale of bullion, but only a limited exemption available only to those persons who are specified in Clause 4 of the notification, on fulfillment of the further conditions specified therein. The factual situation pointed out by the counsel for the assessee has no relevance for understanding the scope of the "notification. In these circumstances, we are of the view that the decision of the Division Bench in *Supreme Boards'* case (cited *supra*) is squarely applicable. In *Supreme Board's* case mentioned above a similar question arose as to whether purchase tax u/s 5A can be levied from a person who purchased taxable goods from a dealer who is a newly set up small scale industrial unit eligible for exemption on the strength of the notification issued u/s 10 of the Act. The Division Bench after adverting to the provisions of Section 5A, the notification G.O. 968 of 1980 granting exemption to new small scale industrial units, arguments advanced by both the parties and after considering the decisions of the Supreme Court and of this Court ultimately held that resin, which is a taxable item purchased by the assessee, for which sales tax was not payable u/s 5 at the hands of the supplier for the special circumstance that supplier being a newly set up small scale industrial unit, is liable to purchase tax u/s 5 A of the Act at the hands of the assessee, who is not having such an exemption. If that be so, the majority decision of the Tribunal in the instant case is liable to be interfered with. We, accordingly, set aside the majority view and accept the view taken by the departmental member in his dissenting order. We hold that the purchase turnover of bullion made by the assessee from State Bank of India is liable to be assessed u/s 5 A of the Act. We accordingly, uphold the order of the assessing authority.

The T.R.C. is disposed of as above.