
(2011) 06 KL CK 0118
In the High Court Of Kerala
Case No : S.T. Rev. No. 67 of 2011

Elite Foods (P.) Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 21-06-2011

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 5(2)

Citation : (2012) 52 VST 241

Hon'ble Judges : C.N. Ramachandran Nair, J;Bhabani Prasad Ray, J

Bench : Division Bench

Advocate : Harisankar V. Menon, for the Appellant;

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—Prior to the introduction of the VAT regime in 2005-06 for levy and collection of sales tax, the scheme prevalent under the Kerala General Sales Tax Act, 1963 (hereinafter called "the Act", for short) provided for levy, of tax, on most of the items at the point of first sale in the State. A device was contrived by several manufacturers of branded products, to get the manufacture of the goods in brand name done by job-workers or small industrial units under licence and then arrange purchase of the same in Kerala at a price agreed upon between the parties and then market the same in the State as second sales on which the brand name holder will not be liable to pay tax. Under this arrangement, the tax paid on branded products on first sales by the job-workers to the brand name holders used to be at much below the market price leading to evasion of tax. In order to get over this problem, the Legislature introduced section 5(2) to the Act in the year 1998 providing for levy of sales tax on branded products at the point of sale by the brand name holder which was declared as deemed first sale. There can be no controversy that the whole purpose of the amendment was to levy and collect tax on the genuine wholesale price on branded goods when introduced to the market. As usual, attempts started among dealers to get over this provision also, and one device adopted

was to give brand name rights to job-workers also so that when they manufacture and sell the goods first sale itself happens to be by the brand name holder so that second seller, though also is brand name holder can claim exemption from tax. In other words, the attempt is to make the first sale itself as between the brand name holders so that the second sale, which is the genuine bulk sale to the market at real price can be claimed as exempt from tax. This is one such case, where the brand name holders gave the brand name rights to sister concerns engaged in manufacture of products and the petitioner purchased the products from them and sold in the market claiming second sale exemption, which was rejected by the assessing officer, the first appellate authority and the Tribunal, against which this revision case is filed. We have heard learned counsel appearing for the revision petitioner and learned Government Pleader appearing for the respondent.

2. The admitted facts are that the brand name "Elite" under which cakes and breads are manufactured and sold is owned by seven individuals, one of whom is a director and another a shareholder of the petitioner, which is a private limited company. There is no dispute that the petitioner has every right to use the brand name "Elite" for the products manufactured or marketed by them. However, the petitioner's case is that the petitioner is not manufacturing breads and cakes in the brand name "Elite", and on the other hand, the goods are manufactured by two other companies in the very same group, i.e., M/s. Elite Bakers Pvt. Ltd. and M/s. Elite Breads Pvt. Ltd., which are co-owners of the same brand name "Elite". This is because the directors and shareholders of those companies are also co-owners of the registered brand name "Elite". The contention raised therefore is that since the manufacturers themselves are brand name holders their sales to the petitioner also are sales falling u/s 5(2) of the Act and so much so, the second sales made by the petitioner which though is also brand name holder cannot be treated as deemed first sales for levy of tax u/s 5(2) of the Act. Section 5(2) of the Act is extracted hereunder for easy reference :

5. (2) Notwithstanding anything contained in this Act in respect of manufactured goods other than tea, which are sold under the trade mark or brand name, the sale by the brand name holder or the trade mark holder within the State shall be the first sale for the purposes of this Act.

3. The contention of the petitioner is that the second sale of branded goods can be treated as deemed first sale only when first sale is not by the brand name holder, no matter the second sale also happens to be made by the owner of the very same brand name under which the goods are manufactured and marketed. Learned counsel for the petitioner has mainly relied on our observations in the decision in *State of Kerala v. Kitchen Appliances India Ltd.* reported in [2011] 40 VST 191 (Ker), wherein this court observed that if unusual trade margins are not collected by the second seller then there is no justification for ignoring the first sale if the same is also by the brand name holder. Learned Government Pleader on behalf of the respondent submitted that the observation of this court in the

above judgment does not have general application and in order to give effect to the purpose of the legislation the second sale by the brand name holder which is the real sale to the market should be subjected to tax as deemed first sale as provided u/s 5(2) of the Act. The scope of section 5(2) has to be considered keeping in mind the objective for which this section is enacted and it should be applied such a way as to achieve the objective and not to defeat it. We have already traced the purpose of the legislation as one to levy tax on the genuine wholesale price of the commodity which happens when the product is introduced to the market and not when inter-dealer sales are made between group concerns at prices which are not genuine or real but are fixed to suit the interests of the beneficiaries of the business concerns in the same group. Admittedly, the first sellers, i.e., the manufacturers of the products and the petitioner-company are owned and controlled by the same group of persons. So much so, both the manufacturing companies and the marketing company which is the petitioner are owners of the very same brand name "Elite" under which cakes and breads are manufactured and sold to the market. Since the object of section 5(2) is to levy tax on the genuine wholesale price, there is no need to examine whether sales between the brand name holders within the group is at realistic price or that the margins obtained by the second seller, i.e., the petitioner to the market is reasonable or not. In our view, the only way to achieve the objective of section 5(2) is to levy tax on the brand name holder who makes the sale to the market whether it is directly to the consumers or to retail dealers for resale to consumers. We, therefore, hold that for the purpose of section 5(2) inter-dealer sales between the brand name holders should be ignored and the last sale by the brand name holder to the market should be treated as deemed first sale for levy of tax and assessment u/s 5(2) of the Act. It is immaterial whether there is one sale or more than one sale among brand name holders within the group all of which should be ignored and the last sale by the brand name holder to the market is assessable as deemed first sale u/s 5(2) of the Act. We, therefore, do not find any merit on this ground raised and consequently reject the petitioner's challenge against the assessment confirmed by the Tribunal.

4. The learned counsel for the petitioner brought to our notice the benefit of set-off available to the petitioner under rule 32(13B) of the Kerala General Sales Tax Rules, which provides for set-off of the tax collected and remitted by the first seller when second seller is assessed on sales under the brand name u/s 5(2) of the Act. We feel the petitioner is entitled to the relief by way of credit and set-off of tax to the extent the petitioner produces evidence regarding collection and remittance of tax by the first sellers, i.e., the manufacturers of the goods from the petitioner, which are also companies within the same group. Subject to the above, this S. T. revision case is dismissed.