
(2002) 12 KL CK 0071
In the High Court Of Kerala
Case No : T.R.C. No. 180 of 2000

E.M. Purushothaman

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 11-12-2002

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 2, 5, 5(1)
Kerala General Sales Tax Rules, 1963 — Rule 32(13)

Citation : (2003) 2 ILR (Ker) 117 : (2004) 134 STC 326

Hon'ble Judges : R. Basant, J;G. Sivarajan, J

Bench : Division Bench

Advocate : K.B. Muhamed Kutty, for the Appellant; Georgekutty Mathew, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

G. Sivarajan, J.—The matter arises under the Kerala General Sales Tax Act, 1963 (for short, "the Act"). Assessee to sales tax under the Act is the revision-petitioner. He is aggrieved by the order of the Sales Tax Appellate Tribunal, Additional Bench, Ernakulam, in T.A. No. 1074 of 1992. The assessment year concerned is 1988-89. The assessee is a dealer in woollen carpets. For the assessment year 1988-89 he filed a return disclosing a total and non-taxable turnover of Rs. 40,884.69. The assessing authority found certain defects in the return. The assessee had produced a photocopy of a letter from the Manager, Canara Bank, Sasthamangalam Branch which showed that the assessee had purchased carpets to the tune of Rs. 3,05,000 in an auction sale of pledged/hypothecated goods of M/s. Home Makers, Thiruvananthapuram, conducted by the said bank. The assessing authority on that basis had taken the view that in the absence of production of a declaration under Rule 32(13) of the Kerala General Sales Tax Rules, 1963, the claim of exemption towards second sales cannot be allowed. The assessing authority accordingly issued a notice proposing to assess the estimated sales turnover of carpets purchased through auction sales. The assessee raised the contention that the bank is a casual trader as

defined in the Act and therefore it is liable to pay tax on its sales u/s 5 of the Act. An alternate contention was also taken to the effect that the sale proceeds have to be treated as the turnover of Home Makers, Thiruvananthapuram, and as it exceeds the taxable limit it is the Home Makers who is liable to pay tax on the sale of carpets. The assessing authority took the view that in the absence of production of declaration as provided under Rule 32(13) of the KGST Rules, the claim cannot be allowed. This order of the assessing authority was confirmed by both the appellate authorities for the very same reason that in order to get exemption as second sales the assessee had to establish the same by producing the declaration as contemplated under Rule 32(13) of the Rules. This tax revision case was admitted on the following questions of law :

"(i) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law in dismissing the claim of the petitioner only on the ground that no certificate under Rule 32(13) of the KGST Rules, 1963 has been produced when admittedly the bank is proved to be the first seller and whose taxable turnover exceeds the taxable minimum ? and

(ii) Whether under any circumstances the point of levy fixed by the charging section of the KGST Act be shifted to another point only on the ground that the certificate under Rule 32(13) was not produced. Is not this only directory ?"

2. The facts are not in dispute. The assessee is a dealer in carpets. He had purchased woollen carpets in a public auction conducted by the Canara Bank, Sasthamangalam, evidenced by annexures D to H. The assessee is the second seller of the carpets so purchased in the State.

3. u/s 5 of the Act every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than one lakh rupees and every casual trader or agent of a non-resident dealer, whatever be his total turnover for the year, shall pay tax on his taxable turnover for that year (i) in the case of goods specified in the First or Second Schedule, at the rates and only at the points specified against such goods in the said Schedules. Woollen carpets at the relevant time were taxable at the point of first sale in the State by a dealer who is liable to tax u/s 5 as per entry 142 of the First Schedule to the Act. The expression "tax" as defined in Section 2(xxiv) means the tax payable under this Act. The definition of "taxable turnover" in Section 2(xxv) means the turnover on which a dealer shall be liable to pay tax as determined (the rest of the definition omitted as unnecessary). The term "dealer" is defined in Section 2(viii) of the Act to mean any person who carries on the business of buying, selling, supplying or distributing goods directly or otherwise.....(rest omitted). The term "business" defined in Section 2(vi) includes any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern contemplated in the main part of the definition of "business".

The definition of "casual trader" in Section 2(vii) means a person who has, whether as principal, agent or in any other capacity, occasional transactions of

business nature involving the buying, selling, supply or distribution of goods in the State, whether for cash or deferred payment or for commission, remuneration or other valuable consideration. From a reading of the provisions of Section 5(1)(i) read with Section 2(vi), (vii), (viii), 2(xxiv), 2(xxv) and entry 142 of the First Schedule as it stood at the relevant time it is evident that in order to claim exemption on the ground of second sales the assessee has to establish that the first sale in the State was made by a dealer who is liable to pay tax u/s 5 of the Act. The liability to pay tax u/s 5 of the Act will depend on various factors : (1) that the person who had effected the first sale must be a dealer as defined in Section 2(viii) of the Act. A "dealer" must be a person who carries on the business of buying, selling, supplying or distributing goods directly or otherwise. Business of course includes any transaction in connection with or incidental or ancillary to the main trade, commerce, manufacture, etc., (2) the turnover of the business so far as persons other than a casual trader must exceed Rs. 1,00,000 and (3) the transaction must be a "sale" as defined u/s 2(xxi) of the Act which means every transfer Whether in pursuance of a contract or not of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration. It is only on being satisfied of the above requirements in respect of the first sale u/s 5(1)(i) read with entry 142 of the First Schedule to the Act exemption can be granted on the second sale of the very same goods subjected to the single point levy. Once the person who effects the first sale in the State admits his liability to pay tax on such transaction by making an endorsement on the reverse of the sale bill that the goods covered by the sale bill has suffered tax at his hands the requirements of establishing all the ingredients mentioned above are dispensed.

4. u/s 12 of the Act the burden of proving that any transaction of a dealer is not liable to tax under the Act shall lie on such dealer. It is in order to obviate the cumbersome process of establishing the ingredients of Section 5(1)(i) read with the relevant entry in the Schedule delineated earlier that Rule 32(13) of the Rules provides a simple mode by which the said burden has to be discharged. Rule 32(13) of the Rules reads as follows :

"Every dealer in goods taxable at the point of first sale in the State, shall, if he is not liable to tax on such goods by reason of his not being the first seller of the goods in the State, obtain a certificate written and signed underneath or on the other side of the bill or cash memorandum to the effect that the goods covered by the bill or cash memorandum had suffered tax at his (sellers) hands or at the hands of any other dealer mentioned in the certificate. The seller in such goods shall give such a certificate on every sale made by him."

5. Here, it must be noted that this is the only mode provided under the Rules for establishing that the second seller of a single point commodity is not liable to tax under the Act. The Supreme Court in *Kedarnath Jute Manufacturing Co. Ltd. v. Commercial Tax Officer* [1965] 16 STC 607 (three Judge-Bench) considered the question whether u/s 5(2)(a)(ii) of the Bengal Finance (Sales Tax) Act, 1941 the

furnishing of the declaration form issued by the purchasing dealers was a condition for claiming exemption thereunder. u/s 5(2)(a)(ii) the appellant, in order to claim exemption thereunder, had to furnish declaration forms duly filled in and signed by registered dealers to whom the goods were sold. Under Rule 27A of the Rules, a dealer who wishes to claim the said exemption shall on demand produce such a declaration in writing signed by the purchasing dealer. It was contended that the substantive part of Section 5(2)(a)(ii) provides for exemption in respect of certain sales to a dealer if the sales are made to a registered dealer for the purposes mentioned thereunder and that the proviso to the said sub-clause prescribes in effect that the declaration form in the manner prescribed is the best evidence to prove that the sales were for the said purposes and that the proviso cannot be construed as laying down a condition for giving the exemption but only as directory provisions to subserve the substantive provision in a reasonable way. The respondent contended that a dealer can claim exemption under the said sub-clause but if he seeks exemption he must comply strictly with the conditions under which the exemption can be granted. The Supreme Court observed that a provision prescribing exemption shall be strictly construed. A dealer cannot get exemption unless he furnishes the declaration in the prescribed form. The court observed that there is an understandable reason for the stringency of the provisions and stated thus :

"The object of Section 5(2)(a)(ii) of the Act and the Rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will well-nigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section. Therefore, presumably to achieve the two-fold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clause seek to avoid."

The Supreme Court again in *Commissioner of Sales Tax v. Prabhudayal Prem Narain* [1988] 71 STC 1 considered a claim for exemption u/s 3-D(7)(b) of the U.P. Sales Tax Act.

The said section reads as follows :

"Every sale within Uttar Pradesh by a dealer, either directly or through another, whether on his own account or on account of any one else, shall, for the purposes of Sub-section (2), be deemed to be a sale to a person other than a registered dealer, unless the dealer selling the goods proves otherwise to the satisfaction of the assessing authority after having furnished such declaration or

certificate, obtained from the purchaser of such goods, in such form and manner and within such period, as may be prescribed."

Rule 12-B of the U.P, Sales Tax Rules prescribed the declaration under the above section as form III-C(I).

6. There was a conflict of decisions between two single Benches on the matter of interpretation of the above provisions. The division Bench of the Allahabad High Court in *Govind Ram Tansukh Rai & Co. v. Commissioner of Sales Tax, U.P.* [1988] 71 STC 4 occurring as appendix at pages 4 to 9 of 71 STC after elaborate consideration of the matter and in the light of the decisions of the Supreme Court held that the aforesaid provision is mandatory in nature and unless proof is given as required therein, it cannot be said that onus has been discharged and the assessee would not be entitled to exemption by examining other documents. The Supreme Court in *Prabhudayal Prem Narain's case* [1988] 71 STC 1, the division Bench decision discussed above must prevail since the same follows logically from the decision of the Supreme Court in *Kedarnath Jute Mfg. Co. Ltd. case* [1965] 16 STC 607, mentioned above.

7. In *Phool Chand Gupta v. State of A.P.* [1997] 104 STC 603 the Supreme Court considered the validity of Rule 12(3)(ii) of the Central Sales Tax (Andhra Pradesh) Rules, 1957 where the contention was that the said rule was directory and not mandatory. The said rule reads as follows:

"Rule 12(3)(ii).--For the purpose of claiming exemption from tax on his subsequent sale under Sub-section (2) of Section 6, the purchasing dealer who effects a subsequent sale to another registered dealer by transfer of documents of title to the goods during their movement from one State to another, shall furnish to the appropriate assessing authority,--

(i) the portion marked "original" of the form E-I received by him from the registered dealer from whom he purchased the goods ; and

(ii) the original of the declaration in form C received from the registered dealer to whom he sold the goods."

The Supreme Court noted the contention thus :

"Form "C" has been prescribed under Rule 12 of the Rules by the Central Government to satisfy the requirement of Section 8(4) and similarly to satisfy the requirement of Section 6(2), Rule 12(3)(ii) of the State Rules provides for the production of the declaration in form "C" received from the registered dealer to whom the goods were sold. Of course under the Central Rules, Sub-rule (4) of Rule 12 the certificate referred to must be in form "E-I" or "E-II" as the case may be. It is the requirement of furnishing form "C" under Rule 12(3)(ii) of the State Rules which is the bone of contention in the present proceedings. It is contended that if this rule is not construed to be directory in character, it will be ultra vires the Act.

It is true that while the proviso to Section 6(2) of the Act imposes the liability of production of form "E-I", Rule 12(3)(ii) of the State Rules imposes the additional requirement of filing form "C" as well. As pointed out earlier to secure exemption u/s 6(2), proof of the subsequent sale is a sine qua non. Unless the subsequent sale to a registered dealer in the course of inter-State trade or commerce of goods of the description referred to in Section 8(3) is shown to have been effected by the transfer of documents of title to such goods, there could be no question of grant of exemption from payment of tax. In order to claim, and secure exemption, this fact has to be proved by the production of form "E-I" under Rule 12(4) of the Central Rules and form "C" under Rule 12(3)(ii) of the State Rules."

Regarding the challenge to the said Rule the court observed thus :

"The rule deliberately restricts itself to the production of the specified documents as that would be the best possible evidence in regard to subsequent sale u/s 6(2) by transfer of documents of title to the goods. To permit substantial compliance would introduce uncertainty and may lead to avoidable litigation. In order to avail of the concession granted u/s 8(1)(b) of the Act, the dealer has to prove the fact that the goods are of the description mentioned u/s 8(3) by furnishing the declaration in form "C" and in no other manner. So also, in order to claim the benefit u/s 6(2), the very same fact has to be proved and if the State Government adopts the same mode of proof, it is impossible to say that the mode of proof adopted is inconsistent with the provisions of the Act and/or the Central Rules. All that the State Government has done is to fill the gap left by Section 6(2) in regard to the mode of proof that the goods are of the description of Section 8(3) of the Act. It was open to the State Government to select the mode of proof accepted by the Central Government as the exclusive mode of proof to avoid uncertainty and avoidable litigation. If the provision is held to be directory, substantial compliance would suffice. That would permit the dealer to adopt any other mode of proof. It would be for the authorities to accept it as sufficient or to reject it. If the authorities reject it as insufficient, it would lead to avoidable litigation. It was, therefore, open to the State Government to accept the recognised mode as the exclusive mode of proof to avoid disputes on the sufficiency or otherwise of the proof and also to make the process of granting exemption easy and uniform. Such a rule must be held to be within the scope and ambit of Section 13(3) read with Section 13(4) of the Act and not inconsistent with the Act or the Central Rules."

It was also observed as follows :

"If the mode of proof is left to the dealer to choose, each dealer may choose his own mode and the concerned authority would be required in each case to apply his mind to each situation and come to an independent conclusion which may on the same set of facts vary from authority to authority and thus introduce uncertainty and consequently lead to avoidable delay and litigation. To avoid such a situation, if the State Government decided to restrict the mode of proof to

one, namely, the production of form "C" it is difficult to see how the provision can be construed as directory as such an interpretation would destroy the very purpose of the rule."

8. In *Commissioner of Sales Tax v. Leather Facts Co.* [1987] 66 STC 91 also the Supreme Court justified the adoption of rule devising an appropriate form for establishing the claim for exemption u/s 5(3) of the CST Act and only till such time a form is prescribed the respondent who claims to have entered in those transactions in the course of export as defined by Section 5(3) was allowed to furnish to his vendor a copy of form H as provided under the CST Act.

9. The Supreme Court again in *Bharat Hari Singhania and others Vs. Commissioner of Wealth Tax (Central) and others*, , in the context of a challenge to Rule 1D of the Wealth Tax Rules observed that when the rule-making authority has prescribed only one method of valuing the unquoted equity shares and no other methods prescribed and where there is a rule prescribing the manner in which a particular property has to be valued, the authorities under the Act have to follow it. They cannot devise their own ways and means for valuing the assets. The court further observed that the rule has to be followed and that there is no question of the rule being mandatory or directory.

10. We had also occasion to consider whether Rule 28A of the KGST Rules prescribing form 18A for establishing a claim u/s 5(3) of the CST Act in T.R.C. No. 290 of 2002 and held that in order to claim the benefit of exemption u/s 5(3) of the CST Act production of declaration in form 18A prescribed under Rule 28A is mandatory.

11. A division Bench of this Court considered the mandatory nature of Rule 32(13) of the KGST Rules in the judgment dated June 12, 1990 in T.R.C; No. 4 of 1990. In that case the assessee who claimed exemption on the ground of second sales did not produce the certificate contemplated under Rule 32(13) of the Rules. The division Bench in that context observed as follows :

".....In any case, the requirement of the rule was necessarily to be satisfied by the production of a certificate. If the law stipulates that a thing should be done in a particular manner to have any particular result, that is necessarily to be done in that manner. No reason had been mentioned for the omission to produce the certificate. The rule has been framed to ensure that there is no evasion of tax. An assessee is therefore necessarily bound by such a rule."

12. However, we notice that another division Bench of this Court in *Sales Tax Officer, Special Circle, Ernakulam v. Pkipson & , Co. Ltd.* [1969] 24 STC 542 incidently considered a contention of the Government Pleader that the assessee did not obtain the declaration forms from Me Dowell & Co. Ltd., Shertallai, to evidence the payment of tax as provided under Rule 32(13) of the KGST Rules and therefore the exemption cannot be allowed. The division Bench relying on the decision in *State of Orissa v. M.A. Tulloch & Co. Ltd.* [1964] 15 STC 641 held that the said rule is only directory and not mandatory. It must be noted that

there is no discussion on this issue in the judgment. The Supreme Court in Kedarnath Jute Manufacturing Co, Ltd's case [1965] 16 STC 607 referred to the decision of the Supreme Court in M.A. Tulloch and Co.'s case [1964] 15 STC 641, and distinguished the said decision. Applying the principles laid down by the Supreme Court and of this Court discussed above Rule 32(13) of the Rules prescribing for production of the certificate or endorsement on the reverse of the sale bill or cash memorandum has to be held as mandatory. We do so.

13. In fact a division Bench of this Court in South Indian Bank Ltd. v. State of Kerala Reported as Lord Krishna Bank Limited v. Assistant Commissioner (Assessment I), Sales Tax Officer, Special Circle [1999] 114 STC 333 considered the question as to whether in a case where a bank in the course of business, acquires gold and jewellery as security and sells the same for realising the loans and advances, the said transaction of sale of secured goods is exigible to tax u/s 5 of the Act. The division Bench held that the expression "sale" as defined in the Act makes it clear that mere transfer of the property in goods by one person to another does not attract the provisions of the Act unless such transfer is in the course of trade or business and that the transaction of selling of secured goods is not incidental to main business of the bank. Accordingly it was held that the said transaction is not exigible to tax under the Act. However, another division Bench of this Court in Kerala Small Financier's Association v. State of Kerala [1999] 115 STC 563 ; (1999) 3 KLT 67 relying on a decision of the Supreme Court in Karnataka Pawn Broker's Association v. State of Karnataka [1998] 111 STC 752; (1998) 7 JT 370 (SO held that the sales of unredeemed goods, being incidental to the business of pawn broker, was liable to sales tax. These decisions are also indicative of the fact that disputes may arise in regard to the liability to tax on a transaction at the assessment stage. It is in order to obviate any such dispute and/or adjudication of such dispute at the assessment stage Rule 32(13) of the Rules has prescribed a particular mode of establishing the nature of the transaction.

In these circumstances, we are of the view that the authorities and the Tribunal were perfectly justified in rejecting the claim of the assessee on the ground that the petitioner had not satisfied the requirements of Rule 32(13) of the KGST Rules. There is no merit in this revision. It is accordingly dismissed.