
(2004) 09 KL CK 0046

In the High Court Of Kerala

Case No : WP (C) No. 28444 of 2003 (J)

Flemingo (DFS) Private Ltd.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 10-09-2004

Acts Referred:

Central Sales Tax Act, 1956 — Section 10, 10(1), 10(2), 2, 5(1)
Constitution of India, 1950 — Article 14, 19(1), 226, 286, 286(1)
Customs Act, 1962 — Section 57, 58, 59(2)
Kerala General Sales Tax Act, 1963 — Section 10

Citation : (2005) 142 STC 435

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Advocate : P. Chithambaram and A. Kumar, for the Appellant; N.N. Sugunapalan, S.C. Kias Ltd., Rojo Joseph Thuruthipara, Addl. CGSC and Raju Joseph, Special Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

G. Sivarajan, J.—Whether the sale of goods effected in duty-free shops (for short, "DFS") in the international airports is exempt from payment of sales tax under the Kerala General Sales Tax Act, 1963 (for short, "the Act") by virtue of Article 286(1)(b) of the Constitution of India and the provisions of Sections 2(ab) and 5 (1) and (2) of the Central Sales Tax Act, 1956 (for short, "the CST Act") is the main question involved in this writ petition.

2. The petitioner is a company incorporated under the Companies Act, 1956 with its registered office at Surya Samudra, Beach Garden, Pulinkudi, Mullar P.O., Thiruvananthapuram. The object of the company, it is stated, is to set up Duty-free Shops (DFS) at various international air ports in India and to import, export buy and sell, various goods which could be sold at the DFS (underlining mine). It carries on business of selling goods at the DFS allotted to it and located at the departure and arrival halls at Thiruvananthapuram International Airport. The goods sold in the DFS, it is stated, are the goods imported from foreign

countries. It is the case of the petitioner that such sales at the arrival DFS falls u/s 5(2) of the CST Act, 1956, as the sales were in the course of import being effected by transfer of documents of title to the goods before the goods crossed the customs frontiers of India and the sale at the departure DFS are in the course of exports and therefore the taxation authorities in the State of Kerala have no authority to impose levy, demand or collect tax in the said transaction. The petitioner has also got a case that respondents 2 and 3 who are also allottees of duty-free shops at Thiruvananthapuram have been granted exemption from payment of sales tax by the State of Kerala on the turnover of sale of goods effected by them at the DFS (extension counter) at the arrival halls in all international airports in the State. According to the petitioner it is also entitled to the same exemption by virtue of the provisions of Section 10 of the Act.

3. The airport authority of India has granted licence and permitted the petitioner to operate DFS at the arrival and departure launches in the terminal buildings at the Thiruvananthapuram International Airport for a period of 5 years as per proceedings dated July 2, 2003 (exhibit P1). The petitioner had commenced sale from August 17, 2003. Respondents 2 and 3 are also allottees of DFS at Thiruvananthapuram International Airport. They also trade in the same items of goods as are traded by the petitioner. The petitioner had raised two main issues in this writ petition : (1) The sale of goods effected from the arrival and departure halls of DFS are not exigible to tax and the authorities in the State have no power or jurisdiction to tax such sale and (2) in the alternative the exemption to respondents 2 and 3 alone and/or restricting the exemption granted to respondents 2 and 3 is bad in law since the same is arbitrary, irrational and violative of Articles 14 and 19(1)(g) of the Constitution of India.

4. The first respondent has filed a counter-affidavit. Regarding the first issue it is stated in paragraphs 6, 7 and 8 of the counter-affidavit as follows :

"The petitioner has stated very elaborately the law on the subject with special reference to the same during the course of import. The petitioner has cited several decisions of the honourable Supreme Court to explain as to what is a sale during the course of import. It is respectfully submitted that this respondent has no quarrel with the propositions stated by the petitioner. However, it is the burden of the petitioner to show that the transaction effected by the petitioner will come u/s 5(2) of the CST Act, 1956 and thereby they are entitled to get exemption from payment of sales tax. The petitioner has produced various documents to show that the nature of the transaction is one during the course of import. It is not possible for this honourable court to examine the veracity of those documents and come to a definite conclusion regarding the nature of transaction carried on by the petitioner. In the said circumstance, it is only just and proper that the petitioner is relegated to the statutory authority established under the Act to examine the various documents and come to a definite conclusion.

It is respectfully submitted that after the amendment made to the CST Act by incorporating Section 2(ab) by which "crossing the customs frontiers of India" was specifically defined, it is the burden of the petitioner to show that the sale had actually taken place before the goods had crossed the customs frontiers of India as defined under the Act. As per the explanation, customs station and customs authorities are given the same meaning as in the Customs Act, 1962 (52 of 1962). However, the main part of the definition restricts to the area of customs station in which imported goods or exported goods are ordinarily kept before clearance by customs authorities. Thus it can be seen that the entire customs station are not included in the definition.

The petitioner has produced exhibit P2 which is a circular issued by the Commissioner of Central Excise and Customs. The circular gives the details of the transaction made in a duty-free shop. The sales tax authorities cannot presume that the petitioner will adhere to the procedure made mention in exhibit P2 circular. On the basis of the circular the jurisdiction of the sales tax authorities to ensure that no tax legitimately due to the State exchequer is evaded cannot be ousted. Here also it is a matter of evidence. If the petitioner is able to establish that the transaction carried on by the petitioner is one entitling them to get exemption from sales tax, they can very well get that benefit."

5. Regarding the second issue it is stated in paragraph 11 of the counter-affidavit that Section 10 of the Act gives power to the State Government to give exemption to any specified goods or class of dealers and that in the impugned notification exemption is granted to the second and third respondents and that these two respondents form a different class and therefore there is no illegality in giving exemption to them. It is also stated that Articles 14 and 19(1)(g) of the Constitution are applicable only if discrimination is shown by the State within a specified class and that the petitioner cannot claim that it is similar to the respondents 2 and 3.

6. Sri P. Chidambaram, learned Senior Counsel appearing along with Mr. A. Kumar for the petitioner raised the two issues which have already been mentioned in para 3 above. With respect to the first issue the Senior Counsel submitted that admittedly the petitioner is carrying on business of selling goods at the DFS allotted to it and located at the departure and arrival halls of the Thiruvananthapuram International Airport. The Senior Counsel submitted that the DFS both at the arrival and departure halls are located within the customs frontiers of India as defined in Section 2(ab) of the CST Act, 1956 and therefore the sale transactions effected in the DFS are outside the purview of the State authorities under the Act. The Senior Counsel submitted that the sales effected in the DFS are in the course of import and/or export falling under Article 286 of the Constitution of India and as provided in Sections 2(ab), 5(1) and 5(2) of the CST Act, 1956. The Senior Counsel also took me to the various documents such as the certificate issued by the Airports Authority of India (exhibit P1), Circular No. 18/2003 dated August 14, 2003 (exhibit P2), true copy of the licence for private

bonded warehouse issued to the petitioner by the Deputy Commissioner of Customs (exhibit P3), permission to transship cargo issued by the Assistant Commissioner of Customs dated July 15, 2003 (exhibit P3A), true copy of the general bond executed by the petitioner u/s 59(1) of the Customs Act, 1962 (exhibit P3B), true copy of General Bond executed by the petitioner u/s 59(2) of the Customs Act, 1962 (exhibit P3C) as also the affidavits dated January 14, 2003 filed by the petitioner.

7. The Senior Counsel further submitted that the order (exhibit P5) issued by the first respondent rejecting the petitioner's request for exemption u/s 10 of the Act is arbitrary, irrational and is violative of Articles 14 and 19(1)(g) of the Constitution of India. The Senior Counsel took me to the Government Order dated February 10, 2001 (exhibit P6) granting exemption to respondents 2 and 3 and submitted that the only condition imposed for the grant is that the consideration for such sale is paid in foreign exchange. The Senior Counsel submitted that if earning of foreign exchange is the object, the petitioner also is receiving the consideration for sale of the items in foreign exchange only. The Senior Counsel further submitted that if the exemption is limited to respondents 2 and 3 alone who are also having DFS in the same premises the passengers would naturally purchase goods only from the DFS which has got exemption from payment of sales tax. The Senior Counsel also submitted that exemption granted to the second and third respondents alone as per G.O. (P) No. 16/2001/PD dated February 10, 2001, etc., is also arbitrary, discriminatory and is liable to be quashed. The Senior Counsel had relied on the decisions of the Supreme Court in *J.V. Gokal and Co. (Private) Ltd. Vs. The Assistant Collector Sales-tax (Inspection) and Others*, *Minerals and Metals Trading Corporation of India Limited Vs. Sales Tax Officer and Others*, *Garden Silk Mills Ltd. and Another Vs. Union of India and Others*, *In re, Sea Customs Act, 1878, Section 20(2)* AIR 1963 SC 1760 as also in *Kiran Spinning Mills Vs. Collector of Customs*, (para 6).

8. Respondents 2 and 3 are Corporations in which the State or the Central Government has got interest, in that, the State Government holds 26 per cent of the shares in the second respondent and the Minister is a member of the governing body and the third respondent is a Central Government undertaking. Since the petitioner has challenged the exemption order (exhibit P6) granted in favour of respondents 2 and 3 they have also filed statement/counter-affidavits in the case. The second respondent in the statement filed has stated that the primary objective of ITDC, a Central public sector undertaking is to promote tourism industry and cater to the needs of the national and international tourists and passengers and that the ITDC is also earning foreign exchange apart from discharging statutory duties. It is further stated that the profit earned by the ITDC is again re-invested for the expansion of tourist infrastructure within the country which aspect makes the ITDC stand on an altogether different footing than other private duty-free traders who operate with pure profit-motive. It is also stated that the classification made u/s 10 of the KGST Act between the petitioner and the second and third respondents is on the basis of intelligible

differentia and the classification has a rational nexus with the object sought to be achieved ; the object behind the classification is to promote/encourage a public sector undertaking engaged in promoting the tourism of India and achieving foreign exchange, apart from discharging statutory duties ; the profit making by the ITDC is going to the public exchequers of the Government of India which ultimately is to the benefit of the general public and also the national growth of this country.

9. The third respondent in its counter-affidavit has stated as follows :

"This respondent is an institution, in which State Government's interest is very much present by holding 26 per cent of the shares and the Minister's presence in the governing body. Taking into account the nature of the institution, Cochin International Airport Limited, it is a unique and pioneer venture in the country. To have an airport with the assistance of the public, Government wanted to see that this institution gets all concessions. The duty-free shop opened at Cochin International Airport was exempted, taking into account these factual position and the public interest involved. Whereas the petitioner is concerned, it is only a private entrepreneur and therefore, there is absolutely no comparison with this respondent to invoke the question of a discrimination, attracting Article 14 of the Constitution."

It is further stated in para 3 as follows :

""The goods" stored and retained in the customs station/bonded warehouse, which is within the customs frontiers covered u/s 2 (a) and (b) of the Central Sales Tax Act, 1956 and is therefore, if the purchaser is importing the goods it is not a sale by the local dealer. The provisions say the goods ordinarily kept before clearance by the customs authorities will show that these arguments are sustainable in law. Sections 57 and 58 of the Customs Act, 1962 also permit the goods to be stored if the goods are kept in the warehouse, that will be within the "customs station" and therefore, the goods are in the customs frontier. The duty-free shops are located within the customs boundaries and the sale can be effected only to international passengers carrying valid travel documents and the payments are effected only in foreign exchange, as per norms prescribed by Reserve Bank of India. A passenger arriving at Kochi from an international station has an option of shopping duty-free goods at the embarkation airport abroad or at the disembarkation airport at Kochi and his choice will be influenced by the price of the goods. Large number of passengers arriving at Cochin Airport are non-resident Keralites from middle east and none of the middle east countries have imposed any sales tax or other tax on the items sold in the duty-free shop in those countries. Therefore, if the prices are compared in tax or duty imposed, will naturally discourage passengers from buying from the duty-free shop at Kochi. Since Cochin International Airport Limited is run with the State Government participation, the exemption granted on the sales tax is justified."

10. Sri Raju Joseph, learned Special Government Pleader (Taxes) appearing for

the first respondent submitted that the question whether the transaction of the petitioner in the DFS is exigible to tax under the Act by virtue of the provisions of Article 286 of the Constitution or under the provisions of Section 5(1) or 5(2) of the Central Sales Tax Act, 1956, are all matters which have to be considered by the statutory authorities on the basis of materials produced before them in the course of the assessment under the Act and that this Court under Article 226 of the Constitution of India may not be in a position to satisfactorily adjudicate the said claim in this proceedings. The Special Government Pleader further submitted that the petitioner's application for exemption from payment of sales tax u/s 10 of the Act was rejected on the ground that the petitioner does not satisfy the requirement of the said section. The Special Government Pleader further submitted that the third respondent is a company incorporated under the Companies Act where the State is having a share holding of 26 per cent ; besides, the Minister is a member of the governing body of the third respondent-company. The Special Government Pleader submits that exemption was granted to the second respondent in public interest. The Special Government Pleader also submitted that the third respondent is a fully Central Government owned company and that exemption was granted to the said company in public interest right from 1980 onwards. The Special Government Pleader also relied on the decisions in *Mukut Dutta v. Anirban Purakayastha*, C.T.O. [1998] 109 STC 559 (WBTT), *North-24-Parganas District Pantiles Manufacturers Samity v. Commissioner of Commercial Taxes* [1991] 82 STC 260 (WBTT), *State of Uttar Pradesh and another Vs. M/s. Laxmi Paper Mart and others*, , *Loharn Steel Industries Ltd. v. State of Andhra Pradesh* [1997] 105 STC 30 (SC) and other decisions in the matter.

11. Sri. N.N. Sugunapalan, learned Counsel appearing for the third respondent, on the basis of the averments made in the counter-affidavit submitted that there is a valid classification of dealers for the purpose of grant of exemption from payment of sales tax u/s 10 of the Act and that the petitioner, who is a private party whose profit goes to its hands for private use cannot be equated with that of respondents 2 and 3.

12. Learned Counsel for the second respondent submitted that the said respondent was enjoying the benefit of sales tax exemption from 1980 onwards and that the inclusion of the second respondent in exhibit P6 is only by way of inclusion in the Notification S.R.O. No. 1090/99. The counsel also made submissions on the lines argued by the counsel for the other respondents.

13. The first contention of the petitioner, as already noted, is that the sales effected at the arrival DFS as well as in the departure DFS are not sales exigible to tax under the Act and the authorities in the State have no power or jurisdiction to tax such sales in view of the provisions of Article 286(1)(b) of the Constitution and Sections 2(ab), 5 (1) and (2) of the CST Act, 1956. Before considering the factual situation leading to the said claim it will be profitable to refer to the relevant provisions in the Constitution, the CST Act, the Act and the

principles laid down by the Supreme Court in that regard.

14. Article 286(1) of the Constitution of India states that no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place--(a) outside the State ; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

15. Section 5(2) of the Central Sales Tax Act reads :

"A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

16. A Constitution Bench of the Supreme Court in J.V. Gokal and Co. (Private) Ltd. Vs. The Assistant Collector Sales-tax (Inspection) and Others, , considered the scope of the expression "in the course of the import into the territory of India" occurring in Article 286(1)(b) of the Constitution of India.

17. Referring to the crucial words "import" and "in the course of the Supreme Court observed that the course of import, therefore, starts from one point and ends at another ; it starts when the goods cross the customs barrier in a foreign country and ends when they cross the customs barrier in the importing country. The Supreme Court referring to its earlier decision in State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others, as regards the limits of the course, observed thus :

"It would seem, therefore, logical to hold that the course of the export out of, or of the import into, the territory of India does not commence or terminate until the goods cross the customs frontier."

The Supreme Court in J.V. Gokal and Co. (Private) Ltd. Vs. The Assistant Collector Sales-tax (Inspection) and Others, summarised the legal position vis-a-vis the import-sale thus :

"(1) The course of import of goods starts at a point when the goods cross the customs barrier of the foreign country and ends at a point in the importing country after the goods cross the customs barrier ; (2) the sale which occasions the import is a sale in the course of import ; (3) a purchase by an importer of goods when they are on the high seas by payment against shipping documents is also a purchase in the course of import; and (4) a sale by an importer of goods, after the property in the goods passed to him either after the receipt of the documents of title against payment or otherwise, to a third party by a similar process is also a sale in the course of import."

18. A two-Judge Bench of the Supreme Court in Minerals and Metals Trading Corporation of India Ltd. v. Sales Tax Officer [1998] 111 STC 434 (MMTC) considered the scope of Article 286(1)(b) of the Constitution with reference to

Section 2(ab) and Section 5(2) of the CST Act, 1956. In that case the MMTC, a Government of India undertaking functioned as canalising agent for import and export of minerals and metals, imported certain goods for and on behalf of SAIL (the actual user) subject to certain terms agreed to between the parties. The Sales Tax Officer imposed sales tax on the sale of the goods by the appellant to SAIL rejecting the plea that the sale was in the course of import covered by Section 5(2) of the CST Act, 1956. The writ petition filed by MMTC was dismissed. In appeal the Supreme Court reversing the decision of the High Court held that while the consignment was still upon the high seas and the sale was in the course of import into the territory of India, it was effected by transfer of documents to the goods before they had crossed the limits of the customs station, which was a customs port and that the sale was covered by the latter part of Section 5(2) read with Section 2(ab) of the CST Act, which was in the course of import and not liable to sales tax. The Supreme Court for holding so referred to the provisions of Article 286(1)(b), the definition in Section 2(ab) of the CST Act, the phrase "crossing the customs frontier of India" inserted by an amendment in 1976 as also the principles laid down in the decision of the Supreme Court in *J.V. Gokal and Co. (Private) Ltd. Vs. The Assistant Collector Sales-tax (Inspection) and Others*, . Again the Supreme Court in *Garden Silk Mills Ltd. and Another Vs. Union of India and Others*, , in the context of assessment of customs duty on the question of inclusion of landing charges in the assessment of customs duty on imported goods with reference to certain other decisions of the Supreme Court in *Union of India and others Vs. Apar Private Ltd. and Others*, , *Bharat Surfactants (Private) Ltd. and Another Vs. Union of India (UOI) and Another*, and *Dhiraj Lal R. Vohra and Others Vs. Union of India (UOI) and Others*, , in paragraph 18 of the said report observed thus :

"It would appear to us that the import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country, the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed."

19. Yet another decision of the Supreme Court in *Kiran Spinning Mills Vs. Collector of Customs*, in the context of levy of additional duty under the Customs Tariff Act particularly with reference to its earlier decision in *In Re: The Bill To Amend S. 20 of The Sea Customs Act, 1878 and S. 3 of The Central Excises and Salt Act, 1944*, observed that the taxable event occurs when the customs barrier is crossed. It was further observed that in the case of goods which are in the warehouse the customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country.

20. The exigibility to sales tax under the Act in respect of the sales turnover of goods effected by the petitioner at the arrival DFS as well as in the departure DFS of the International Airport at Thiruvananthapuram has to be considered in the light of the legal position settled by the Supreme Court in the

aforementioned cases.

21. I have already stated the factual situation with regard to the procedure followed by the petitioner and the nature of transactions effected by the petitioner including the facts stated in the affidavit filed in this writ petition. If the factual situation stated by the petitioner is true certainly the petitioner has got a strong case to claim exemption by virtue of the provisions of Article 286(1) (b) of the Constitution and the provisions of Section 2(ab) and Section 5(2) of the CST Act, 1956. However, this is a matter for evidence which in the ordinary course has to be agitated before the statutory authorities under the Act. In other words the petitioner has got an effective remedy with respect to the claim made in this writ petition by way of raising objection to the assessment, if any, proposed under the KGST Act and if aggrieved, to take up the matter in appeal before the appellate authorities and before this Court in revision.

22. The first respondent in the counter-affidavit has stated that going by the definition of "customs frontiers of India" in Section 2(ab) of the CST Act, 1956 the main part of the definition restricts to the area of customs station in which imported goods or exported goods are ordinarily kept before customs clearance by the customs authorities and hence it cannot be said that the entire customs stations are included in the definition. It is also stated that whether the petitioner is strictly acting in compliance with the circular issued by the customs department has to be considered. Further, from the fact that the second and third respondents had applied and obtained exemption from payment of sales tax from the Government (exhibit P6) it is clear that the parties were under the impression that the DFS transaction is exigible to tax under the Act or otherwise the petitioner also would not have applied for tax exemption. At the same time from the fact that exemption was sought it will not follow the transaction is exigible to tax if in law it is not exigible to tax. The matter requires consideration in assessment proceedings.

23. The decisions of the Supreme Court discussed above clearly show that the course of import ends at a point in the importing country after the goods cross the customs barrier, that a purchase by an importer of goods when they are on the high seas by payment against shipping documents is also a purchase in the course of import and that a sale by an importer of goods after the property in the goods passed to him either after the receipt of the documents of title against payment or otherwise to a third party by a similar process is also a sale in the course of import. It is also clarified that the import of goods into India is completed when the goods become part of the mass of goods within the country. The taxable event being reached at the time when the goods reached the customs frontiers and the bill of entry for home consumption is filed. This is further clarified that in the case of goods which are in the warehouse the customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country.

24. In view of the contention taken by the respondents the crucial question to be

considered in the instant case is as to whether the goods brought to the duty-free shops at the arrival and departure DFS can be said to have become part of the mass of goods in the country. This is the matter which has to be considered by the authorities under the Act.

25. Now I will deal with the second issue raised by the Senior Counsel, viz., exemption granted to respondents 2 and 3 alone restricting the exemption to respondents 2 and 3 are bad in law since the same is arbitrary, irrational and violative of Articles 14 and 19(1)(g) of the Constitution of India. The exemption is granted to respondents 2 and 3 in exercise of the powers vested in the State Government u/s 10 of the Act. The said section empowers the Government if they consider it necessary in the public interest by notification in the gazette make an exemption or reduction in rate either prospectively or retrospectively in respect of any tax payable under this Act, inter alia, by any specified class of persons in regard to the whole or any part of their turnover. u/s 10(2) any exemption from tax, or reduction in the rate of tax, notified under Sub-section (1) may extend to the whole State or to any specified area or areas therein and may be subject to such restrictions and conditions as may be specified in the notification.

26. Thus the Government u/s 10 of the Act has got the power to grant exemption or reduction in rate in respect of tax payable under this Act by any specified class of persons in regard to the whole or any part of the turnover subject to such restrictions and conditions as may be specified in the notification. In the instant case the Government by notification dated February 10, 2001 (exhibit P6) by way of amendment to the Notification S.R.O. No. 1090/99 included respondents 2 and 3 in the said notification whereby the turnover of sale of goods effected by the said respondents at the arrival DFS (extension counter) at all international airports in the State was exempted from tax. The only condition which is imposed is that the consideration for such sale is paid in foreign exchange. Though the explanatory note shows that the decision of the Government was to exempt the turnover of sale of goods effected in the DFS run by respondents 2 and 3 and attached to all international airports within the State the exemption notification grants such exemption only to the turnover of sale of goods effected at the arrival DFS. This means that such exemption has not been extended to the turnover of sale of goods effected at the departure DFS. So far as the petitioner is concerned it has got extension DFS counter both at the arrival and at the departure DFS of the International Airport at Thiruvananthapuram. It is not clear as to whether respondents 2 and 3 have got any DFS at the departure counter of the International Airport at Thiruvananthapuram. According to the petitioner the only condition which is imposed in the notification is that the consideration for the sale of goods in the DFS is paid in foreign exchange. According to the petitioner the consideration for sale of goods in the duty-free shops of the petitioner is being received only in foreign exchange and therefore there is no justification for a differential treatment between the petitioner and respondents 2 and 3. It is their further case that the petitioner and respondents 2 and 3 fall in

the same class in that all the three are conducting duty-free shops in the international airport at Thiruvananthapuram. In other words the contention of the petitioner is that the petitioner and respondents 2 and 3 will fall under a specified class, viz., persons conducting duty-free shops in the International Airport at Thiruvananthapuram. It is also their case that it is not as if there are a large number of DFS in the international airport, that the DFS conducted by the petitioner and respondents 2 and 3 are the only DFS in the Thiruvananthapuram Airport and that if exemption is limited to respondents 2 and 3 no purchaser would come to the DFS of the petitioner, in that, they won't get the benefit of tax exemption by purchasing goods from the petitioner's DFS. This, according to the petitioner, will amount to discrimination writ large violating Articles 14 and 19(1)(g) of the Constitution.

27. The contention of the second respondent is that exhibit P6 notification was issued in public interest, viz., to protect the ITDC, it being a Central public sector undertaking established solely for the purpose of promoting the tourism industry of this country and obliged to discharge statutory functions apart from earning foreign exchange; the profit earned by ITDC is again re-invested for the expansion of tourist infrastructure within the country and that this aspect makes the ITDC stand on an altogether different footing than other private duty-free traders who operate with pure profit-motive. According to the second respondent there is an intelligible differentia and the classification has a rational nexus which is sought to be achieved. In other words, according to the second respondent, those grouped together must possess a common characteristic justifying their inclusion in the group but distinguishing them from those excluded, and performance of this exercise bear a rational nexus with the reason for exercise.

28. The third respondent in its counter-affidavit has stated that it is an institution in which State Government's interest is very much present by holding 26 per cent of the shares and the Minister's presence in the governing body. Further it is a unique and pioneer venture in the country and that too have an airport with the assistance of the public the Government wanted to see that this institution gets all concessions. The exemption, it is stated, was granted in public interest. The Government also in its counter-affidavit has stated that the petitioner, on the one hand, and respondents 2 and 3, on the other hand, are two classes of dealers and therefore there is no illegality in giving exemption to the latter class of dealers. It is further stated that the petitioner cannot claim that they are similar to respondents 2 and 3 and that so long as there is discrimination within a specified class there is no room for the petitioner to plead discrimination on the basis of Articles 14 and 19(1)(g) of the Constitution of India.

29. The petitioner, admittedly, is a private concern which has contracted with the Airport Authority of India and the said authority had granted licence to the petitioner to operate duty-free shops at the arrival and departure launches of the terminal place at Thiruvananthapuram Airport for a period of 5 years with effect from March 27, 2003 subject to certain terms and conditions. The procedure for

receipt and sale of articles at the duty-free shops situated inside the arrival/ departure halls at Thiruvananthapuram Airport Terminal II is contained in the Circular No. 18/2003 dated August 14, 2003 (exhibit P2). The terms of the bonded warehouse licence and the permission to transship the cargo meant for DFS at Trivandrum International Airport under preventive Escort are contained in exhibit P3. The petitioner with reference to all these has submitted exhibit P4 representation seeking for sales tax exemption in respect of the turnover of sales effected in the duty-free shops at Thiruvananthapuram International Airport. The Government had rejected the said application simply stating that the request for sales tax exemption on the goods sold through duty-free shop cannot be considered as per the existing rules. Though there is reference to the existing rules which are the relevant rules which would disentitle the petitioner from getting exemption from payment of sales tax other than that is contained in Section 10 of the Act is not mentioned or considered.

30. Of course respondents 2 and 3 are either Central Government owned company or institution in which State is very much interested. Respondents 2 and 3 cannot be equated with the petitioner, for, as already stated, the petitioner is purely a private concern and the profit from the business in the duty-free shop goes for enriching the business of the petitioner only.

31. The power to classify without unreasonably discriminating between persons similarly situated, with reference to various decisions of the Constitution Bench of the Supreme Court was considered by the Supreme Court in *The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another*, and held as follows :

"Simply stated the law is this : Differences in treatment must be capable of being reasonably explained in the light of the object for which the particular legislation is undertaken. This must be based on some reasonable distinction between the cases differentially treated. When differential treatment is not reasonably explained and justified the treatment is discriminatory. If different subjects are equally treated there must be some basis on which the differences have been equalised otherwise discrimination will be found."

It was further held in the said decision that the burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack. It was observed that "the burden is proving not possible "inequality" but hostile "unequal" treatment" and that to be able to succeed in the charge of discrimination, a person must establish conclusively that persons equally circumstanced have been treated unequally and vice versa. The Supreme Court also referred to the principles stated in *KHANDIGE SHAM BHAT AND ANOTHER Vs. AGRICULTURAL Income Tax OFFICER, KASARAGOD, AND ANOTHER.*, , that "if there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstance arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment" and that "the power of the Legislature to classify is of "wide range and flexibility" so that it can

adjust its system of taxation in all proper and reasonable ways".

32. Going by the aforesaid principles laid down by the Supreme Court in the matter of discriminatory treatment between persons, as already noted, respondents 2 and 3 form a different class from that of the petitioner. If the Government in public interest has decided to grant exemption from payment of sales tax in respect of the turnover of sale of goods effected at the arrival duty-free shops (extension counter) at all international airports in the State subject to the condition that the consideration for such sale is paid in foreign exchange it cannot be said to be arbitrary or discriminatory as contended by the petitioner. Respondents 2 and 3 form a different class altogether. The petitioner cannot be equated with respondents 2 and 3 though all the three are conducting duty-free shops in the International Airport at Thiruvananthapuram. In the circumstances, the notification, exhibit P6, cannot be said to be illegal, arbitrary or discriminatory. It is declared accordingly.

33. However, the fact remains that the petitioner's is the only other duty-free shop in the International Airport at Thiruvananthapuram. Generally the class of persons who purchase goods from the DFS are either persons coming from abroad or persons going abroad. It is not known as to whether local people are not entitled to purchase from the DFS at the International Airport at Thiruvananthapuram. If such a person purchases goods from the duty-free shops belonging to respondents 2 and 3 they need not pay any sales tax due under the Act whereas if such persons purchase goods from the duty-free shop conducted by the petitioner they will not get the benefit of sales tax exemption and consequently the price of goods purchased from the petitioner's shop will be higher than the value of the same goods purchased from the duty-free shops conducted by respondents 2 and 3. This would result in an unequal treatment of the petitioner. Though strictly speaking it cannot be held that there is a discrimination attracting Article 14 of the Constitution of India the consequence of this unequal treatment may have an adverse impact on the business conducted by the petitioner in the DFS at the International Airport at Thiruvananthapuram. This is all the more so for the reason that the duty-free shops of the petitioner and respondents 2 and 3 are situated side by side. Having regard to the fact that the petitioner has got a contention that the turnover of sale of goods effected in the duty-free shops are not at all exigible to tax under the Act by virtue of the provisions of Article 286(1)(b) of the Constitution of India and Section 5(2) of the CST Act, 1956, with respect to which certain observations have been made in this judgment and particularly since no other persons are concerned with the situation obtained in this case I am of the view that the Government must be directed to consider the claim for exemption made by the petitioner in exhibit P4 afresh. The Government as already noted has not assigned any reasons except to say that the rules do not permit. I accordingly set aside exhibit P5 communication and direct the Government to pass fresh orders on exhibit P4 in accordance with law and in light of the observations made herein above after affording an opportunity of being heard to the petitioner

within a period of three months from the date of receipt of a copy of this judgment. It is open to the petitioner to raise all contentions available to them before the Government at the time of personal hearing.

Writ petition is disposed of as above.