

(2003) 11 KL CK 0018

In the High Court Of Kerala

Case No : T.R.C. No's. 7, 15, 33, 34, 40, 41, 42, 44, 45, 50, 51, 52, 53, 60 and 62 of 2003

Kerala State Electronics Development Corporation Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 07-11-2003

Acts Referred:

Central Sales Tax Act, 1956 — Section 3, 6A(1), 8(1), 8(2)
Kerala General Sales Tax Act, 1963 — Section 35

Citation : (2006) 143 STC 549

Hon'ble Judges : Pius C. Kuriakose, J;K.S. Radhakrishnan, J

Bench : Division Bench

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

Judgement

K.S. Radhakrishnan, J.—The cardinal question to be considered in all these cases is enumerated hereunder :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law in holding that the transaction in question is not a branch transfer but an inter-State sale ?

The revision petitioner-assessee, Kerala State Electronics Development Corporation Limited (for short "KSEDC") entered into an agreement on June 1, 1974 with M/s. Electronics Corporation of India Limited (for short "ECIL") to provide technical know-how to KELTRON for the manufacture of commercial T.V. receivers and also for purchase of T.V. sets manufactured by them. Assessment year is 1975-76 (Central sales tax). Assessment for the year 1975-76 was originally completed as per order dated August 31, 1977 disallowing the exemption claimed by the assessee for branch transfer of T.V. receivers to its branch at Bombay. On appeal, S.T.A. No. 226 of 1978, the assessment order was set aside and the matter was remanded. Fresh assessment was completed on February 3, 1982 allowing the claim of exemption. However, the Deputy

Commissioner reopened the assessment u/s 35 of the Kerala General Sales Tax Act, 1963 by order dated August 24, 1982, and remanded the matter. Assessee filed appeal before the Sales Tax Appellate Tribunal and the Tribunal by order dated March 16, 1983 confirmed the decision of the Deputy Commissioner and remanded the matter back to the assessing authority since the matter requires fresh appraisal. Assessing authority passed fresh assessment order disallowing the claim as per order dated September 15, 1983. Assessee filed appeal S.T.A. No. 315 of 1983. Appellate authority confirmed the assessment by order dated January 16, 1984. On second appeal the Tribunal set aside the order of the appellate order dated May 20, 1987. Tribunal took the view that the goods were sent by the assessee only by way of stock transfer to Bombay and the actual sale took place in Bombay and there was no inter-State sale. Matter was taken up before this Court in T.R.C. Nos. 87 to 89 of 1988. Division Bench of this Court set aside the order of the Tribunal and remitted the matter to the Tribunal for reconsideration. Matter was reconsidered and the impugned order was passed by the Tribunal on January 1, 2002.

2. The issue that has come up for consideration in this case is whether despatch of T.V. sets by the assessee is branch transfer or inter-State sale ?

3. The main point which is to be considered is in T.R.C. Nos. 45 of 2003, 7 of 2003, 60 of 2003, 50 of 2003, 15 of 2003, and 53 of 2003. In T.R.C. Nos. 50 of 2003, 15 of 2003 and 53 of 2003 apart from the abovementioned question few other questions have also to be considered. In T.R.C. Nos. 33 of 2003, 62 of 2003, 52 of 2003, 51 of 2003, 40 of 2003, 34 of 2003, 42 of 2003, 44 of 2003 and 41 of 2003 rate of tax under S.R.O. No. 710/1976 and the question of waiver under G.O. dated 38/95/TD has to be considered.

4. We may first examine the first question posed hereinbefore. Before examining the question as to whether the transfer of T.V. sets outside the State is a branch transfer or inter-State sale in the light of the agreement dated June 1, 1974. We may examine the principle to be applied in the light of the various decisions cited at the Bar.

5. The Central Sales Tax Act, 1956 was enacted to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India, to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce, etc. Section 3 of the Act placed in Chapter II thereof reads as follows :

3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce.--A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase,--

(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of title to the goods during their

movement from one State to another.

The essential ingredient to constitute a sale in the course of inter-State trade is that there must be a contract of sale incorporating stipulation, express or otherwise, regarding inter-State movement of goods, goods must actually bring from one State to another and such movement of goods must be from State to another State where the sale closes.

6. In order to establish the contention, counsel on either side placed reliance on several decisions. Counsel for the assessee Dr. K.B. Muhamed Kutty placed reliance on the decisions of the apex Court in *Tata Engineering and Locomotive Co. Ltd. v. Assistant Commissioner of Commercial Taxes* [1970 26 STC 354, *Kelvinator of India Ltd. v. State of Haryana* [1973 32 STC 629, *Balabhagas Hulaschand v. State of Orissa* [1976 37 STC 207 and *Bharat Heavy Electricals Limited v. Union of India* [1996 102 STC 373. Reliance was also placed on the decision of the Gujarat High Court in *Bharatkhand Textile Mfg. Co. Ltd. v. State of Gujarat* [1964 15 STC 885 and also the decision of the Orissa High Court in *State of Orissa v. Vijayalaxmi Timber Depot* [2002 126 STC 169. Placing reliance on the above said decisions, counsel contended that movement of goods which takes place independently of a contract of sale would not fall within the ambit of Clause (a) of Section 3 of the Central Sales Tax Act. Counsel submitted that transaction entered into between KELTRON and ECIL did not constitute sale in the course of inter-State trade or commerce and therefore there is no liability to pay tax under the Central Sales Tax Act. Counsel submitted that movement of goods from Kerala to Bombay was not in furtherance of any contract of sale but moved independently to the branch for further sale. Counsel submitted in order to determine whether sale has been taken place in the course of inter-State trade or commerce, matter has to be adjudged only if concluded sale has taken place, because unless sale takes place the question regarding the application of sales tax does not arise at all. Placing reliance on the delivery chalan and lorry receipts, counsel submitted that delivery was to the branch office of KELTRON to ECIL and therefore it is a branch transfer. Counsel also placed reliance on the order of assessment passed by the Bombay sales tax authorities.

7. Learned Standing Counsel appearing for the department, Sri Georgkutty Mathew, placed reliance on the decisions of the apex Court in *English Electric Company of India Ltd. v. Deputy Commercial Tax Officer* [1976 38 STC 475, *Sahney Steel and Press Works Ltd. v. Commercial Tax Officer* [1985 60 STC 301, *Union of India v. KG. Khosla and Co. Ltd.* [1979] 43 STC 457, *Ashok Ley land Ltd. v. Union of India* [1997 105 STC 152 and *State of Andhra Pradesh v. National Thermal Power Corporation Ltd.* [2002 127 STC 280 : (2002 10 KTR 560. Reference was also made to the decisions of this Court in *A.L. Antony v. State of Kerala* [1978 42 STC 180 and *Vijayamohini Mills v. State of Kerala* [1989 75 STC 63. Learned Government Pleader contended that movement of goods from one State to another is an incident of contract and sale in the course of inter-State sale and does not matter which is the State in which the property

passes. Counsel submitted what is decisive is whether sale is one State to another. Counsel submitted that the contract contains all the stipulations of a contract of sale. Counsel also submitted that u/s 6A(1) of the Central Sales Tax Act, the burden of proof is on the dealer to prove that movement of goods was occasioned not by reason of sale, but was occasioned by reason of transfer of such goods by him to any other place of business or to his agent or principal. Placing reliance on the decision of the apex Court in Ashok Leyland's case [1997 105 STC 152, Government Pleader submitted that mere fact that assessee was assessed under the General Sales Tax Act of a State is not the criteria to determine whether a sale is inter-State or not.

8. The KELTRON is admittedly a company owned by the Government of Kerala incorporated under the Companies Act having its registered office in Kerala. ECIL is also a registered company incorporated under the Companies Act, 1956 having its office in State of Andhra Pradesh and having its branch at Bombay. Placing reliance on the agreement, counsel contended that the agreement envisaged only for technical know-how to KELTRON and there was no agreement of sale. We find it difficult to accept the argument of assessee. Movement of goods from Kerala to Bombay succeeded the contract of sale. Contract of sale dated June 1, 1974 is the only incident based on which goods moved from State of Kerala to Bombay. As held in English Electric Co. of India Ltd. and Another Vs. The Deputy Commercial Tax Officer and Others, , when the movement of goods from one State to another is an incident of the contract of sale it is a sale in the course of inter-State trade falling u/s 3(a) of the Central Sales Tax Act. Apart from the agreement dated June 1, 1974 no other agreement with the branch office has been produced by the assessee. First condition with regard to inter-State sale has been satisfied. The goods actually moved from the State of Kerala to Bombay in the State of Maharashtra pursuant to contract of sale dated June 1, 1974. In fact goods moved from Kerala to Bombay only on the basis of agreement dated June 1, 1974. Another ingredient to be proved is that in the course of sale such movement of goods must be from one State to another. Sale in this case took place from Kerala to State of Maharashtra at Bombay where the sale is concluded. Therefore all the three ingredients to establish a sale in the course of inter-State have been satisfied in this case.

9. We are not prepared to say that the agreement dated June 1, 1974 is an agreement to give technical know-how. It is worthwhile to refer to some of the terms and conditions of the agreement. Agreement specifically states that KSEDC have obtained a letter of intent for the manufacture of commercial television receivers and is desirous of manufacturing T.V. receivers. Accordingly it had approached ECIL for technical know-how for the manufacture of commercial T.V. receivers and had agreed to for the manufacture of commercial T.V. receivers for which formal agreement dated August 30, 1973 was duly executed between KSEDC and ECIL. Later in modification of the said agreement dated August 30, 1973 both KSEDC and ECIL had decided to execute fresh agreement in supersession of the prior agreement dated August 30, 1973. Consequently

agreement dated June 1, 1974 was entered into. In the said agreement ECIL had agreed to give technical know-how to KSEDC for the manufacture of commercial T.V. receivers. Over and above, ECIL had agreed to furnish KSEDC additional know-how or know-how as it may require with reference to the manufacturing of the commercial T.V. receivers of 19" and 20" sizes. Further it was agreed to as follows :

KSEDC shall agree to manufacture T.V. receivers under ECIL brand name and sell, any of such receivers on their own or through their distributors, dealers or representatives, as per the directions of ECIL. During the period of currency of this agreement, KSEDC shall not be entitled to sell to other except with the permission of ECIL. The question of putting the KSEDC label on the set will be considered at the appropriate time after the quality of the receiver is well established in the market.

KSEDC shall strictly follow the inspection and testing procedures prescribed by ECIL during the process of manufacture of T.V. receivers. ECIL will be at liberty to. post at or send periodically to the television receiver factory of KSEDC their inspectors to supervise the processes and ensure that these procedures are followed. To ensure that the quality of the T.V. receivers is maintained, only those components approved by ECIL and detailed in the bill of materials shall be used in the manufacture of these T.V. receivers.

KSEDC shall arrange for the packing and-forwarding of the T.V. receivers as per the specifications given by ECIL.

KSEDC shall deliver the sets at such places and in such manner as desired by ECIL. On delivery ECIL shall pay 50 per cent of the agreed price plus the excise duty paid by KSEDC to the excise authorities on the sets delivered. The balance will be paid after satisfactory testing and acceptance of the goods by ECIL.

If any of the commercial T.V. receivers supplied by KSEDC are found defective on inspection by ECIL at the place of delivery, such of those sets shall be returned to KSEDC for rectification of the defect, KSEDC shall bear the transport charges to and fro if any, cost of rectification of the defect and other expenses incidental thereto.

Agreement had to be in force for a period of five years or till 25,000 sets were manufactured and delivered. Further we notice that at the time of transfer of goods in the State of Kerala there was no facility for T.V. reception. The facilities were available only in Bombay, Madras, Calcutta and New Delhi. What is decisive is whether sale is one which occurred from movement of goods from one State to another. Assessment if any under the sales tax law applicable in the State is not the criteria and cannot defeat inter-State sale, when ingredients are satisfied. In this case contract is between ECIL and KSEDC and not from the branch office of KSEDC at Bombay. Mere fact that octroi was paid does not mean that there was a contract of sale between the branch of the assessee and the ECIL. We have therefore no hesitation to hold that the Tribunal is justified in holding that

transactions are inter-State sales. We uphold the findings of the Tribunal and answer the question in favour of the Revenue.

10. In T.R.C. No. 50 of 2003 one additional question was raised, which reads as follows :

Whether on the facts and in the light of S.R.O. No. 710/76 issued under the KGST Act, the higher rate adopted for transaction not covered by C/D declarations is justified ?

The said question has been raised in T.R.C. Nos. 15 of 2003, 53 of 2003, 33 of 2003, 62 of 2003, 52 of 2003, 51 of 2003, 40 of 2003, 34 of 2003, 42 of 2003 and 41 of 2003. We notice that the question relates to rate of tax applicable to T.V. sets sold by the assessee. Stand of the department is that as per S.R.O. No. 710/76 rate of tax is 10 per cent. In respect of inter-State sale of electronic goods not covered by C/D declaration higher rate was levied. Plea for lower rate advanced by the assessee was rejected. We find the assessing authority has levied tax on sales which were not covered by C/D declarations. As per S.R.O. No. 1095 rate of tax is 9 per cent, but by Section 8(2)(b) tax payable by any dealer on his turnover in so far as the turnover or any part thereof relates to the sale of goods in the course of inter-State trade or commerce not falling within Sub-section (1) thereof shall in the case of goods other than declared goods, be calculated at the rate of ten per cent or at the rate applicable to the sale or purchase of such goods inside the appropriate State, whichever is higher and for the purpose of making any such calculation any such dealer, shall be deemed to be a dealer liable to pay tax under the sales tax law. Therefore, we find Tribunal is justified in deciding the dispute in favour of reduced rate of tax granted as per S.R.O. No. 710/76 and the assessee is deemed to be a dealer under the Kerala General Sales Tax Act. Since liability of the assessee as per the above order, the rate adopted by the assessing authority is 16 per cent and the challenge against S.R.O. cannot be considered u/s 8(1) of the Central Sales Tax Act. This question is also answered against the assessee and in favour of the Revenue.

11. In T.R.C. Nos. 15 of 2003, 53 of 2003, 33 of 2003, 66 of 2003, 52 of 2003, 51 of 2003 and 40 of 2003 the following question has been referred.

Whether the Appellate Tribunal is justified in not allowing the claim in respect of products of ancillary units covered by G.O. (Rt) No. 38/95/TD dated February 2, 1995 ? Is not the disallowance of claim of exemption based on stock transfer effected in F form declaration erroneous ?

The Tribunal noticed that G.O. (Rt.) 38/95/TD dated February 2, 1995 was not in existence at the time of completion of the assessment and it is proper that an opportunity be given to the assessee so that the said issue could be reconsidered. Assessment order to that effect was set aside by the Tribunal and assessing authority was directed to consider the issue in the light of the above said G.O. We find no reason to interfere with the said finding of the Tribunal.

12. In T.R.C. No. 44 of 2003 the following question of law has been raised.

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law in confirming the levy of tax on the transfer of fixed assets such as furniture, fixtures, office equipment, etc., to M/s. Electronic Research and Development Centre, especially when the revision petitioner was not a dealer in these items ?

We notice that during the year 1987-88 assessee-company had sold furniture, fixtures, office equipment, canteen wooden machinery and equipment and assets for research purpose amounting to Rs. 6,58,268 to KSEDC. Assessing authority levied tax on these items at the rate applicable to the said commodities. Contention was raised by the assessee that these transactions are not sales. It was contended that even if the transactions are treated as sales since these items are purchased from within the State petitioner is not liable to pay tax on the sale of those items. We notice with regard to the said issue assessee could not produce any evidence. Under such circumstances the claim was negatived. We find no reason to interfere with the same. The question is answered in favour of the Revenue. All the revision cases are disposed of as above.