
(2003) 04 KL CK 0058
In the High Court Of Kerala
Case No : O.P. No. 22715 of 1999

Kevi Hardware

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 09-04-2003

Acts Referred:

Citation : (2003) 2 ILR (Ker) 417 : (2003) 2 KLT 776

Hon'ble Judges : Jawahar Lal Gupta, C.J.; R. Rajendra Babu, J.; Kurian Joseph, J

Bench : Full Bench

Advocate : Abraham Mathew Vettoor, C.B. Sreekumar, P.I. Georgekutty, Marlin Mathews and K.P. Shahul Hameed, for the Appellant; Raju Joseph, Sr. Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Jawahar Lal Gupta, C.J.—Is the action of the respondent-assessing authority, in levying tax on the sale of "Dolomite" under Entry 42 instead of Entry 50 in the First Schedule of the Kerala General Sales Tax Act, 1963 legal and valid? This is the short question that arises for consideration in this case. A few facts may be noticed.

2. The petitioners are registered as dealers under the Kerala General Sales Tax Act. The assessments for the years 1992-93, 1993-94 and 1994-95 had been finalized. The competent authority had levied tax on the sale of "Dolomite" at the rate of 2.5% as prescribed under Entry 50. The assessments were arbitrarily reopened. The assessing authority proposed to levy sales tax under Entry 42 of the First Schedule. The proposal was based on the decision of a Bench of this Court in Marbles India v. State of Kerala, (1996) 4 KTR 445. A copy of the notice issued to the petitioner No. 1 has been produced as Ext. P2. Ultimately, the assessments were finalised for the years 1992-93, 1993-94 and 1994-95 on the basis that the sales were covered under Entry 42. The tax was levied at the rate of 12.5% for the years 1992-93 and 1993-94. For the year 1994-95, the rate of tax was fixed at 10%. Aggrieved by the order passed by the assessing authority,

petitioner No. 1 had filed an appeal. It was, inter alia, pointed out that the sales had been effected to dealers in fertilizers. The tax had been collected at the rate of 2.5% only. The decision of the Court in M/s. Marbles India had no relevance. The appellate authority considered the matter. It noticed that "the assessing authority has no case that the appellant had used dolomite powder for the manufacture of mosaic tiles so as to attract the rate of tax applicable to mosaic chips and mosaic powder." It had presumed that the powder sold by the appellant was used for manufacturing mosaic tiles for flooring purpose. This presumption was raised on the basis that the assessee was dealing in building materials. The appellate authority further noticed that the assessee had produced "certain sale bills for verification which shows that sale of dolomite powder is mainly effected to a fertilizer dealer, namely, M/s. Organic Fertilizers and the rate of tax charged is 2.5% only". Thus, the appellate authority allowed the appeals in respect of the three assessment years and remanded the case to the assessing authority for fresh disposal.

3. The petitioners allege that the departmental authorities have taken the view that "dolomite powder" is covered under Entry 42. It is proceeding on the basis of the decision in M/s. Marbles India case (supra). This decision is clearly distinguishable. The action in reopening of the assessments and the consequential proceedings are illegal. Thus, the petitioners pray for a declaration that the sale of "dolomite" is taxable only under Entry 50 at the rate of 2.5% and not at any higher rate under Entry 42 of the Schedule to the Act.

4. A counter affidavit has been filed on behalf of the respondents by the Assistant Commissioner (Law), Commercial Taxes, Ernakulam. According to the respondents, the petitioners are engaged in the sale of mosaic chips, whitewashing materials, cement, oxides and other flooring materials. The assessment in respect of petitioner No. 1 was completed for the assessment years 1992-93 to 1996-97 by treating "dolomite powder as a fertilizer vide Entry 50(xi) taxable at the rate of 2.5%." Thereafter, the assessing authority had made an enquiry. In view of the decision rendered by this Court in M/s. Marbles India case (supra), it had come "to the conclusion that dolomite powder dealt with by the petitioner-firm is taxable at the rates specified for mosaic chips and powder vide Entry 42 of the First Schedule of the Kerala General Sales Tax Act and taxable at the rate of 12.5% for the years 1992-93 and 1993-94. For the subsequent years, viz., 1994-95 and 1995-96, the rate of tax is 10%". Accordingly, all the assessments were revised u/s 19 of the Act. Thereafter, the Appellate Assistant Commissioner had remanded the matter for fresh disposal. In pursuance to the order of remand, the assessing authority "conducted a factual enquiry". The assessee did not produce any evidence to prove that they sold dolomite powder as fertilizer. It was also found that the main business of the petitioners was sale of mosaic chips and flooring materials. Hence, "assessment was completed treating dolomite powder sold by petitioner No. 1 as materials used for flooring work which is taxable under Entry 42 of the First Schedule to the Kerala General Sales Tax Act". In view of the decision of this Court in M/s.

Marbles India case (supra), "emphasis is to be given to the use to which the material is put in order to determine the distinctive feature of an article and not to the common parlance in which the material is referred to". The assessments were made after giving adequate opportunity to the petitioners. When the petitioners had failed to pay amounts due to the Government, steps for recovery were initiated. The procedure is in accordance with law. On this basis, the respondents maintain that the Writ Petition deserves to be dismissed.

5. The matter was posted before a Division Bench of this Court. It noticed that there was a conflict of view in the two Division Bench judgments of this Court in Marbles India v. State of Kerala, (1996) 4 KTR 445 and Southern Veneers & Wood Works Ltd. v. State of Kerala, (1997) 5 KTR 437. Thus, the matter was referred to a Full Bench.

6. Learned counsel for the parties have been heard. On behalf of the petitioners, it has been contended by Mr. Abraham Mathew that the action of the respondents in reopening the assessments and levying tax under Entry 42 is wholly illegal. "Dolomite" is clearly covered under Entry 50. Thus, it cannot be assessed as "mosaic chips and powder" under Entry 42. On the other hand; Mr. Raju Joseph, Special Government Pleader for Taxes, contended that the view taken by the authorities is in conformity with law and the decision in M/s. Marbles India (supra).

7. The Kerala General Sales Tax Act, 1963 was promulgated to consolidate the law relating to levy of tax on the sale or purchase of goods in the State. The incidence and levy of tax is governed by Section 5. A dealer is liable to pay tax when his total turnover for a year is not less than the prescribed amount. Initially, it was fixed at Rs. 1 lakh. By Act 19 of 1994 it was raised to Rule 2 lakhs. In case of goods specified in the First or Second Schedule, the tax is leviable at the rates mentioned therein. The Entries as relevant for the present case are contained in the First Schedule. For the assessment years in question, the Entries are 42 and 50. These read as under:-

Sl. no.

Description of Goods

Point of Levy

Rate of tax (%)

(1)

(2)

(3)

(4)

"42.

Cuddappa stone & slabs & other similar decorative stones and slabs, mosaic tiles, mosaic powder & chips, glazed tiles, marbles, marble slabs & chips, all other wall or floor tiles except brick tiles.

At the point of first sale in the State by a dealer who is liable to tax u/s 5..

12.5

50.

(i) Ammonium Chloride,

(ii) Ammonium Phosphate, sulphate of any description, (iii) Ammonium sulphate,(xi) Dolomite.....(xxvi)Any mixture of one or more of the articles mentioned in items (i) to (xxv) above, with or without the addition of any other articles (on the turnover relating to components thereof which have not already suffered tax)."

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A perusal of the above shows that Entry 42 deals with the sale of various items of building materials like Cuddappa stone & slabs, decorative stones, mosaic tiles, mosaic powder & chips etc. etc. However, it does not include "Dolomite". Still further, it is also clear that in Entry 50, Dolomite is specifically mentioned at serial number (xi). Thus, the short question that arises for consideration is - Could the assessing authority have levied tax on the sale of "Dolomite" as made by the petitioners under Entry 42?

8. It is well settled that the provisions of a fiscal statute have to be strictly construed. The assessee is entitled to take advantage of the loopholes in an Act. It is not for the court to plug those loopholes. Still further, when the goods are clearly described under different entries in the Schedule and different rates of levy are fixed, the court can assume that the Legislature intended to levy the tax on the goods mentioned in an Entry at the rate specified therefor. Another rule followed by Courts is that the dealers are not technically qualified persons. They are not botanists, engineers or scientists. The goods have to be seen from the view point of the trade. Even the dictionary may not be a good guide.

9. Under the Act, the taxable event is the sale or purchase of goods. The levy of sales tax is normally not dependant on the "use" of the goods. It is not unknown that an item can be used for different purposes. When a particular item is specifically mentioned under a specific Entry, the mere fact that the article can be used for another purpose as well, would not mean that the specific Entry can be ignored and that tax can be levied on the basis of a general Entry. When the Legislature has clearly included a particular commodity under an Entry and prescribed the rate of tax, the court is entitled to assume that the legislative intent was to levy tax at the rate as prescribed under the specific Entry and not under any other provision. The principle of "generalia specialibus non-derogant"

is clearly attracted in such a situation. It is an accepted norm for the interpretation of a statute that the special over-rides the general. It promotes justice. It avoids uncertainty. What is the position in the present case?

10. Entry 50 in the Schedule mentions various products. "Dolomite" is one of those. It is specifically mentioned. The tax is levied on the sale of the commodity. The rate of tax is not relatable to or dependant upon the use of the goods. The Legislature having specifically mentioned Dolomite under Entry 50, the Court is entitled to presume that it wanted to levy tax on the sale or purchase of the commodity at the rate of 2.5%. Not at a higher rate.

11. There is another aspect of the matter. Entry 42 deals with stones etc. It may even be possible to use Dolomite in one form or the other for the purpose of preparing tiles. Yet, it cannot be said that the goods shall be covered under Entry 42 for the reason that Dolomite has been specifically included in Entry 50.

12. It deserves notice that according to "the Condensed Chemical Dictionary" (9th Edition), as revised by Gessner G. Hawley, Co-editor, "Encyclopedia of Chemistry", Dolomite is "a carbonate of calcium and magnesium". It is found in different colours like grey, pink and white. It can put to different uses like "refractory for furnaces; manufacture of magnesium compounds and magnesium metal; as building material; in fertilizers: stock feeds; paper making; ceramics, mineral wool; removal of sulphur dioxide from stack gases". According to "Materials and Technology", a "Systematic Encyclopedia of the Technology of Materials used in Industry and Commerce, including foodstuffs and fuels based upon a work originally devised by the late Dr. J.F. Van Oss, Volume II", Dolomite can be used as "a concrete aggregate, road metal, railroad ballast, poultry grit, filler, whiting, soil conditioner, acid neutralizer, and raw material in glass-making..... dimension stone dolomite is used for building purposes." Thus, it is clear that Dolomite can be put to different uses. But the mere fact that the Article can be used for different purposes cannot mean that the assessing authority shall have the wide discretion to tax it under one or the other Entry. Its discretion shall be essentially limited by the Entry. In case there is a specific Entry, the assessing authority shall not be entitled to impose the tax under a general Entry. The levy of tax has to be at the rate as specified under the relevant Entry.

13. Mr. Raju Joseph submitted that the petitioners are dealing in hardware materials. They are selling cement, chips and steel. Thus, it can be safely assumed that they are selling even Dolomite for use as a building material.

14. The contention cannot be accepted. It is not unknown that one can buy a large variety of goods under one roof. Today, some of the big stores provide almost everything in one place. One can buy anything, from a ear to curry powder, under one roof. Thus, the mere fact that the petitioners are selling certain items of building material cannot mean that they are precluded from selling other goods. There is no ban on the petitioners selling Dolomite, which can be used as

a fertilizer also, in the same store in which they are conducting sale of other items. The rate of tax is not relatable to the premises. Nor to the other goods sold by the dealer.

15. There is another aspect of the matter. Entry 42 refers to different kinds of building material. Nothing has been placed on record to show that Dolomite is covered under that Entry. It is not Guddappa stone or a slab or a decorative stone. It is not a mosaic tile or a mosaic powder. The petitioners are admittedly not selling Dolomite as chips or glazed tiles, marbles, marble slabs etc. Thus, it cannot be said to fall under Entry 42. Resultantly, it cannot be taxed at the rates as mentioned therein.

16. Learned counsel for the respondents contended that "user" is relevant for determining the head under which the goods shall be taxed. He referred to the decision of the Division Bench in M/s. Marbles India case (supra). In this case, the issue related to the levy of tax on Magnesite powder used for manufacture of mosaic tiles. The assessee had claimed that Dolomite was Magnesite powder. While dealing with the issue, the Division Bench had observed that :

"the distinctive characteristic feature of article could be determined only with reference to its use. If dolomite is used as a fertilizer and it is so established in the enquiry, it may be a case of levy of sales tax at the rate of 2%. On the otherhand, if it is used as a raw material for manufacture of mosaic tiles, it will attract tax at the rate of 10%. When there is such a dispute, it cannot be said that the assessing authority has no power to conduct an enquiry in that behalf. It is essentially for the dealer to explain as to how the article has been used by him".

On the basis of these observations, it was contended that the action of the authorities is legal and valid. Is it so?

17. It deserves mention that the assessee in the above noted case was a manufacturer of tiles. The Bench had noticed that "during the enquiry, the assessee had admitted that it is a raw material used for the manufacture of mosaic tiles." Thus, the Sales Tax Officer had "treated the goods as a raw material used for the manufacture of mosaic tiles and thereby applied the rate of tax at 10%". This finding of fact was upheld by the Division Bench. The decision was based on the peculiar facts. However, it is not an authority for the proposition that Dolomite can only be used for manufacture of mosaic tiles. It has also not been held that Dolomite is not a fertilizer. In fact, as noticed above, Dolomite can be used for a variety of purposes. Since it has been specifically mentioned in Entry 50, it cannot be taxed under the general Entry 42. The Act does not authorize the Authority to shift an item from one Entry to another on the basis of its use. While interpreting a taxing Entry, the use of a particular item for a purpose other than that mentioned in the Special Entry cannot be the basis for the levy of tax at a higher rate. If the goods, which form the subject matter of transaction of sale, are covered under an Entry, the benefit of concessional

rate cannot be denied to the assessee on the basis of the fact that the goods could also be used by the purchaser for some other purpose. Once the Entry is clear, there can be room for invoking "use" and creating confusion. Only Entry has to be seen. All else shall be extraneous. The rule in this behalf was clearly enunciated by a Division Bench of this Court in *Dy. Commissioner v. Western India Plywoods*, 1980 KLT 592. Eradi, C.J. (as his Lordship then was) had categorically observed as under:-

"Once it is found that the commodity which forms the subject matter of the transaction of sale or purchase is directly covered by an entry in the First Schedule, the benefit of the concessional rate becomes available to the assessee and that will not be lost by reason of the fact that the goods purchased were used by the assessee for a purpose other than what is regarded as the predominant or ordinary use of that article".

18. Still further, in *Mukesh Kumar Aggarwal and Co. Vs. State of Madhya Pradesh and Others*, , while reversing the decision of the Madhya Pradesh High Court, their Lordships of the Supreme Court had observed as under:

"Here again, pushed to its logical conclusions, the reasoning incurs the criticism of proceeding to determine the nature of the "goods" by the test of the use to which they are capable of being put. The "user-test" is logical: but is, again, inconclusive. The particular use to which an article can be applied in the hands of a special consumer is not determinative of the nature of the goods. Even as the description of the goods by the authorities of the forest department who called them wrongly as "eucalyptus fuel-wood" "eucalyptus wood-heap", etc., is not determinative, the fact that the purchasers were dealers in timber is also not conclusive".

The above observations clearly show that the use of which an article can be put by a particular consumer is not determinative of its true nature. The user-test is not conclusive. Similarly, the business of the purchasers is not determinative of the rate of levy. A similar view was also taken by a Division Bench of this Court in *Southern Veneers & Wood Works Ltd. v. State of Kerala*, (1997) 5 KTR 437. In this case, it was held as under:

"What is relevant is the article which is subject to levy of tax. There is no difficulty in identifying the article. It is attempted to be understood in terms of its use, which is not permissible. In a taxing statute what is taxable is the article referred to in the Entry and it cannot be understood in the context of its use. The article sold was veneer and would be governed by Entry 94, subject to tax at 4% during the relevant assessment year in question".

19. Another fact, which may be mentioned here, is that the petitioners are merely engaged in the sale of goods. They are not manufacturing any item. Anyone can walk into a shop. He can buy the goods. The dealer can charge tax only at the rate mentioned in the relevant Entry. The petitioners or any other dealer shall have no control over the actual use of the goods after these have

been sold. The purchaser may use them for making tiles or as fertilizer. Very often, a salesman shall not record the name or the particulars of the person who purchases any item. In any event, he may not have any means to verify the actual name of the purchaser. Still further, it can be easily assumed that a person may purchase Dolomite from a dealer with a written undertaking that he will use it as fertilizer. Having got it, he may use it for making tiles. In such a situation, it cannot be said that the petitioner shall be liable to pay tax at a higher rate than that specified in Entry 50. The reason is that he would have no control over the purchaser with regard to the use of the goods. Since the petitioners are not engaged in the manufacture of goods, the possible use of the goods cannot determine their liability. Entry 50 being absolutely clear, the liability could be determined only at the rate fixed therein.

20. Mr. Raju Joseph contended that the petitioners are liable to pay tax as leviable on the sale of tiles etc. Otherwise, the revenue would suffer loss. On the other hand, Mr. Abraham Mathew, learned counsel for the petitioners, pointed out that as a consequence of the reopening of the assessments since the year 1992, the Department has not only created an additional liability, but the assesseees are also liable to pay interest at the rate of 24% u/s 23(3). The result is that the assesseees have been made liable to pay substantial amounts despite the fact that they had collected tax only at the rate of 2.5%. According to the counsel, it would be wholly inequitable to allow the respondents to do so.

21. The contention appears to be well founded. It has not been even suggested on behalf of the respondents that the petitioners had actually collected tax at the rate of 10% or 12.5% during the relevant assessment years. It is also the admitted position that the assessments had been originally made on the basis that the goods were covered under Entry 50. The cases were reopened after a long time in view of the decision of this Court in *M/s. Marble India's* case. Still further, interest is leviable at the rate of 24%. This would create a substantial liability against the petitioners. It is true that the principle of unjust enrichment has been normally used against the assesseees only. But, in the present case, the State is attempting to recover what the assesseees are not even alleged to have collected. If permitted, there would be injustice. Justice or fairness is normally not a valid argument in cases of payment of tax. However, in the present case, it would appear to be totally inequitable to sustain the plea of the State.

22. No other point was raised.

23. In view of the above, it is held that:-

(1) An Entry in a fiscal statute has to be strictly construed. While ascertaining the meaning of a fiscal Entry, "reference to a dictionary is apt to be a somewhat delusive guide as it gives all the different shades of meaning". Equally, an Entry has not to be examined in the light of what a scientist or a technically trained person would think of it to be. Normally, the common parlance test has to be applied. However, these questions can arise only when the language of the

statute is not clear. When an item has been specifically mentioned, it has to be understood in its popular sense. It has not to be given a technical meaning.

(2) Once the Entry is clear, it can be assumed that the legislative intent was to tax the commodity at the rate mentioned in the Entry and not at a higher rate under any other entry on the basis of a possible use of the commodity. In such a case, the user-test is not a safe guide as various items can always be used for different purposes.

(3) In the present case, it is clear that "Dolomite" can be used as a fertilizer. It is also clear that the petitioners are not manufacturing tiles or any items of building material. The mere fact that the commodity can be used for making tiles cannot mean that the tax can be levied under Entry 42. If the rule in *M/s. Marbles India* case (supra) is to be interpreted as entitling the assessing authority to levy tax under Entry 42, in our opinion, it does not contain the correct enunciation of law. So far as the present case is concerned, "Dolomite" can only be assessed under Entry 50 of the First Schedule in the Act.

Resultantly, the Writ Petition is allowed. It is held that the sales of dolomite can be assessed only under Entry 50. The view taken by the Division Bench in *Marbles India v. State of Kerala*, (1996) 4 KTR 445 was based on the admission of the assessee. However, it does not contain the correct statement of law. It is, consequently, over-ruled. The parties are left to bear their own costs.