
(1971) 10 KL CK 0009
In the High Court Of Kerala
Case No : O.P. No. 6416 of 1970

K.L. Johar and Co.

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 07-10-1971

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 6

Citation : (1973) 30 STC 394

Hon'ble Judges : V. Balakrishna Eradi, J

Bench : Single Bench

Advocate : C.T. Peter and T.C. Karunakaran, for the Appellant; Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

V. Balakrishna Eradi, J.—The petitioner-company is a registered dealer under the Kerala General Sales Tax Act, 1963. They are carrying on business at Ernakulam in the sale of foreign liquor. Considerable amounts had been paid by the company by way of excise duty in respect of the quantities of liquor brought by them into this State and, quite naturally, the company has been passing on this liability in respect of the excise duty to their purchasers by the process of inclusion of such amounts under the head "excise duty" in the sale invoices. The question raised in this writ petition is whether the amounts of excise duty so charged to the customers are not liable to be included in the taxable turnover of the petitioner for purposes of assessments under the Kerala General Sales Tax Act. Under the order of provisional assessment made against the petitioner-company for the month of October, 1970, evidenced by exhibit P-4, the assessing authority--Sales Tax Officer, Special Circle, Ernakulam--overruled the petitioner's objections and held that the amounts included in the bills under the head "excise duty" did not form an allowable deduction in computing the taxable turnover and the assessment was made on that basis. The petitioner has sought to quash exhibit P-4 and has also prayed for a declaration that" the Notification, exhibit

P-5, dated 28th December, 1965, published by the State Government in the Kerala Gazette dated 29th December, 1965, amending the Kerala General Sales Tax Rules, 1963, by deleting Clause (i) of Rule 9 is illegal and ultra vires.

2. Another head of deduction which the petitioner had claimed before the assessing authority was with respect to the freight charges incurred by the company for transporting the liquor to Ernakulam and that was also disallowed by the 2nd respondent in exhibit P-4. The petitioner challenges the legality of the action taken by the 2nd respondent in including in the taxable turnover amounts collected by him from his customers by way of such inward freight charges.

3. u/s 5 of the General Sales Tax Act, 1963, hereinafter referred to as the Act, every dealer whose total turnover for a year is not less than ten thousand rupees, shall pay tax on his taxable turnover for that year 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, and in the case of other goods at the rate of three per cent, at all points of sale. Liquor other than toddy is included in item 1 in the First Schedule and it is taxable at 50 per cent, at the point of first sale in the State by a dealer who is liable to tax u/s 5. The expression "taxable turnover" is defined in Section 2(xxv) as meaning the turnover on which a dealer shall be liable to pay tax as determined after making such deduction from his total turnover and in such manner as may be prescribed, but shall not include the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export of goods out of the territory of India or in the course of import of goods into the territory of India. It, therefore, remains to examine what exactly the scope of the expression "turnover" is. That again is the subject-matter of a definition in the Act which is contained in Clause (xxvii) of Section 2. That clause defines the word "turnover" thus:

(xxvii) "turnover" means the aggregate amount for which goods are either bought or sold, or supplied or distributed, by a dealer, either directly or through another, on his own account or on account of others, whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant, or otherwise, shall be excluded from his turnover.

Explanation (1)-"Agricultural or horticultural produce" shall not include-

(i) such produce as has been subjected to any physical, chemical or other process for being made fit for consumption, save mere cleaning, grading, sorting, drying or dehusking ;

(ii) tea, coffee, rubber, cardamom or timber.

Explanation (2)-Subject to such conditions and restrictions, if any, as may be prescribed in this behalf,-

(i) the amount for which goods are sold shall include any sums charged for

anything done by the dealer in respect of the goods sold at the time of, or before, the delivery thereof ;

(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover ; and

(iii) where for accommodating a particular customer, a dealer obtains goods from another dealer and immediately disposes of the same to the said customer, the sale in respect of such goods shall be included in the turnover of the latter dealer but not in that of the former.

According to the above definition the aggregate amount for which goods are either bought or sold or supplied or distributed by a dealer will constitute his turnover for the purposes of the Act. Where the taxing point is the sale point, the aggregate amounts for which the goods are sold or supplied will be the turnover in respect of the transactions of sale. The expression "total turnover" has been defined as meaning the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax, including the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India.

4. Once the total turnover of a dealer is determined on the basis of the above definitions all that has to be done to arrive at the "taxable turnover" is to effect a computation by making the prescribed deductions from the total turnover. Rule 9 of the Kerala General Sales Tax Rules, 1963, lays down what are permissible deductions for the purpose of determining taxable turnover under the Act. An assessee will be entitled to a deduction of any amount from his taxable turnover only if the said amount falls within one or other of the categories specified in Clauses (a) to (I) of Rule 9 referred to above. In the said rule as it was originally framed, provision was contained in Clause (i) for the deduction from the total turnover of a dealer of amounts of excise duty, if any, paid by him to the Central Government in respect of the goods sold by him. By an amendment introduced in the Rules with effect from 1st January, 1966, as per a notification dated the 28th December, 1965, exhibit P-5, Clause (i) was omitted. Thus, the resultant position that obtains on and from the 1st January, 1966, is that there is no provision in any of the clauses of Rule 9 which authorises the deduction of amounts paid by way of excise duty from the total turnover of a dealer for the purpose of determination of his taxable turnover.

5. It is argued on behalf of the petitioner that the State Government have acted in excess of its powers in amending Rule 9 by deleting Clause (i), because, according to the petitioner, the purpose and effect of the said amendment is to make taxable a turnover which really is not liable to be taxed under the provisions of the parent enactment. Elaborating this contention, the petitioner's

counsel sought to rely on Section 6 of the Act as containing a clear indication that it is not the intention of the Legislature that sales tax should be levied in such a way as to operate as a tax on tax. To examine the tenability of this argument, it is necessary to refer to the provisions of Section 6 of the Act. That section reads :

6. Tax under this Act to be in addition to tax under Central Act 74 of 1956 or any other law.-The provisions of this Act relating to taxation of successive sales or purchases inside the State, only at a single point or at one or more points, shall apply only to sales or purchases inside the State (other than sales or purchases in the course of inter-State trade or commerce) ; and the tax under this Act shall be levied in addition to any tax levied under the Central Sales Tax Act, 1956 (Central Act 74 of 1956), or any other law for the time being in force.

The petitioner's advocate sought to derive support for his contention from the last portion of the above section which states that the tax under this Act shall be levied in addition to any tax levied under the Central Sales Tax Act, 1956, or any other law for the time being in force. It is urged that the words "in addition to" must be understood as meaning "inclusive of" and that if construed in that manner the conclusion that should necessarily follow is, that in levying sales tax under this enactment the amount of "any tax levied under any other law for the time being in force" should not be included as part of the turnover of a dealer for the purposes of computing the sales tax. On this reasoning, counsel submitted that the assessing authority was bound to allow a deduction in respect of amounts paid by way of excise duty since the excise duty is a tax.

6. I do not find it possible to uphold the above contention put forward by the petitioner's counsel because the obvious result of construing Section 6 in the manner suggested by the petitioner would be to completely defeat the very purpose of the said provision. I feel no doubt that the object of the Legislature in enacting Section 6 is to clarify beyond doubt that irrespective of the payment of any other tax by the dealer whether under the Central Sales Tax Act or any other law for the time being in force in respect of the goods or in respect of the turnover, there will be liability for payment of sales tax under the Kerala General Sales Tax Act and that the said liability will be entirely unaffected by the provisions for taxation that may be contained in any other enactment. Section 6 is not the charging section, nor does it deal with or lay down the principles for determination of the taxable turnover of a dealer or for the grant of exemption from taxation in respect of amounts representing taxes paid under other enactments. On the contrary, as already pointed out, the effect of Section 6 is to declare unambiguously that the liability under this Act shall be absolute in the sense that it is quite independent of any other tax liability that may exist in respect of the goods or the transactions of sale or purchase under other enactments of the Central Legislature or the local Legislature.

7. I see no merit at all in the petitioner's contention that the State Government had no inherent competence to amend Rule 9 by deleting Clause (i). If it could

originally make the rule incorporating Clause (i) in it, it must necessarily follow that it has full power to amend the rule at any subsequent stage by deleting any one of the clauses originally included in it.

8. Equally untenable is the petitioner's next argument that the effect of the deletion of Clause (i) by the impugned notification, exhibit P-5, is to create by a rule a liability to tax which the Legislature has not provided for in the parent enactment. I have already repelled the plea advanced on behalf of the petitioner based on Section 6 of the Act that the scheme of the Act is to exclude from taxation that portion of the turnover which represents excise duty paid by the dealer. u/s 5 which is the charging section, every dealer is liable to pay tax on his taxable turnover at the rate and at the points specified therein. Applying the definition of turnover contained in Section 2(xxvii), the aggregate amounts for which the goods are sold or supplied by the petitioner will constitute his turnover and the entirety of it will form his taxable turnover except to the extent to which any portion thereof falls within the items of allowable deduction enumerated in Rule 9. Since under the said rule, as it now stands, amount representing the excise duty paid to the Central Government is not a permissible item of deduction, it cannot be excluded in determining the taxable turnover for the purposes of the Act. It is true that originally the rule-making authority had incorporated in the Rules a provision in Clause (i) of Rule 9 authorising deduction in respect of amounts paid by way of excise duty. The fact that subsequently the rule has been amended by deleting the said provision is relied on by the petitioner as constituting the imposition of a new tax. This argument is clearly fallacious because what was done as per the amendment was only the withdrawal of an exemption. The very fact that an exemption had to be originally provided for necessarily implies that but for the said exemption that portion of the turnover was liable to be taxed under the Act. Hence, there is absolutely no substance in the contention that by the deletion of Clause (i) of Rule 9 there has been an illegal imposition of a new tax by the executive without legislative authorisation. The decision reported in *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*, which was sought to be relied on by the petitioner's advocate has absolutely no application to the facts of this case.

9. Another contention put forward on behalf of the petitioner is that by including in the taxable turnover the amounts of excise duty also, it becomes a case of taxation on tax and such a levy is illegal and unauthorised by Section 5 of the Act. I have already referred to the definition of the words "turnover", "total turnover" and "taxable turnover". The Legislature has authorised the levy of tax on the entire amount of total turnover of a dealer after making only the deductions that are specifically provided for in the Rules. The total turnover for the purposes of the Act is the aggregate amount for which the goods are sold or supplied by the dealer. The aggregate amount for which the petitioner has sold the goods includes the amount of excise duty in respect of which the company is now claiming immunity from taxation. The excise duty paid by the petitioner-company has been passed on by it to its customers by including it in the total

amount of the sale bills. The levy of tax under the Act in respect of the goods in question is on the sale turnover and the mere fact that one of the ingredients which has gone into the calculation of the total invoice price happens to be excise duty paid for bringing the goods into the State will not make the levy under the Kerala General Sales Tax Act, a tax on the excise duty. The petitioner has offered the goods for sale quoting a price which included the excise duty which it decided to pass on to the buyer. The aggregate amount for which the goods are sold includes such excise duty and the entirety of the said amount constitutes the turnover for the purposes of the Act. I do not find any constitutional inhibition whatever prohibiting the State Legislature from levying sales tax on the turnover of a dealer determined on the basis of the aggregate amount for which the goods are sold.

10. The Supreme Court had occasion to consider a similar question in *George Oakes (P.) Ltd. Vs. State of Madras*, where a contention had been taken that the levy of sales tax on the turnover of a dealer which included purchase tax paid by him and passed on to his customer was illegal. Rejecting that contention, their Lordships held that when a sale attracts purchase tax and the tax is passed on to the consumer, what the buyer has to pay for the goods includes the tax as well and the aggregate amount so paid would fall within the definition of turnover and was taxable. Their Lordships quoted with approval the dictum of Lawrence, J., in *Paprika Ltd. and Anr. v. Board of Trade* [1944] 1 All E.R. 372 wherein the learned Judge had said:

Whenever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands but it does not cease to be the price which the buyer has to pay even if the price is expressed as X plus purchase tax.

Reference, was also made to the decision of Goddard, Lord Justice, reported in *Love v. Norman Wright (Builders) Ltd.* [1944] 1 All E.R. 618 wherein the learned Lord said thus :

Where an article is taxed, whether by purchase tax, customs duty, or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration though made up of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or not.

Applying those principles, the Supreme Court held that there was nothing in the provisions of the Madras General Sales Tax Act (9 of 1939) or of the Madras General Sales Tax (Definition of Turnover and Validation of Assessments) Act (17 of 1954) which would indicate that when the dealer collects any amount by way of tax that cannot be part of the sale price and that there was no reason why the

whole amount paid to the seller by the purchaser should not be treated as consideration for the sale and included in the turnover.

11. In a later decision of the Supreme Court reported in *State of Kerala Vs. Ramaswami Iyer and Sons*, their Lordships had occasion to consider the same question with reference to the provisions of the Travancore-Cochin General Sales Tax Act, 1950. Their Lordships held that the principles laid down in *George Oakes (P.) Ltd. Vs. State of Madras*, would fully govern the interpretation of the expression "turnover" occurring in the Travancore-Cochin General Sales Tax Act and, since there was at the material time no express provision in the said enactment which obliged the taxing authority to exclude from the computation of tax the amount of sales tax collected by the dealer, the contention that the inclusion of those amounts in the taxable turnover was illegal was held to be devoid of substance.

12. The definition of the expression "turnover" contained in the Kerala General Sales Tax Act, 1963, is substantially the same as was contained in the Travancore-Cochin General Sales Tax Act. The principles laid down by the Supreme Court will therefore fully govern the present case as well. The contention advanced by the petitioner that the assessing authority acted illegally in including in the taxable turnover amounts representing the excise duty paid by the petitioner and passed on to the customers will therefore stand rejected.

13. It now only remains to examine the further point raised by the petitioner, namely, that the company ought to have been allowed deduction in respect of the freight charges incurred by it for bringing the liquor to Ernakulam from the place of manufacture which amounts had been separately shown in the invoices relating to the transactions of sale included in the turnover. This subject is again directly covered by two decisions of the Supreme Court, one of which was rendered in a case where the petitioner himself was a party. The earlier decision is reported in *Dyer Meakin Breweries Ltd. Vs. State of Kerala*, wherein their Lordships held that the expenditure incurred by the dealer by way of freight and handling charges prior to the sale was a component of the price for which goods were sold and the dealer was not therefore entitled to deduction thereof under Rule 9(i) of the Kerala General Sales Tax Rules, 1963. The same principle was restated and applied by the Supreme Court in *D. C. Johar & Sons (P.) Ltd. v. Sales Tax Officer, Ernakulam, and Anr.* [1971] 27 S.T.C. 120 (S.C.) which was a decision rendered in an appeal preferred by the petitioner-company. It was held that the company was not entitled to claim exemption in respect of freight and packing and delivery charges notwithstanding the fact that separate bills had been made in respect of those amounts. The Supreme Court pointed out that the tax levied is a tax on the turnover, that is, on the aggregate of the sale price received by the dealer in respect of the sale of goods. The question being thus concluded by the pronouncements of the Supreme Court, it is clear that the second ground of exemption put forward by the petitioner has also only to be rejected.

14. The original petition, therefore, fails and is dismissed. The parties will bear their respective costs.