
(2001) 11 MAD CK 0028

In the Madras High Court

Case No : Writ Petition No. 14760 of 1999

Kma Finished Leather (P) Ltd.

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 20-11-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Tamil Nadu General Sales Tax Act, 1959 — Section 2

Citation : (2004) 134 STC 185

Hon'ble Judges : R. Jayasimha Babu, J;A.K. Rajan, J

Bench : Division Bench

Advocate : K.J. Chandran, for the Appellant; T. Ayyaswamy, Special Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

R. Jayasimha Babu, J.—Misconstruing the scope of the law laid down by the apex Court in relation to REP licences, the assessing officer

appears to have let loose his imagination to regard the drawback of customs duty allowed to the petitioner-exporter, of the customs duty that had

been paid by it at the time of export.

2. The drawback which is effected by issue of cheque by the Government for the amount of the drawback, or by crediting the amount to the bank

account of the exporter, is in effect a refund of the monies that had been paid by the exporter towards customs duty. What is refunded is only

money. The amounts refunded are not traded and there is no sale of those monies.

3. The utter confusion in the mind of the assessing officer who issued the impugned pre-assessment notice proposing to levy sales tax on the sums

aggregating to over two crores received by the petitioner from the Central Board of Customs as duty drawback during the years 1994-95 to

1998-99, is evident from the following paragraph in that notice :

REP licence/exim scrip patterns, trade mark, permission import licence quota sales and other goods of incorporeal and intangible character shall

fall under category of sale of other goods. Similarly sales of credit of import in duty entitlement pass book is also taxable under residuary entry.

Hence the duty drawback is received by the company, as an incentive, it shall be deemed as proceeds out of sale of other goods. Incidentally it

shall be also deemed as proceeds received/other valuable consideration received which is incidental and ancillary to the main business. The Section

2(d) of the TNGST Act advertisement that business includes in Schedule, clause (ii) may transaction in connection with or incidental or ancillary to

such trade or commerce, manufacture, adventure or concern. As said already the goods are incorporeal or intangible character shall also be

considered as goods within the definition of Section 2(d) of the TNGST Act, 1959. The transfer of intangible goods by mere permission in writing

is sufficient to make it as taxable. The trade mark itself or the right there is need not be transferred. Therefore the duty drawback receipt since fall

under the category of other goods of incorporeal or intangible character, it is proposed to be assessed under the TNGST Act, 1959 as shown

below :

DUTY DRAWN RECEIPTS :

Year Turnover Rate of tax Tax due SC/ASC AST Total Penalty at 150%

1994-95 8,48,652 8% 67,892 13,578 ... 81,470 1,22,205

1995-96 31,09,736 8% 2,48,779 49,756 31,646 3,30,181 4,95,272

1996-97 56,37,580 11% 6,20,134 6,20,134 9,30,201

1997-98 95,52,842 11% 10,50,813 10,50,813 15,76,220

1998-99 48,54,444 11% 5,33,989 5,33,989 8,00,984

1998-99 1,06,010 11% 11,661 11,661 17,492

Quota sales

Total 2,41,09,264 25,33,268 69,334 31,646 26,28,249 39,42,374

Total of Tax, SC/ASC and AST due : Rs. 26,28,248

Penalty at 150% due : Rs. 39,42,374

Rs. 65,70,622

4. The assessing officer has jumped to the conclusion that the amount of duty drawback is goods because it is an incentive given for export and

certain other incentives given for export such as REP licences which confer a transferable right to import goods and which can be sold for a

monetary consideration are goods. He has further assumed that the drawback treated by him as goods, and which even according to him has not

been sold to anyone, should be regarded as forming part of the petitioner's total turnover. He has also asserted that there has been wilful

suppression and sought to levy penalty at the rate of 150 per cent in the sum of Rs. 39,42,248.

5. Money which is legal tender and is used to buy goods or services is not ""goods"" under the residuary or any other entry in the Schedules to the

Tamil Nadu General Sales Tax Act, 1959. The refund of customs duty to an exporter does not result in a sale of those monies to the exporter. The

monies received by the exporter is not sold, but is utilised as legal tender for purchase of goods or services or discharge of obligations or by way

of investments. Even if the drawback is capable of being regarded as forming part of the consideration for export--in fact it does not--export sales

being exempt from levy of sales tax, the amount of the drawback cannot be regarded as forming part of the taxable turnover. Goods cannot form

part of taxable turnover. ""Turnover"" is defined in Section 2(r) of the Act as meaning "".....the aggregate amount for which goods are bought or

sold....."". Even if money can be goods, it cannot form part of the taxable turnover.

6. Permitting the proceeding to continue on the wholly erroneous and false premise that the amount of duty drawback is goods, and such alleged

goods"" even though they are not the subject-matter of sale, form part of the taxable turnover, would result in needless and wholly unjustified

harassment of exporters who are being encouraged to maximise their exports by granting to them, by way of incentive, drawback of the customs

duty paid by them. When there is no transaction of sale and the thing sought to be regarded as goods is in fact and in law not goods, the

proceedings initiated is without jurisdiction.

7. We, therefore, consider it appropriate to put an end to this at the inception, even though this Court will not normally interfere with proceedings

under the Act at the stage of a pre-assessment notice. Having regard to the special facts of this case, the exercise of our extraordinary power is

warranted.

8. The pre-assessment notice is quashed and the order of the Tribunal set aside. The writ petition is allowed.