

(2009) 06 KL CK 0013

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 6059 of 2009 (B)

K.M.J. Rice Mill

APPELLANT

Vs

Sales Tax Officer

RESPONDENT

Date of Decision : 04-06-2009

Acts Referred:

Central Sales Tax Act, 1956 — Section 15
Kerala General Sales Tax Act, 1963 — Section 5(1), 5A

Citation : (2011) 40 VST 478

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : Raju Joseph, for the Appellant; Vinod Chandran, Special Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P.R. Ramachandra Menon, J.—The Petitioner-firm is an SSI unit engaged in the business of manufacturing rice from paddy. The grievance projected in the writ petition is against exhibits P5 and P6 reassessments made by the assessing officer without any regard to the dictum in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, , which aspect was specifically directed to be considered and decided as per exhibit P4 judgment, in Sales Tax Revision No. 319 of 20071 preferred by the Petitioner.

2. With regard to the sequence of events, the case of the Petitioner is that, by virtue of the notification issued by the Government, the Petitioner is entitled to have exemption. But while finalizing the assessment for the years 1998-99 and also 1999-2000, the Petitioner could not produce the "exemption certificate" before the assessing authority, which made the assessing authority to pass the assessment orders denying the benefit of exemption. Met with the said circumstances, the Petitioner preferred appeals before the appellate authority, wherein, the Petitioner was permitted to enjoy the victory stand. Aggrieved by the decision of the appellate authority, the Department filed second appeal

before the Tribunal, where the main points of challenge were on two grounds. The first contention was that, the Petitioner, having admittedly purchased paddy from the unregistered dealers in Kerala and since no tax had been suffered u/s 5(1) of the Kerala General Sales Tax Act, 1963, the Department was very much justified in realization of tax u/s 5A of the Act. The second contention was that, by virtue of the amendment of the relevant notification, providing exemption as per S. R. O. No. 295 of 1998, even though the Petitioner being an SSI unit was enjoying the benefit of exemption earlier, in view of the suppression of turnover brought to light, the benefit of exemption was to go ; unless the Petitioner decided to compound the matter. After considering the materials on record, the Tribunal rendered a finding in favour of the Department on both the above grounds, which made the Petitioner to approach this Court by filing two separate tax revisions, viz., STR. Nos. 318 of 2007 and 319 of 20071 respectively.

3. The above revisions were considered by this Court separately and as per exhibit P3 judgment dated August 28, 2008 in STR. No. 318 of 20071, the contention put forth by the Petitioner against withdrawal of exemption with retrospective effect was negated, stating that it was very much permissible. However, considering the facts and circumstances, this Court granted one more opportunity to the Petitioner for compounding the offence and to continue to enjoy the benefit of exemption. It is stated from the part of the Petitioner that, pursuant to the said verdict, the Petitioner sought to compound the offence and accordingly, there is no grievance with regard to that part.

4. With regard to the other issue regarding sustainability of levying tax u/s 5A, a Division Bench of this Court, while passing exhibit P4 verdict in STR. No. 319 of 20071 held that, the issue therein was covered by virtue of the ruling rendered by the apex court in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, and accordingly, directed the assessing officer to modify the assessment in terms of the judgment of the Supreme Court as aforesaid. It is stated that exhibits P5 and P6 modified assessment orders have been passed by the assessing authority in the said circumstances, which in turn are subjected to challenge in the present writ petition, for having rendered contrary to the mandate given by the apex court in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, . Since the very same course has been pursued by the assessing authority in respect of the assessment year 2000-01 as well, leading to exhibit P7 assessment order, the said order has also been impugned in the writ petition.

5. Heard both the sides at length.

6. The learned Counsel appearing for the Petitioner, referring to the dictum in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, , submits that levying tax u/s 5A of the Act can only be contrary to the mandate of Section 15 of the Central Sales Tax Act, 1956, which as it stood then, is extracted below:

15. Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State.-Every sales tax law of the State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed four per cent of the sale or purchase price thereof.

(b) to (d)....

7. From the above, it is clear that the statute contemplates to have tax never more than four per cent., specifically stipulating that it shall only be at the first point of sale within the State (exclusion of the second limb from the statute from 2002 is not relevant for the case in hand). The learned Counsel further submits that the paddy, as well as rice, having a place as given in the Second Schedule to the Act, are "declared goods" and as such, there cannot be any variation as to the statutory prescription at all. Almost similar circumstances were prevalent in the Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, as well, where the goods concerned were "steel ingots" brought from outside the State or purchased from within the State in the course of manufacture of steel rods by the Petitioner's industry. In respect of the purchase made by the Petitioner therein from the manufacturers of ingots within the State, the latter group was having exemption from the payment of tax. The Department, on finding that the goods had not suffered any tax within the State at any point of time, sought to fix the tax liability upon the Petitioner therein, invoking the provisions u/s 5A, which led to the litigation. A single Bench of this Court dismissed the petition filed by the party, referring to the alternate remedy, which though was deprecated by the Division Bench, interference was declined stating that the State was well within its prerogative to assess the dealer u/s 5A, observing that the term "levy" was also very much inclusive of the collection of tax as well and since tax had not been admittedly collected, the dealer was liable to pay the tax. This in turn was subjected to challenge before the Supreme Court, which led to the decision in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, .

8. After considering the facts, figures and the relevant provisions of law including the binding judicial precedents, the apex court observed that the term "levy" and collection/payment contemplated under the statute are two different concepts and that just because of the fact that the tax was not paid, it cannot lead to a conclusion that there was no "levy" at all. It was also observed that the question of "exemption" would not mean that there was no levy since there would have been no "exemption" unless "levy" was there. The matter was decided in favour of the Assessee, observing that as per the relevant Schedule, since the State had stipulated that the "levy" shall only be at the "first point" of sale within the State, the mere exemption provided by the State will not result in any subsequent "levy" at a later stage and hence that there was absolutely no rhyme or reason in

having proceeded against the Assessee/dealer for fixing the tax liability u/s 5A.

9. Coming back to the case in hand, when the sales tax revision filed by the Petitioner came up for consideration before this Court, a specific observation was made by this Court as discernible from exhibit P4 judgment that the issue was squarely covered in favour of the Assessee, by virtue of the decision of the apex court in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, . It was in the said circumstance, that the assessing officer was directed to modify the assessment in terms of the judgment of the apex court. As such, the only question is whether exhibits P5, P6 and P7 assessment orders passed by the assessing authority are in conformity with the dictum in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, .

10. The learned Special Government Pleader (Taxes) appearing for the Revenue submits that, the Petitioner's case stands entirely on a different pedestal. It is pointed out that, the Respondents have got a specific case as put forth in paragraphs 3 and 4 of the counter-affidavit that the dictum in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, is not applicable to the case in hand. It is pointed out that the purchase effected by the concerned dealer in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, was from a registered dealer; whereas in the case of the Petitioner, it was admittedly from unregistered dealers. Referring to the specific stipulation under the statute, the Special Government Pleader (Taxes) asserts that, in the instant case, there is no "levy" at all, particularly in view of the fact there was no tax liability in the case of the unregistered dealers involved in the present case, from whom the goods were purchased by the Petitioner; whereas the position was entirely different in the case considered by the apex court in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, . This is answered by the learned Counsel for the Petitioner stating that, if there is no "levy" in the case of sale of paddy by the unregistered dealers, there cannot be any application for Section 5A.

11. As pointed out earlier, in so far as the case in hand is concerned, there is a positive declaration by the Division Bench of this Court as given in exhibit P4 judgment that the issue involved herein is covered in favour of the Assessee by virtue of the position in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, . There is no case for the Respondents that the above specific observation made by the Division Bench in exhibit P4 has been subjected to challenge by filing SLP before the apex court. Nor do they have any case that the Respondents have filed any review petition before this Court to get it corrected, if it were wrong. In other words, the observation in exhibit P4 judgment that the issue involved in the present case is covered by the decision in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, has become final and hence no more open to the Respondents to take "U" turn and submit that it stands on a different footing.

12. The remaining question to be considered is, whether the impugned

assessment orders have been passed in tune with the direction given by this Court vide exhibit P4 judgment.

13. Obviously, in none of the impugned orders, exhibits P5, P6 and P7, has there been a reference made to exhibit P4 judgment. In exhibit P5, assessment order pertaining to the year 1998-99, the assessing officer has made a reference only to the judgment dated August 28, 1998 passed by this Court in Sales Tax Revision No. 318 of 20071, i.e., exhibit P3 judgment, which relates to withdrawal of exemption from retrospective date, providing for compounding the offence. The issue dealt with in exhibit P4 judgment, (i.e., Sales Tax Revision No. 319 of 20071) has never been referred to therein and as such, it cannot be presumed that the assessing authority was acting in compliance with the direction given by this Court in exhibit P4 judgment (involving Sales Tax Revision No. 319 of 20071). Coming to exhibit P6 pertaining to the year 1999-2000, the reference made at serial Nos. 1 to 3 is only without reference to the original proceedings and the proceedings of the appellate authority. To put it more clear, there is absolutely no reference to any of the judgments passed by this Court, neither exhibit P3 nor exhibit P4. This also persuades this Court to conclude that the assessing authority was not acting in tune with the direction given in exhibit P4 judgment. The position is not an exception when it comes to exhibit P7 assessment order as well, for the year 2000-01, where also no reference is made to exhibit P4 judgment of this Court or as to the mandate given by the apex court in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, .

14. This being the position, it no longer requires any second thought, to conclude that the impugned orders passed by the assessing officer were never in compliance with the direction given by this Court in exhibit P4 judgment, whereby it was specifically directed to reassess the matter in conformity with the law declared by the apex court in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, . That apart, but for giving the figures, there is absolutely no discussion in exhibit P5, exhibit P6 and exhibit P7 orders before arriving at the inference and hence they can never be considered as "speaking orders", which is a mandatory requirement while passing such orders by quasi-judicial authorities. This is more so, in view of the law declared by a Full Bench of this Court as to the sanctity of "speaking orders" in Major Simon v. Advocate General, Kerala reported in (1975) KLT 78 (FB).

15. In the above facts and circumstances, the impugned orders, exhibits P5, P6 and P7, cannot have their breath any further and accordingly, they are set aside. The Respondent is directed to conduct the reassessment as specifically directed by this Court vide exhibit P4 judgment, following the dictum in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, . Final orders as above, shall be passed, after giving an opportunity of hearing to the Petitioner, as expeditiously as possible, at any rate, within a period of one month from the date of receipt of copy of this judgment.

16. The writ petition is allowed to the said extent. No cost.