

(2004) 07 KL CK 0005
In the High Court Of Kerala
Case No : O.P. No. 21633 of 2000

Kuruvilla

APPELLANT

Vs

Asst. Commissioner

RESPONDENT

Date of Decision : 15-07-2004

Acts Referred:

Kerala Tax on Entry of Goods into Local Areas Act, 1994 — Section 8(1), 8(3), 8(4), 8(5)

Kerala Tax on Entry of Goods into Local Areas Rules, 1994 — Rule 5(3)

Citation : (2004) 3 KLT 915

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Advocate : C.K. Thanu Pillai and S. Shaina, for the Appellant; S. Soman, Sr. Government Pleader, for the Respondent

Judgement

G. Sivarajan, J.—The petitioner, an engineering contractor, engaged in contract work with Railways and other institutions and an assessee on the files of the respondent, brought a JCB Loader from Pondichery, purchased as per Invoice No. 10698 dated 18.11.1995. The said JCB Loader was registered with the Assistant Registering Authority, Ernakulam, on 15.12.1995 with registration number KL 7 L 4453. Similarly, the petitioner purchased a HMT 2522 Tractor on 24.4.1995 as per invoice dated 24.4.1995, according to the petitioner, for his use at Coimbatore in Tamilnadu. The said tractor was registered u/s 40 of the Motor Vehicles Act, with the Assistant Registering Authority Coimbatore on 25.4.1995 and assigned Registration No. TN 37K 1350.

2. The Assessing Authority under the Kerala Tax on Entry of Goods into Local Areas Act (for short "the Act") has assessed the said two vehicles to entry tax under the said Act as evidenced by proceedings dated 4.5.2000 (Ext.P6) and also raised demands as per Exts.P7 and P8. The petitioner has challenged the assessment order and demand notices in this Writ Petition.

3. The learned counsel appearing for the petitioner raised various contentions

against the assessment of JCB loader. According to the counsel, though JCB loader is a motor vehicle exigible to tax under the Act by virtue of the decision of the Supreme Court in *Bose Abraham v. State of Kerala & Anr.* 2001 (1) KLT 730 : 2001 121 STC 614. The assessment order is barred by limitation as provided u/s 8(5) of the Act. The counsel also submits that the respondent has no power to make any assessment under the Act. Apart from the above, it was contended that, at any rate, the petitioner is entitled to get reduction of the tax paid in the purchasing State by virtue of the provision of Section 4 of the Act as it stood at the relevant time. Similarly so far as the tractor is concerned, according to the petitioner, it is not exigible to tax under the Act, since the tractor cannot be treated as a motor vehicle. Counsel also relied on the decision of the Supreme Court in *Goodyear India Ltd. Vs. Union of India and others*, , in that regard. The counsel has also stressed the other contentions raised in respect of tractor also.

4. The learned Senior Government Pleader appearing for the respondent submits that the respondent herein is the assessing authority under the KGST Act and that it is the said authority who passed the impugned order. The Government Pleader also submitted that so far as the plea of limitation is concerned, admittedly the petitioner did not file any return in respect of these two vehicles as provided under the Act and therefore, the provision that should be applied for separate assessment is Section 8(l) of the Act read with Rule 4(5) of the Rules in so far as provisional assessment and Rule 5(3) in so far as final assessment. The Senior Government Pleader submits that in respect of those assessments, the limitation provided u/s 8(5) of the Act has no application. So far as reduction of the tax paid in the purchasing State, the Government Pleader, submits that, such a contention was not taken by the petitioner before the Assessing Authority. So far as the tractor is concerned, Government Pleader submits that even according to the petitioner, the said vehicle was registered as a motor vehicle under the Motor Vehicles Act at Coimbatore and further tractors are squarely covered by the schedule to the entry tax Act. The Government Pleader also pointed out that the definition of motor vehicles in the Act is as defined in the Motor Vehicles Act. The Government Pleader further submits that there is a definition of tractor in the Motor Vehicles Act in Section 2(4) as per which tractor is a motor vehicle.

5. I have considered the rival submissions. As pointed out by the learned counsel for the petitioner the JCB Loader is a motor vehicle exigible to tax under the Motor Vehicles Act vide decision of the Supreme Court in *Bose Abraham's* case (supra). So far as the tractor is concerned, the definition of motor vehicles in Section 2(28) of the Motor Vehicles Act applies and in that context a tractor is a motor vehicle and it is in these circumstances, the petitioner has got the tractor registered under the Motor Vehicles Act at Coimbatore. The decision of the Supreme Court relied on by the petitioner in 2001 (1) KLT730 was rendered in the context of a notification issued under the Central Excise Act. The said decision, therefore, cannot be relied on for the purpose of this enactment. The petitioner also relied on the decision of the Supreme Court in *Bolani Ores Ltd.*, .

6. Now coming to the legality of the assessment order with reference to the limitation pleaded by the petitioner, Section 7(l) of the Act provides that every person liable to pay tax under this Act shall furnish returns in such form, for such period, by such dates and to such authority, as may be prescribed. Section 8(l) provides that the amount of tax due from a person liable to pay tax under this Act shall be assessed separately for such period as may be prescribed. Sub-ss. (3) and (4) of Section 8 deals with a situation of an assessee filing a return u/s 7(l) and Sub-section 4 provides for best of judgment assessment in respect of situation covered by Sub-section(3). Now coming to the limitation provision Section 8(5) it starts by saying that no order of assessment under Sub-section(3) or Sub-section (4) for any period shall be made after the expiry of three years from the last date prescribed for filing of returns of that period. It also provides that if for any reason, such order is not made within the period aforesaid, then the return so filed shall be deemed to have been accepted as correct and complete for assessing the tax due from such person. From the aforesaid provision, it is very clear that the limitation provided u/s 8(5) is applicable only to a case where a return is filed u/s 8(l) of the Act. In the present case, admittedly no return is filed by the petitioner and hence Section 8(5) has no application.

7. Now a question may arise as to whether, if, the" provisions of Section 3 has no application, there is any other provision for assessment under the Act. I have already noted that Section 8(l) clearly provides that tax shall be assessed separately for such a period as may be prescribed. Provisions of the Kerala Tax on Entry of Goods into Local Areas Act, 1994 will come into play in this regard. Rule 4 deals with filing of return and Sub-rule(5) thereof deals with situation of no returns filed and provides for a provisional assessment. Similarly Rule 5 deals with only return and assessment. Sub-rule(5) thereof provides that if no return is submitted, or if the return submitted appears to the assessing authority to be incorrect or incomplete, the assessing authority shall after complying the procedure laid down in Sub-rule(5) of Rule 5 determine the purchase value and assess the tax payable to the best of judgment basis and shall serve upon the dealer a demand notice in Form No. 4. From Sub-rule(3) of Rule 5 it is clear that the said rules applied both in respect of matters covered by Section 8(3) and (4) and also in respect of the cases where no return is filed. In other words, the best of judgment is contemplated in cases where return is filed u/s 8(4) as also under Rule 5(3) in case where returns were filed and in case where no return is filed Rule 5(3) provides for best judgment assessment. It cannot be said that there is no provision for making the assessment under the Act in case where no return is filed. Thus the limitation provided u/s 8(5) of the Act would apply only to cases where return is filed under the Act and not to cases where no return is filed. In these circumstances, I do not find any merit in the submission of the counsel for the petitioner that the assessment in the instant case is barred by limitation in view of the provisions of Section 8(5) of the Act. I also do not find any merit in the contentions of the petitioner that the assessment made by the respondent is

not correct. Though the petitioner attempted to make distinction by saying that the Act contemplates only Sales Tax Officers as the assessing authorities and not the Assistant Commissioner of Sales Tax (Assessment) or any other person for the purpose of the Act. According to me, it is only a technical irregularity, which did not in any way prejudice the assessee's case. So far as the claim of the petitioner for reduction of the tax paid in the purchasing State while determining the tax due under the Act in respect of the same vehicle certainly the decision of the Full Bench of this Court in *Babu Cyriac v. Sales Tax Officer & Anr.* 2004 (135) STC 375, could apply. Since this is a matter to be considered by the Assessing Authority himself with reference to the bills and other materials, the respondent is directed to consider the same.

8. Now coming to the question of exigibility to tax under the Act on tractor the petitioner has got a case that the tractor was purchased and registered outside the State for use in that State and that in the absence of any findings that the vehicle has been brought to this State either for use or for sale the provision of this Act is not attracted. It is also the petitioner's case that the tractor was purchased and registered in Tamilnadu in 1995 and that there was no attempt made by the assessing authority to ascertain as to whether the said vehicle has been brought to this State for use. The counsel further submits that the vehicle was purchased as early as in 1995 and unless it is established that the vehicle was brought to the State before the expiry of 15 months thereof there cannot be any liability to tax under the Act. Having regard to the fact that the assessing authority has to consider the claim of the petitioner for reduction of the tax paid on the purchase of JCB in the light-of the Full Bench decision and a direction in that regard was issued. I am of the view that the respondents must be directed to consider the claim of the petitioner in respect of tractor also with reference to the provisions of S .3. For that limited purpose, I set aside Ext.P6 and P7 and direct the assessing authority to pass orders in accordance with law in respect of the said two matters after affording an opportunity of personal hearing to the petitioner. So far as the penalty proposed in Ext.P5 is concerned, the same will be deferred till a decision is taken in the matter of assessment as directed hereinabove. So far as the penalty is concerned, the petitioner has also got a case that the question regarding the exigibility to entry tax on these items was the subject matter of litigation and so far as JCB loader is concerned, it was settled only by the decision of the Supreme Court in *Bose Abraham's* case (supra). In view of the direction already issued the Respondent will proceed with Ext.P5 only after a decision is taken regarding the assessment and after affording reasonable opportunity of being heard to the petitioner. It will be open to the petitioner to raise all contentions regarding the exigibility to penalty with reference to the decision of the Supreme Court in *The Cement Marketing Co. of India Ltd. v. The Assistant Commr. of Sales Tax, Indore, & Ors.* 1980 STC.45

The Original Petition is disposed of as above.