(2014) 11 KL CK 0082

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 26620 of 2003 (R)

Madras Cements Ltd. — APPELLANT

Vs

The Assistant Commissioner (Assessment) — RESPONDENT

Date of Decision : 11-11-2014

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 5, 5D

Citation : (2014) 11 KL CK 0082

Hon'ble Judges : A.K. Jayasankaran Nambiar, J

Bench : Single Bench

Advocate : K.B. Muhamed Kutty, Senior Advocate and K.M. Firoz, Advocate for the Appellant; Lilly K.T., Government Pleader, Advocate for the Respondent

Judgement

A.K. Jayasankaran Nambiar, J.—The petitioner is a dealer in cement. As per the provisions of Section 5D of the Kerala General Sales Tax Act, the petitioner was required to pay additional sales tax at the rate of 15% of the tax that was payable under Section 5 of the Kerala General Sales Tax Act. By a proviso to Section 5D of the Kerala General Sales Tax Act, it was made clear that the levy of additional tax payable under Section 5D would be only for the period up to 31st March, 2003. Going by the said provision therefore, the petitioner was not obliged to pay additional tax under Section 5D for the period after 31.03.2003. The petitioner, however, collected additional sales tax amounts from its customers for the period from 01.04.2003 to 18.05.2003. The total amount collected towards additional sales tax from its customers was an amount of Rs. 63,55,406/-. Thereafter, the petitioner noted the provisions of Section 5D which made it clear that the levy of additional tax was only for the period up to 31.03.2003. Realising the mistake in collecting additional sales tax for the period subsequent to 31.03.2003, and apprehending that penalty proceedings would be initiated against him for collecting tax that was not authorised in law, the petitioner took prompt steps to refund the amounts collected from the said customers by issuance of credit notes to them. Thereafter, the petitioner filed returns for the months of April and May 2003 showing details of the tax collected and the refund effected. Exts. P1 and P2 dated 10.05.2003 and 10.06.2003 respectively, are the returns filed by the petitioner for the months of April and May 2003. While so, with effect from 01.07.2003, the levy of additional sales tax was reintroduced through the Kerala General Sales Tax (Third Amendment) Act, 2003. The amendment Act brought about two changes to S. 5D, namely:-

1. Provided for the omission of the second proviso to Section 5D which contemplated that the levy of additional tax payable under Section 5D would be only for the period up to 31.03.2003 and

2. By a validation clause deemed the amounts collected by registered dealers by way of additional sales tax under Section 5D, for the period between 01.04.2003 to the date of coming into force of the Kerala General Sales Tax (Third Amendment) Act, 2003, to be amounts validly collected under the provisions of the Kerala General Sales Tax Act as amended by the Amendment Act. The validation clause also provided for the dealer to remit the amounts collected to the Government on or before 31.07.2003.

2. Subsequent to the Kerala General Sales Tax (Third Amendment) Act, 2003, the 1st respondent informed the petitioner through Ext. P4 notice that it would be liable to pay additional sales tax for the period from 01.04.2003 to 18.05.2003. The assessment for the year 2003-2004 was also subsequently completed by Ext. P5 order dated 14.02.2008 wherein the additional sales tax amounts for the period between 01.04.2003 to 18.05.3003 were demanded from the petitioner. Although the petitioner preferred an appeal against the said assessment order, by Ext. P6 appellate order dated 23.09.2008, the contentions of the petitioner with regard to the additional sales tax amount for the aforementioned period were rejected and the demand sustained against the petitioner. In the writ petition, the petitioner challenges Ext. P4 notice issued by the 1st respondent, as also Exts. P5 and P6 assessment order and appellate order respectively, to the extent they confirm the demand of additional tax, and penal interest thereon, from the petitioner for the period from 01.04.2003 to 18.05.2003. There is also prayer for a declaration that Section 3 of the Kerala General Sales Tax (Third Amendment) Act, 2003 is invalid and unconstitutional.

3. A counter affidavit has been filed on behalf of the 1st respondent wherein it is admitted that the petitioner had refunded the amounts collected from its buyers who were the registered dealers. The provisions of the Kerala General Sales Tax Act (Third Amendment) Act, 2003, are also reiterated to justify the assessment order and the appellate order passed by the authorities under the Act.

4. I have heard Dr. K.B. Mohammedkutty, the learned Senior counsel for the petitioner as also the learned Government Pleader Smt. K.T. Lilly appearing on behalf of the respondents.

5. On a consideration of the facts and circumstances of the case as also the submissions made across the Bar, I note that the thrust of the averments in the writ petition are with regard to the legality of the validation clause introduced

through the Kerala General Sales Tax (Third Amendment) Act, 2003, to the extent it validates the collection, of amounts towards additional sales tax under Section 5D, by a registered dealer during the period from 01.04.2003 to the date of coming into force of the Amendment Act, 2003. The contention of the petitioner is essentially that the Validation clause has the effect of validating collections of additional sales tax, that were not permissible during the period from 01.04.2003 to the date of coming into force of the Kerala General Sales Tax (Third Amendment) Act, 2003. It is the case of the petitioner that while the provisions of Section 5D, as they stood prior to the amendment, clearly contemplated that the levy of additional tax payable under the Section was only to be for the period up to 31.03.2003, a subsequent amendment could not, through a validation clause, validate the collection of additional sales tax that was made for a period when the levy was not contemplated at all. Attractive though the arguments may appear at first blush, I note that the provisions of the Kerala General Sales Tax (Third Amendment) Act, 2003, contained not only the validation clause but also a provision that provided for the omission of the proviso to Section 5D which read as under:

"Provided further that the levy of additional tax payable under this Section shall only be for the period up to 31.03.2003".

The omission of this proviso effectively resulted in the levy of additional sales tax, as contemplated under Section 5D of the Kerala General Sales Tax Act, continuing to be in force for the period during which the Act was applicable. No doubt, the petitioner has a case that the amendment introduced through the Amendment Act of 2003 did not contemplate a retrospective operation, and therefore, there was no obligation on the petitioner to pay additional sales tax during the interim period between 1st April 2003 and the date of coming into force of the Amendment Act. This contention is one that is available to the petitioner to agitate before the appellate authorities under the Act since it is essentially a question relating to applicability of the provisions of the Act to a particular factual situation. I do not propose to make any observation in that regard in this writ petition. The observation made above with regard to the provisions of the Kerala General Sales Tax (Third Amendment) Act, 2003, which also provided for an omission of the proviso, that earlier stood under Section 5D, is only for the purposes of repelling the challenge in the writ petition, against the validity of the validation clause under the Kerala General Sales Tax (Third Amendment) Act, 2003. The amendments, when read together, clearly indicate that the validation clause was in respect of collection of amounts that could have been validly collected during the period in question. Resultantly, the challenge in the writ petition, against the legal and constitutional validity of the provisions of the Kerala General Sales Tax (Third Amendment) Act, 2003, fails.

I am inclined, however, to permit the petitioner to pursue his appellate remedy against Ext. P6 order before the Appellate Tribunal under the KGST Act. It is also pointed out by the learned Senior counsel for the petitioner that, during the pendency of the writ petition an amount of Rs. 20 lakhs has been paid by the petitioner, as a condition for the stay granted against proceedings for recovery of the tax amounts found due from the petitioner. I make it clear that the payment of the said amounts by the petitioner shall be taken into account by the Appellate Tribunal while considering the appeal on merits. If the petitioner files an appeal before the Appellate Tribunal within a period of one month from the date of receipt of a copy of this judgment, the appellate Tribunal shall consider the same on merits and pass appropriate orders thereon within a period of three months thereafter. Considering the fact that there was stay against recovery proceedings during the pendency of the writ petition, I make it clear that the recovery proceedings against the petitioner, for recovery of such amounts covered by Exts. P5 and P6 orders as pertain to the additional sales tax due for the period from 01.04.2003 to 18.05.2003, shall be kept in abeyance till such time as the Appellate Tribunal passes orders in the appeal and communicates the same to the petitioner.

The writ petition is disposed as above.

