

(2005) 03 KL CK 0010

In the High Court Of Kerala

Case No : O.P. No's. 4567 of 1993-R, 22648 of 1998-U, 27566 of 1999-F, 4726 of 1999-K and 6040 of 1999-R

Managing Trustee, Arya Vaidya Sala

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 17-03-2005

Acts Referred:

Central Sales Tax Act, 1956 — Section 8(5)
Income Tax Act, 1961 — Section 11(4A)
Kerala General Sales Tax Act, 1963 — Section 10

Citation : (2005) 141 STC 142

Hon'ble Judges : M. Ramachandran, J;K.P. Balachandran, J

Bench : Division Bench

Advocate : C. Natarajan and R. Ramadas, for the Appellant; Raju Joseph, Special Government Pleader (Taxes), for the Respondent

Final Decision : Allowed

Judgement

M. Ramachandran, J.—This batch of original petitions, where the petitioner is an assessee under the Kerala General Sales Tax Act and Central Sales Tax Act, have come up for consideration before us. The leading case is stated to be O.P. No. 6040 of 1999. Although four earlier original petitions also were pending when the above original petition had been filed, considering the general issue involved, viz., as to whether the assessment orders issued by the Sales Tax Department were sustainable, the reference came to be made. Demand notices on such assessments had been issued and such demands included surcharge under the Surcharge Act and turnover tax. The petitioner has been claiming exemption from payment of sales tax for the relevant years, and had invited our attention to the notifications, which formed the foundation of the claims and their applicability. Advertence had also been made to a number of decisions, where the petitioner itself was a party, as the issue relating to their claims as a charitable trust, had come to be noticed by the Income Tax Department and such questions stood resolved by the Supreme Court of India. The department

nevertheless was of the view that the assessee could not claim the benefits admissible by the notifications.

2. Learned Senior Counsel Mr. Natarajan, appearing on instructions on behalf of the petitioner, submitted that perhaps it may not be necessary for any adjudication on the claims raised in O.P. No. 22648 of 1998, which pertained to the assessment of Central sales tax for the years 1985-86 and 1986-87. Therefore, the above case is delinked and dismissed as one not pressed.

3. The assessing officer had issued assessment orders, which were followed by demand notices, both under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the KGST Act") and under the Central Sales Tax Act, 1956 (hereinafter referred to as "the CST Act") declining claims of exemption. On reference, a division Bench had admitted the original petition and had granted interim order of stay pending further orders in the original petition. Rest of the original petitions were ordered to be posted along with O.P. No. 6040 of 1999. Therefore, O.P. No. 6040 of 1999 could be treated as the leading case. We may refer to the exhibits produced there and principles as decided could be extended to the other original petitions, as might be warranted.

4. The Managing Trustee representing the Arya Vaidya Sala, Kottakkal, is the petitioner. The State and the Secretary to Government are respondents 1 and 2 respectively. The Assistant Commissioner (Assessment), Special Circle, Malappuram, is the third respondent. Assessment order dated January 30, 1999 is exhibit P15, the assessment order relating to Central sales tax is exhibit P16 and the demand notice issued by the third respondent is marked as exhibit P17 in the original petition. The petitioner prays that a writ of certiorari is to be issued quashing the abovesaid proceedings. It is further submitted that a declaration is called for holding that the medicines manufactured by the petitioner are not exigible to sales tax taking notice of the exemption notifications (exhibit P3 S.R.O. No. 1727 of 1993, exhibit P4 S.R.O. No. 1731 of 1993, exhibit P13 S.R.O. No. 427 of 1995 and exhibit P14 S.R.O. No. 506 of 1995). Inter alia, reference to the will of the founder of the Trust (exhibit P1) of course with reference to the judicial pronouncements, which had come to be passed about it also might be necessary. The claim of the petitioner is that in view of the totality of the circumstances, tax on the ayurvedic medicines manufactured and sold by the petitioner are not to be levied, either under the KGST Act or under the CST Act. Nor could be they subjected to taxation under any cognate enactment. The petitioner has a case that they were not collecting sales tax from June 1, 1994 onwards understanding the purport of the notifications, but on a wrong interpretation of exhibits P13 and P14, the department had been taking a stand that they are exigible for tax.

5. As referred to earlier, in O.P. No. 6040 of 1999, the claim was that exemption from sales tax as per the notifications, referred to earlier, as admissible to a charitable institution was to be granted. O.P. No. 4567 of 1993 is filed challenging the demand notices for turnover tax and penal interest thereon, the

year being 1992-93. There also the contention was that exhibit P1 (S.R.O. No. 342 of 1963) had been omitted to be taken notice of, as coming to their assistance.

6. O.P. No. 4726 of 1999 is filed challenging the revised assessment orders passed for the years 1987-88 to 1993-94 under the KGST Act and under the CST Act. The plea was centered round the impact and protection of S.R.O. No. 342 of 1963, S.R.O. No. 105 of 1967 and S.R.O. No. 987 of 1976 [exhibits P1, P1(a) and P18] in respect of goods at the point of last purchase in the State by pharmacies. In O.P. No. 27566 of 1999, provisional assessment and demand notices for tax and surcharge, again on the basis of the said S.R.Os. were agitated.

7. S.R.O. No. 1727 of 1993, issued under the KGST Act, came into force with effect from January 1, 1994 and the amendment thereof vide S.R.O. No. 427 of 1995 came into force with effect from April 1, 1995. Similarly S.R.O. No. 1731 of 1993, issued under the CST Act came into force with effect from January 1, 1994 and the amendment thereof vide S.R.O. No. 506 of 1995 came into force with effect from April 21, 1995. The benefit of S.R.O. No. 342 of 1963 is made available to sales by any charitable trust or charitable institution profit of which is solely utilised for charitable purposes. S.R.O. No. 1727 of 1993 confers benefit of exemption from sales tax on the sale of goods manufactured within the State by any charitable trust or charitable institution, if the profit earned is utilised solely for charitable purposes during the year or set apart to be utilised for charitable purposes. In case the profit so set apart for utilisation for charitable purpose is utilised for any purpose other than charitable, the institution shall disentitle itself for exemption under the notification during such year. By the amendment brought vide S.R.O. No. 427 of 1995, with effect from April 1, 1995 the exemption so granted is explained. Goods so manufactured by charitable trust or charitable institution get exemption in cases where such manufacturing is incidental to the main objective of such trust which shall be predominantly charitable. The claim by the petitioner of benefit of S.R.O. No. 1727 of 1993 is limited however to the period up to July 29, 1996 as with effect from that date the benefit is limited by insertion of a condition vide S.R.O. No. 584 of 1996 to the effect that the benefit shall be available only on condition that the annual turnover of the institution does not exceed Rs. 10 lakhs. The petitioner's turnover during all these years exceeds Rs. 10 lakhs. Similarly, vide S.R.O. No. 105 of 1967, issued under the CST Act, exemption is granted on sales turnover of such goods in the course of inter-State trade or commerce, provided the profits of such sales are solely utilised for charitable purposes. Vide S.R.O. No. 1731 of 1993 exemption to tax under the CST Act is granted to goods manufactured within the State by charitable institution the profit of which is solely utilised for charitable purposes with the further condition that where the profit so set apart for utilisation for charitable purpose is utilised for any purpose other than charitable, the institution shall disentitle itself for the exemption during such year. The exemption so granted was however limited by amendment

vide S.R.O. No. 506 of 1995 with effect from April 21, 1995 to goods so manufactured, only in the event of such manufacturing being incidental to the main objective of such institution, which shall be predominantly charitable. Vide S.R.O. No. 987 of 1976 exemption is made in respect of tax payable under the KGST Act by pharmacies in regard to their turnover relating to purchase of goods which are subject to tax at the point of last purchase in the State subject to the condition that the goods so purchased are used by the pharmacies in the manufacture or preparation of goods for sale by them.

8. By exhibit P5, the petitioner had addressed the Assistant Commissioner (Assessment) on May 7, 1994 about the proposal for exemption from sales tax from June 1, 1994, as a charitable institution. The officer had required production of supporting documents and a certificate of utilisation. Details, as requested for, were supplied by exhibits P7 and P8. The assessing officer, however, took a stand that where the profit set apart for utilisation for charitable purpose is utilised for purposes other than charitable, the institution shall disentitle itself for exemption from S.R.O. No. 1727 of 1993. He had advised them that "exemption under the notification shall not be available to trust or institution created or established for the benefit of any particular religious community or caste or for the benefit of the trustee or the founder or manager of the institution or the benefit of a member or members of the family of such author, founder, trustees or manager". Therefore, the petitioner was advised that they were to prove with documentary evidence that the establishment was eligible for tax exemption under S.R.O. No. 1727 of 1993. Although by exhibit P10 the particulars were forwarded, by exhibit P11 dated August 23, 1994, they were informed that "it is not clear how the funds allocated to Arya Vaidya Sala can be treated as an expenditure to treat it as an expense connected with a charitable institution. It has also to be proved that another 25 per cent and 10 per cent apportioned to hospital and patasala were used for charitable purpose". Exhibit P11 letter rounded up with an observation that Arya Vaidya Sala has not utilised the entire profit solely for charitable purpose.

9. A detailed reply had been forwarded to the Assistant Commissioner, as could be seen from exhibit P12. A provisional order had thereupon been passed. According to the department, the return could not be accepted as correct and complete and a proposal to complete the assessment order for the year 1994-95 was communicated. Although a reply had been submitted, assessment orders had been passed as exhibit P15 overruling the objections made. Total tax under the KGST Act was arrived at as Rs. 2,03,48,298 plus a surcharge of Rs. 20,34,830. Exhibit P16 dated January 30, 1999, assessed the petitioner under the CST Act, on almost similar grounds, at Rs. 32,17,208 and demand notices were served on the assessee. These are the subject-matters of the attack.

10. The contention of the Senior Counsel, on behalf of the petitioner-assessee could be summarised as following :

Late P.S. Warriar, a reputed ayurvedic physician, had devoted his life for

developing and popularising the ayurvedic system of medicine in India. By exhibit P1 will, he had bequeathed his entire properties to a Trust, which is the petitioner herein. All the assets were to vest in the Board of Trustees. The will was dated October 30, 1939. Mr. Warriar died on January 30, 1944. For a period of 20 years, from the date of his death, 40 per cent of the net income from the Trust was to be given to his heirs and the balance alone was to be utilised for charitable purposes. From 1964 onwards, viz., after the said period, the entire income was to go for charitable work.

11. Legal proceedings had been there, in respect of periods both before 1964 and thereafter, and the courts had uniformly upheld the position that up to the year 1964 only 60 per cent of the profit, from Trust funds, qualifies for exemption under the Income Tax Act.

12. The counsel highlights that after 1964, the entire income was to be allowed as exempted from Income Tax. With reference to the judgments in Commissioner of Income Tax Kerala and Coimbatore Vs. Krishna Warriar, , Commissioner of Income Tax Vs. P. Krishna Warriar, , and as overruled by the decision reported in P. Krishna Warriar Vs. Commissioner of Income Tax, by a Full Bench of this Court, it had been conclusively held that when the predominant purpose was charitable in nature, the exemption as claimed under the Income Tax Act was always admissible. Mr. Natarajan also submits that the charitable nature of the trust as coming under the Kerala Land Reforms Act also had been upheld by a division Bench of this Court in the decision reported in (1989) 2 KLN 127 (Arya Vaidya Sala, Kottakkal v. State of Kerala). According to the counsel, it was diabolical therefore for the State Government to contend that the Trust pertaining to Arya Vaidya Sala was not a charitable institution.

13. Counsel submits that examination of the claims and objections have to be done in the abovesaid background. After the lapse of almost two decades, a dilation about the scope and intent or an interpretation of S.R.O. No. 342 of 1963, we feel, would be outdated. More so, because it will be agonising to the assessee to be repeatedly told that there is possibility for an alternate view, which has come lingering to the mind of officers, who had later on come to the scene. After 1996, because of the amendments brought in, this has become a non-issue, since the benefit of exemption had been confined to assessees, whose annual total turnover is less than Rs. 10 lakhs and Arya Vaidya Sala may not at all come within an exempted establishment. They are thereafter shouldering the responsibility of tax collection.

14. By S.R.O. No. 342 of 1963, exemption is granted on the sale or purchase of goods specified in Schedule II in liberal terms. Thereby sales carried out by any charitable trust or charitable institution, the profit of which is solely utilised for charitable purposes, qualifies for exemption. The proviso to the provision has no application to the facts of the present case.

15. By explanation, which is part and parcel of the provision, an inclusive

definition is incorporated as regards the term "charitable purposes". The inclusive definition almost always justifies an interpretation leading to a liberal construction. "Charitable purposes" under the notification includes relief of the poor, education, medical relief and advancement of any other object of public utility. The wordings of S.R.O. No. 105 of 1967 are not much different which concerns the exemption to be claimed under the CST Act. S.R.O. Nos. 1727 of 1993 and 1731 of 1993, as amended by S.R.O. Nos. 506 of 1995 and 427 of 1995, could have been understood in consonance with the above positions. Counsel submits that business of Arya Vaidya Sala is held in Trust, and for public charitable purposes, and there has been no change in the situation ever. The income generated was to be applied for purposes of charity. The properties of the Arya Vaidya Sala are held in Trust. There was no case, according to the Revenue, Mr. Natarajan argues, that any part of the income was used for any other purpose. The primary and chief objective of the Trust was to facilitate functioning and development of the two institutions, namely, the Arya Vaidya Sala and the Arya Vaidya Hospital. Preparation of ayurvedic medicines was to be an objective of the Arya Vaidya Sala. Medicines were required for treatment of the sick ; manufacture of medicines also was to be an activity ancillary to the main objective of the establishment. This alone could have sustained the Trust, giving it power to generate funds for meeting the avowed objectives. One other objective was to maintain the Ayurveda Patasala, which had grown as an Ayurveda College, where research in ayurveda is practiced. This had added new dimensions in improving the skills, systems and acceptability of the branch of treatment, in consonance with the objective of the Trust, and wishes of the propounder.

16. The salient features of S.R.O. No. 1727 of 1993, according to the counsel, was that by Clause 6, exemption was to be granted on the turnover of sale or purchase of goods to or by charitable institutions, subject to certain conditions. Similar notification as S.R.O. No. 1731 of 1993 u/s 8(5) of the CST Act also had come to be issued. It was in this context, that the petitioner had informed the department about its intention to avail of the exemption. The effort of the department should have been to see that when Government exempted them from the liability of sales tax, taking notice of the charitable nature of the institution, a stumbling block was not introduced. The benefit of lower price was to be essentially passed over to general public. It was not as if reluctance was there on the part of the institution to levy tax and to remit the same to the Government. But, this would have unnecessarily put the general public to liability, which the Government wished them to avoid. A burden therefore ought not have been cast on the establishment for the pleasure of it.

17. It is further submitted that the subsequent notifications (S.R.O. No. 427 of 1995 u/s 10 of the KGST Act and S.R.O. No. 506 of 1995 u/s 8(5) of the CST Act) were clarificatory in nature and by themselves were not intending to create any fresh liabilities. The objective was to explain the position that unscrupulous claims were discouraged. The main objective of the institution should be

predominantly charitable and manufacture should be incidental to the main objective of the institution. It is argued that the petitioner, by any standards, satisfies the conditions that had been so laid down.

18. For this purpose, it was again reiterated that in addition to the conduct of the Ayurvedic Charitable Hospital, the income had been utilised for meeting the expenditure and development of the Ayurvedic College well in lines prescribed by the provisions of the will and there was no expenditure of profit otherwise than for the purpose of charity. The developmental activities and research had made the institution stronger and more relevant to meet the objectives of charity and the short sighted assessment orders, could not have been therefore approved. It is asserted that when true and correct facts were placed, although advertence was made to such circumstances in the order, by extracting the contentions in extenso, there was no application of mind and the assessment orders were therefore unsustainable.

19. We had opportunity to hear the Special Government Pleader for Taxes, who opposes the claims with reference to facts and law. He submits that the claim for exemption has to be proved to the hilt by the assessee, who put up such claims. It is submitted that the yardsticks for conferring the status of a charitable institution under the Income Tax Act and the Sales Tax Act are distinct and different. For example, he submits that if there are circumstances to show that a portion of the profits by a charitable institution had been earmarked for charitable work, the Income Tax law provided that exemption in respect of that part of the profit could be claimed as admissible by the assessee. But, as far as the KGST Act and CST Act are concerned, the notifications were specific, when they point out that for any year, if there was no utilisation of the profits to the full extent, the resultant position would have been that for the year concerned the exemption would have been wholly forfeited. The submission is that the issue had been so approached by the assessing authority and the original petition therefore was wholly misconceived and liable to be rejected.

20. The Special Government Pleader had adverted to the decision in *The Ahmedabad Mfg. and Calico Printing Co., Ltd. Vs. S.C. Mehta*, Income Tax Officer and Another, , and especially paragraph 20 thereof, for the proposition that the principle laid down in a decision rendered with reference to one statute may not be applicable on all fours, when tested with another set of circumstances, and therefore the parameters to be considered herein were different. The Supreme Court had held that "...cases on the construction of one statute are rarely of value in construing another statute, for each case turns on the language with which it is concerned and statutes are not often expressed in the same language". However, the only aspect here is as to whether the notifications had put the institution to any disabling circumstance. Likewise, the case cited by him, reported in *Carmel Book Stall Vs. Dy. Commissioner of Sales Tax*, also appears to be not strictly relevant, as the substantial question there was as to whether the profit derived by the unit was to be solely utilised for charitable purposes during

the relevant year. Such an issue also is not alive to be considered. Another decision cited at the bar was Assistant Commissioner of Income Tax Vs. Thanthi Trust, . The contention raised by the assessee there was that the trust's objects are for providing relief to the poor and spread of education. Such activity was held as one in the course of the actual accomplishment of the trust's objects of imparting education. The Supreme Court had held that Sub-section (4A) of the Income Tax Act restricts the benefit u/s 11 so that it is not available for income derived from business unless (a) the business is carried on by a trust only for public religious purposes or (b) it is carried on by an institution wholly for charitable purposes. However, the ultimate finding appears to be that "...all that it requires for the business income of a trust or institution to be exempt is that the business should be incidental to the attainment of objectives of the trust or institution. A business whose income is utilised by the trust or the institution for the purposes of achieving the objectives of the trust or the institution is, surely, a business which is incidental to the attainment of the objectives of the trust". This appears to be a safe yardstick to be applied in the present case as well.

21. We are of the view that Schedule VII of S.R.O. No. 1727 of 1993, as modified by S.R.O. No. 427 of 1995 and Schedule IV of S.R.O. No. 1731 of 1993, as amended by S.R.O. No. 506 of 1995, do not have materially altered the position as far as the present assessee is concerned. In respect of sale of goods manufactured within the State by any charitable trust or charitable institution, the profit is entitled to exemption, if the profit, if any, is solely utilised for charitable purpose during the year or set apart to be utilised for charitable purpose. The "charitable purpose" is defined in wide terms. The amendment to Schedule VII, in serial number 5, in column (2), was substitution of the words "by any Charitable Trust or Charitable Institution" by the words "by any Charitable Trust or Charitable Institution where such manufacturing is incidental to the main objective of such institution which shall be predominantly charitable". Manufacturing of medicines, as far as the petitioner-assessee is concerned, cannot but be termed otherwise than as incidental to the main objective of the institution. The will refers to the manufacture as one of the areas where the Trust is to engage. The propounder has foreseen that sustenance of the organisation cannot be guaranteed, other than by continuous generation of income. The existence of the establishment, the objectives of the trust and the usefulness to the community is closely linked to the production of medicine and we need not comprehend the word "incidental" used in the amended notification so as to disjoint the basic purpose or consider the activity as one which is alien from being part and parcel of the main objective. The objective of the amendment itself was to ensure the nexus as between the two and there is no case for the Revenue that the trust as such was not predominantly charitable in nature or that the trust had any other objective which was not essentially charitable. The income derived by manufacture of medicine by the very nature of the activity would have had no comparison with the other limbs, but by accepting the interpretation of the Revenue, it may lead to absurd inferences, viz., that

manufacture was the predominant activity. There is nothing illogical for an incidental activity to become the money spinning programme and for that reason alone, it will be unsafe to jump to weird conclusion.

22. In fact, this is the sole issue that is involved in the case. We see that with sufficient clarity such objections had been raised by the petitioner when the provisional assessments had been served on them. Although the assessment order verbatim reproduces the objections so raised, unfortunately while applying the law, the officer has got himself misled. It is observed that the dealer is not eligible for exemption as they are predominantly manufacturers and sellers in ayurvedic medicine and incidentally a charitable institution. This, according to us, was an observation on the border lines of perversity. Running of a charitable institution was the predominant motive and manufacture and sale of ayurvedic medicines necessarily had to be carried out for effectively supporting the system. Without such activity the Trust would not have survived. Priorities have been misunderstood and the benefit arising from the notification has been unduly restricted.

23. The impugned orders in O.P. No. 6040 of 1999 are, therefore, set aside.

24. Counsel for the petitioner-assessee refers to a decision of the Supreme Court in Ashok Service center and Others Vs. State of Orissa, . It was a case where additional sales tax was sought to be levied. The Revenue had contended that even in case where a dealer is not liable to pay tax under the principal Act, he is liable to pay additional sales tax and therefore such claims were fully sustainable. However, the above position did not find acceptance. The court held that additional sales tax is in the nature of surcharge over and above what is due and payable by an assessee under the principal Act. It was held that it may be necessary to read and construe the Acts together, as if the two Acts were one.

25. This appears to be an authority for the proposition that it may not be permissible for the Revenue to insist for payment of turnover tax or additional tax, though they are statutorily authorised, but such demands have to be subservient to the exemption granted under the principal Act.

26. We hold that the claims put up by the Revenue, subjected to challenge in the rest of the original petitions as well are not sustainable. The original petitions therefore, stand allowed and the impugned orders are set aside.

27. In the aforesaid view taken, we do not think it is necessary to go in detail with respect to the contentions that have been raised in O.P. No, 4567 of 1993. The challenge is against the demand notice for turnover tax and penal interest for the year 1992-93. O.P. No. 4726 of 1999 is filed challenging the revised assessment orders urging eligibility for exemption available to pharmacies in the State in respect of the assessment years 1987-88 to 1993-94. As we have found that the assessee was a charitable institution and functioning as pharmacy, the demands could not have been sustainable. The said original petitions therefore stand allowed. The impugned orders are quashed.

28. However, we may clarify that Arya Vaidya Sala will be liable to remit to the State any amount of tax of whatever nature, collected during the above period, if not already handed over. This should be done within one month from today.