

(1988) 02 KL CK 0028
In the High Court Of Kerala
Case No : O.P. No. 10181 of 1987

M/s Rajan Plastics and Others

APPELLANT

Vs

S.T.O. and Others

RESPONDENT

Date of Decision : 01-02-1988

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 5(3)

Citation : (1988) 1 KLJ 270

Hon'ble Judges : P.C. Balakrisiina Menon, J

Bench : Single Bench

Advocate : S. Venkitasubramonia Iyer, A.K. Alex, V. Giri, K.K Chacko and M. Mohammed Navaz, for the Appellant; Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P.C. Balakrisiina Menon, J.—The only point for decision in this original petition is as to whether new industrial units entitled to a limited exemption from sales-tax as per notification of Government S. R. O. 968/80 are excluded from the benefits of a lower rate of tax as provided for in sub-sec. (3) of sec. 5 of the Kerala General Sales Tax Act as substituted by the Kerala Finance Act 18/1987. There is no dispute that the three petitioners are small scale industrial units established after the notification aforesaid and they are entitled to the benefits of the notification. Their claims for the benefits of sub-sec. (3) of sec. 5 were referred by the respective sales-tax officers and the Deputy Commissioner (Sales-tax) to the Board of Revenue for clarification and can be seen from Exts. P1, P3 to P5 and P7. The Board of Revenue has taken the view that small scale industrial units entitled to exemption from sales-tax under the notification S. R. O. 968/80 are not entitled to the benefits of the lower rate of tax as provided for in sec. 5 (3) of the Act. Ext. P9 dated 1-1-1988 (produced along with C.M.P. No. 1609/1988) is a communication from the Deputy Commissioner, Agricultural income tax and Sales-tax, Ernakulam addressed to the 3rd petitioner wherein it is stated;

The Board of Revenue has clarified that the S. S. I. Units enjoying the benefit of

exemption will not be eligible for concession under sec. 5 (7) of the Act. Your petition requesting for the Form 18 is therefore rejected.

2. Sub-sec. (7) of sec. 5 was omitted and re-enacted as sub-sec. 3 of by sec. 2 of the Keala Finance Act 18/1987. Sub-sec. (3) of sec. 5 (as substituted by the Finance Act) with its first proviso is extracted below ;

Notwithstanding anything contained in sub-section (1) or subsection (2), the tax payable by a dealer in respect of any sale of industrial raw materials, component parts or packing materials which is liable to tax at a rate higher than two per cent when sold to industrial units for use in the production of finished products inside the State for sale or for packing of such finished products inside the State for sale, as the case may be, shall be at the rate of only two percent on the taxable turnover relating to such industrial raw materials, component parts, or packing materials, as the case may be:

Provided that this sub-section shall not apply where the sale of such finished products is not liable to tax either under this Act or under the Central Sales Tax Act, 1956 (Central Act 74 of 1956) or when such finished products are exported out of the territory of India;

The notification S.R.O. 968/80 was issued by the Government in exercise of its powers under sec. 10 of the Act As per the notification an exemption is made in respect of tax payable under the Kerala General Sales Tax Act on the turnover of the sale of goods produced and sold by new industrial units for a period of five years from the date of commencement of sale of such goods by the said units. The first proviso to the notification requires the unit concerned to produce proceedings of the General Manager, District Industries Centre, declaring the eligibility of the unit for exemption from sales-tax. The second proviso to the notification is extracted below:

Provided further that the cumulative sales-tax concession granted to a unit at any point of time within this period shall not exceed 90% of the cumulative gross fixed capital investment of the unit.

As per the charging provisions in sub-secs.(1) and (2) of the sec. 5 every dealer referred to therein is liable to pay tax on his taxable turnover at the rates and at the points mentioned therein. "Taxable turnover" is defined in sec. 2(xxv) to mean the turnover on which a dealer is liable to pay tax as determined under the Act "after making such deductions from his total turnover and in such manner as may be prescribed" excluding the turnover of purchase or sale in the course of inter-state trade and turnover relating to export of goods to countries outside India and import of goods into the territory of India. "Total turnover" is defined in sec. 2(xxvi) to mean the aggregate turnover in all goods of a dealer at all places of business in the State, and "turnover" is defined in sec. 2(xxvii) to mean "the aggregate amount for which goods are either bought or sold, supplied or distributed, by a dealer either directly or through another, on his own account or on account of others, whether for cash or for deferred payment or other valuable

consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover. The incidence of taxation is on the sale or purchase of goods and the levy is on the taxable turnover. It is well-settled that if a taxing statute is of two interpretations, the one in favour of the assessee is to be capable preferred, The benefit of a lower rate of tax under sec. 5 (3) on industrial raw-materials, component parts or packing materials sold to industrial units for use in the production of finished products for sale inside the State or for the packing of such finished products will not be available where the sale of such finished products "is not liable to tax" either under the K.G.S.T. Act or under the Central Sales Tax Act or when finished products are exported out of the territory of India. The question for consideration is whether the sale of finished products referred to in the first proviso to sec. 5 (3) ceases to be liable to tax for the reason of the limited exemption from tax provided for under the notification of Government S.R.O. No. 968/80. Lord Dunedin observed in *Whitney v. Commissioner of Inland Revenue* (1926) A. C. 37 at p. 52):

Now, there are three stages in the imposition of a tax: There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend upon assessment. That, *ex hypothesi*, has already been fixed. But, assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery if the person taxed does not voluntarily pay.

Following the above observation Lord Hanworth, M. R. in *W.H. Cockerline & Co. v. Commissioners of Inland Revenue* (1930) 16 Tax Cases 1) observed at page 19 :-

...but the charge is made, in consequence of, the Act, upon the subject; the assessment is only for the purpose of quantifying it" Lord Uthwatt in (1948) 16 ITR 240 (Privy Council) stated that the liability to tax arises by virtue of the charging section alone in a case arising upon the provisions of the Indian income tax Act, 1922, This dictum has been re-affirmed by the Supreme Court in *Kalwa Devadattam and Others Vs. The Union of India (UOI) and Others*, Based on the above decisions the Allahabad High Court in *M.A. and Company Vs. Assistant Commissioner (Judicial) Sales Tax and Another*, held :

Tax becomes payable when liability to pay tax arises, and liability to pay tax arises by the happening of the taxable event. The taxable event under the U.P. Sales Tax Act is the sale of goods or their supply or distribution by way of sale. It is not necessary to wait until the assessment has been completed in order to be able to say that a tax has become payable. There is a distinction between the expressions "tax payable" and "tax due Tax is due when it becomes a debt owed to the taxing State: it becomes a debt when it has been determined by assessment and quantified, and a notice of demand has been issued intimating the amount of tax and demanding payment.

The same view is expressed by the Andhra Pradesh High Court in *K. Kannaiah Vs. Deputy Commercial Tax Officer and Others*, . Considering the provisions of the Andhra Pradesh General Sales Tax Act Chandra Reddy C. J, on behalf of the Division Bench stated at page 694:

In our considered opinion, the moment a dealer makes either purchases or sales which are subject to tax, the obligation to pay the tax has arisen and taxability is attracted, All that could be posited is that till the quantification is effected by assessment proceedings, that liability could not be enforced. So, the liability for payment of tax is independent of the assessment. The expression "liability already incurred thereunder", in our opinion, denotes the taxability, i.e., the chargeability to tax, and not the quantification of the tax or the payment thereof. It is true that the declaration of liability by the statute and the quantification thereof are two different stages in the imposition of tax. But. there can belittle doubt that the declaration of liability implies the liability to pay.

The Supreme Court in *A.V. Fernandez Vs. The State of Kerala*, :

There is a broad distinction between the provisions contained in the statute in regard to the exemptions of tax or refund or rebate of tax on the one hand and in regard to the non - liability to tax or non-imposition of tax on the other. In the former case, but for the provisions as regards the exemptions or refund or rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are prima facie liable to tax and the only thing which the dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. In the latter case, the sales or purchases are exempted from taxation a"together.

Construing sec. 7 of the Orissa Sales Tax Act - corresponding to sec. 10 of the Kerala Act providing for exemptions the Orissa High Court in *William Jacks and Co. Ltd. Vs. State of Orissa*, :

Section 7 of the Orissa Sales Tax Act confers on the State Government the power to exempt, either in whole or in part, any class of dealers from payment of sales tax. This power of exemption can obviously be used only where; but for the order of exemption, the dealer would be liable to pay sales tax. On the other hand, if, under the law as it stood on a particular day - as interpreted by the Supreme Court a dealer was not liable to pay sales tax, Government could not obviously issue an exemption order u/s 7 in respect of that dealer.

The same view is expressed by the Allahabad High Court in *Deep Chand Goyal and Another Vs. The Sales Tax Officer and Another*, where in it is stated:

There is a distinction between the provision relating to exemption and non-liability to tax. The sales and purchases of such goods would have to be included in the gross turnover and because of the exemption, deduction would be allowed in order to arrive at the net turnover while in regard to non-liability to tax such turnover will not be included in the gross or the net turnover. The distinction has

been lucidly spelt out by the Supreme Court in A.V. Fernandez Vs. The State of Kerala, .

The Rajasthan High Court has also expressed the same view in a recent decision in Commercial Taxes Officer Vs. Gadia Textiles and Another, . It is stated at page 169:

The Board has construed "liable to pay tax under the Act", as tax payable under the Act. In doing so, the Board ignored the distinction and difference between the two expressions "liable to pay tax" and "tax shall be payable", for a manufacturer may be liable for payment of tax but on account of exemption tax is not payable by him. We have already given reasons that. "liable to pay tax" does not mean that tax is payable by the dealer/manufacturer under the Act. From a dealer/manufacturer tax may not be payable because of exemption under the Act, none the less it cannot be said that he is not liable to pay tax under the Act.

It is clear from the above authorities that the taxable event is the sale or purchase of goods and the sale of the finished products referred to in the first proviso to sec. 5 (3) does not cease to be liable to tax for the reason of the partial exemption provided for in the notification S.R.O. 968/80. The mere fact that in the matter of computation of tax payable the benefits of exemption will be available to the small scale industrial units is not aground to hold that the sale of its finished products is not liable to tax under the Act.

I therefore declare that the small scale industrial units entitled to the benefits of exemption are also entitled to the concessional rate of tax on the sale of industrial raw-materials, component parts or packing materials to them in cases where their finished products are for sale inside the State or for packing such finished products for sale inside the State. This original petition is accordingly allowed as indicated above.

There will be no order as to costs.