
(2010) 05 KL CK 0001

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 1876 of 2006 (W)

N.P. Thomas

APPELLANT

Vs

State of Kerala And Another

RESPONDENT

Date of Decision : 04-05-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 265

Kerala General Sales Tax Act, 1963 — Section 17, 17(6), 17B, 23

Kerala Provisional Collection of Revenues Tax Act, 1985 — Section 3, 4, 5, 5(2)

Citation : (2012) 55 VST 24

Hon'ble Judges : C.K. Abdul Rehim, J

Bench : Single Bench

Advocate : C.K. Thanu Pillai, for the Appellant; V.K. Shamsudheen, Government Pleader, for the Respondent

Judgement

C.K. Abdul Rehim, J.—The writ petition is filed with prayers for declaring section 17B of the Kerala General Sales Tax Act, 1963 ("the KGST Act") inserted by the Kerala Finance Act, 2005 as unconstitutional and ultra vires. The petitioner is also seeking relief to quash exhibit P2 notice which is issued with proposal for assessment u/s 17B of the KGST Act. When the writ petition came up for admission on January 20, 2006 this court made it clear that, proceedings pursuant to exhibit P2 notice can be continued and the assessment can be completed. But enforcement of the assessment was restrained. It is also made clear that the petitioner can take recourse to statutory remedies available against such assessment, if any passed. During the pendency of the writ petition the assessment pursuant to exhibit P2 notice was completed on March 15, 2006, as per exhibit P3. The petitioner is also seeking to quash exhibit P3 assessment, vide additional prayer incorporated through I.A. No. 6496 of 2009. The petitioner is a registered dealer under the KGST Act engaged in second and subsequent sale of cement, which was included in the description of goods under entry 27 of the First Schedule to the KGST Act, taxable at 15 per cent on the point of first sale in the State. Through the Kerala Finance Bill, 2004 amendment was

proposed bringing the goods mentioned under entry 27 of the First Schedule, to the Fifth Schedule including the same as entry 16 of that Schedule, and to make it taxable at 10 per cent on the first sale point and five per cent on the last sale point. The Finance Bill contained a declaration as provided u/s 3 of the Kerala Provisional Collection of Revenues Act, 1985 (Act 10 of 1985) which by itself created the provisions of the Finance Bill to have force of law from the 1st day of April, 2004. But when the Kerala Finance Act, 2004 was passed by the Legislature, for which consent was given on July 28, 2004, the original entry 27 of the First Schedule was retained and the proposal to shift the particular item of goods to the Fifth Schedule was abandoned. The Finance Act was introduced with retrospective effect from April 1, 2004. Thus the position regarding rate of tax to be collected on cement, contained in the KGST Act, remained as unamended. But at the same time by virtue of section 4 of Act 10 of 1985 the provision contained in Finance Bill, 2004, being a declared provision, was in force from April 1, 2004 till July 27, 2004.

2. On the factual aspects of the case, the contention of the petitioner is that, the amendment proposed through the Finance Bill, 2004 had invited wide protest among the dealers engaged in the second and subsequent sales of cement within the State. At the intervention of the association of the dealers, the Government have agreed that the proposal will not be enacted into law and therefore the petitioner as well as similarly situated dealers have not collected tax during the last point of sale. According to the petitioner, during April to July 2004 he had purchased cement from M/s. Malabar Cements Ltd., Cherthala after paying 15 per cent sales tax and 15 per cent additional sales tax and also from M/s. N.T.P. Trade Centre (P) Ltd., Ettumanoor. Both are registered dealers and thus tax due at the first sale point was paid on the goods. The petitioner had produced exhibit P1 invoice issued by M/s. Malabar Cements Ltd., Cherthala in order to show that 15 per cent tax was paid at the point of first sale. But from exhibit P2 notice and exhibit P3 order of assessment it is evident that the petitioner had purchased cement from M/s. N.T.P. Trade Centre (P) Ltd., Ettumanoor for Rs. 1,31,40,932 by paying tax at 10 per cent under the Kerala General Sales Tax Act, 1963 (the KGST Act) on submitting declaration in form 25A, as provided under rule 32(13C) of the KGST Rules, declaring that the petitioner is a dealer of the goods at the point of last sale within the State. Exhibits R2(a) and R2(b) are copies of such declarations submitted by the petitioner. But the petitioner had failed to remit five per cent tax liable at the point of last sale within the State with respect to the above quantity of cement purchased by him by paying 10 per cent KGST. Therefore the return submitted for the period from April to July 2004 was rejected and best judgment assessment was completed fixing tax liability on the petitioner at five per cent on the sales of cement which are purchased by paying tax only at 10 per cent adding 14.5 per cent gross profit on such turnover. It is also stated that the tax due thereon was demanded along with interest u/s 23 of the KGST Act due thereon from July 2004 onwards.

3. Section 17B which was introduced into the KGST Act by virtue of the Finance

Act, 2005 reads as follows:

17B. Special provision for completion of assessment.--Notwithstanding anything contained in this Act, a dealer who had purchased any goods falling under serial numbers 12 to 32 of item (iv) of sub-clause (18) of clause 3 of the Kerala Finance Bill, 2004 during the period from the first day of April, 2004 to the 27th day of July, 2004, from any registered dealer after paying tax at the rates shown in column (4) against the said serial numbers, such dealer shall pay tax on the re-sale of such goods at the rates mentioned in column (6) against such goods and the assessing authority shall complete the assessment u/s 17 of the Act.

4. It is an admitted case that for the period from April 1, 2004 to July 27, 2004 the goods dealt with by the petitioner will fall squarely within the purview of section 17B and going by the said provision the petitioner is liable for payment of tax on the resale of cement at the rate of five per cent and that assessment is liable to be completed in this respect against the petitioner u/s 17B of the Act imposing such liability.

5. But the petitioner is challenging validity of section 17B on various grounds. One of the main grounds raised by the petitioner is that, such a levy is inconsistent with the provision contained in Act 10 of 1985. Sections 4 and 5 of Act 10 of 1985 which deals with the effect of declarations made under that Act, regarding duration of such declarations, and regarding liability for refund when such declaration ceases to have effect. Sections 4 and 5 of Act 10 of 1985 is extracted below:

4. Effect of the declarations under this Act and duration thereof.-

(1) A declared provision shall have the force of law on the 1st day of April, following the date on which the Bill containing it is introduced in the Legislative Assembly.

(2) A declared provision contained in a Bill shall cease to have the force of law under the provisions of this Act,

(a) When it comes into operation as an enactment with or without amendment; or

(b) When the Government, in pursuance of a motion passed by the Legislative Assembly, directs, by notification in the Gazette that it shall cease to have the force of law; or

(c) If it has not already ceased to have the force of law under clause (a) or clause (b), then on the expiry of one hundred and twenty days from the 1st day of April following the date on which the Bill containing it was introduced.

5. Certain refunds to be made when declaration ceases to have effect.--(1) Where a declared provision comes into operation as an enactment in an amended form before the expiry of the period referred to in clause (c) of sub-section (2) of section 4, refunds shall be made of all taxes, duties, cesses, fees and other

revenues collected which would not have been collected if the provision adopted in the enactment had been the declared provision:

Provided that the rate at which refunds of any tax, duty, cess, fee or other revenue may be made under this sub-section shall not exceed the difference between the rate of such tax, duty, cess, fee or other revenue proposed in the declared provision and the rate of such tax, duty, cess, fee or other revenue in force immediately before the 1st day of April following the date of introduction of the Bill.

(2) Where a declared provision ceases to have the force of law under clause (b) or clause (c) of sub-section (2) of section 4, refunds shall be made of all taxes, duties, cesses, fees or other revenues collected which would not have been collected if the declaration in respect of it had not been made.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the amount to be refunded under this section may at the option of the person entitled to the refund, be adjusted against any tax, duty, cess, fee or other revenue which is, or may become, recoverable from such person.

6. The contention of the petitioner based on the above provision is that, even though the amendment proposed through the Finance Bill, 2004 is having effect of a declared provision and force of law from April 1, 2004, it became ceased to have force of law by virtue of operation of the Finance Act, 2004 which was introduced with retrospective effect from April 1, 2004. Therefore as per section 5(2) the petitioner is eligible for refund of tax collected which would not have been collected if the declaration was not there. But in the case at hand it is pertinent to note that the issue does not pertain to eligibility for refund. But the issue pertains to liability for payment of tax. It is evident from the facts of the case that the petitioner purchased cement by paying 10 per cent tax from the seller at the first point of sale within the State, by following the declared provisions introduced through the Finance Bill 2004 which is having statutory effect by virtue of provisions contained in Act 10 of 1985. It is pertinent to note that such purchase by paying 10 per cent tax was made after making a declaration that he is the last seller of the commodity within the State. Effect of such declaration is that he is liable for payment of tax at the point of last sale within the State at the rate of five per cent. But the petitioner claims that he has not collected tax at the point of last sale in view of the promise alleged to have been made by the first respondent, that the proposed amendment will not be enacted. His further contention is that he was not liable for collection and payment of five per cent tax because of the fact that the Finance Act, 2004 was introduced with retrospective effect from April 1, 2004 onwards. But it is the admitted case that the Finance Act was introduced only on July 28, 2004 and during the interregnum the petitioner had purchased cement from the first seller by paying rate of tax as introduced by the Finance Bill 2004 and also by making declaration to the effect that the petitioner is the last seller thereby declaring an implied obligation of collecting and paying tax at five per cent on the point of last

sale. Therefore merely relying on the provision of Act 10 of 1985 which enables for raising a claim of refund, the petitioner could not escape from the liability from not making payment of tax during the interregnum period. This is especially because of the provisions contained in section 17B of the KGST Act which prescribe special method for making assessment during the interregnum period between April 1, 2004 to July 27, 2004.

7. The next contention of the petitioner with respect to the validity of section 17B is that, the said section was introduced only with effect from April 1, 2005 and the same could not have any retrospective effect with respect to assessment for the period from April 1, 2004 to July 27, 2005. From section 1(2) of the Kerala Finance Act, 2005 it is evident that sub-section (7) of section 3 of the Finance Act through which section 17B was introduced was given effect only from April 1, 2005. But going by provision contained in section 17B it is clear that the said provision is introduced specifically prescribing procedure for completion of assessment with respect to the period from April 1, 2004 till April 27, 2004. It is evident that the assessment with respect to the year 2004-05 will fall due only on April 1, 2005. Therefore section 17B, being a special provision for enabling and prescribing method of assessment with respect to a period specifically mentioned therein need not have any retrospectivity for completing the assessment following that particular method. In other words, section 17B is a special procedure prescribed for completing assessment with respect to a particular period falling within the previous accounting year. Hence the argument that section 17B is not having retrospectivity, cannot be accepted.

8. Another aspect highlighted by the petitioner is that the charging section under the KGST Act remained unamended by virtue of retrospectivity of the Finance Act, 2004, which was given effect from April 1, 2004. Therefore "levy" of tax in accordance with the declared provisions of the Finance Bill which stood in force from April 1, 2004 till July 27, 2004 has no sanctity of law. In other words, there was no charging section imposing "levy" of tax at five per cent at the last sale point. As long as a charging section imposing "levy" of tax is lacking in the statute, any special provision introduced prescribing method of assessment cannot be made use of for fetching liability on a dealer, is the contention of the petitioner.

9. Mr. C.K. Thanu Pillai, learned counsel appearing for the petitioner, had placed reliance on Govind Saran Ganga Saran Vs. Commissioner of Sales Tax and Others, , to canvass the legal position that, the first component which enter into the concept of tax is the taxable event attracting "levy". It is contended that unless and until a charging section is there through which levy of tax is attracted which makes a dealer with an obligation to pay tax, and unless there being any rate of tax imposed through such charging section, the assessment through which computation of tax liability is ascertained, could not be adopted. He further relies on the decision of the honourable Supreme Court in State of Tamil Nadu Vs. Thirumagal Mills Ltd., etc., as well as the decision in Assistant Collector of

Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., in order to canvass the above proposition.

10. In the case at hand it is evident from the legal and factual position that, there existed a declared provision which was introduced through the Finance Bill, 2004 which fetched liability on the petitioner for payment of tax at five per cent on the last sale point from April 1, 2004 till July 27, 2004. Going by section 4 of Act 10 of 1985 the declared provision contained in the Bill had ceased to have force of law when the Finance Act was introduced on July 27, 2004. But contention of the petitioner is that by virtue of retrospectivity given in the Finance Act, 2004 the charging section in the KGST Act remained unamended. The above position, when considered on the basis of section 5 of Act 10 of 1985, at the best, will give rise an entitlement for the petitioner to claim refund of tax paid during the period from April 1, 2004 to July 27, 2004. But merely because he has got a claim for refund based on section 5 of Act 10 of 1985, it could not be contended that there existed no provision of "levy" of tax during the interregnum period. Section 17B which prescribes special procedure for completing assessment in this regard, in my considered opinion, could not be held as invalid based on the contention that there existed no corresponding charging provision. In fact, by virtue of the declared provision under the Finance Bill the charging section deemed to have been stood amended. Of course, by way of retrospectivity given in the Finance Act the amendment was in fact not came into force. It is to ensure the benefit of such retrospective amendment that a provision for making refund of tax when a declared provision ceases to have effect is incorporated in Act 10 of 1985.

11. The learned Government Pleader Sri V.K. Shamsudheen had brought to my notice a Division Bench decision of this court in Paul Varghese v. State of Kerala [2005] 13 KTR 29 (Ker). Interpreting the provisions of second proviso to section 17(6) of the KGST Act it is held that such a provision even though introduced after expiry of period of limitation provided u/s 17(6) has to be treated as retrospective in character to save the limitation provided u/s 17(6) and to fix the period within which the assessment for the year concerned has to be completed. In such case, it is observed that, it is not a question of retrospective operation, but it only provides a special time-limit for completion of the assessment. Therefore it is held that no time-bar can be attributed merely because the second proviso was introduced subsequently. An analogous situation existed in this case also and section 17B prescribes provision of completing the assessment with respect to the period of interregnum.

12. Lastly, learned counsel for the petitioner argued that section 17B of the KGST Act is ultra vires of article 265 of the Constitution of India which provides that no tax shall be levied and collected except by authority of law. The argument again is regarding lack of charging section by which tax liability is created which enable levy of tax. I think the discussions in the foregoing paragraph itself is answer to such contention and the decision in Govind Saran Ganga Saran Vs. Commissioner

of Sales Tax and Others, cannot be considered as a direct bearing on the facts and issues involved in this case, which as discussed above, stands on a different footing.

13. The learned Government Pleader also contended that in order to get rid of liability of tax, it is the burden of the petitioner to prove that he is not the last seller of the commodity within the State. It is pointed out that in view of the declarations submitted by the petitioner such proof cannot be introduced. He also pointed out that the allegation regarding non-collection of tax at the point of last sale cannot be made use as an excuse to deny the liability. Reliance is placed in this regard on the decision of the Supreme Court in *State of Rajasthan and Another Vs. J.K. Udaipur Udyog Ltd. and Another*, .

14. From the discussions made as above, I am of the considered opinion that section 17B of the KGST Act introduced through the Finance Act, 2005 does not suffers from any infirmity nor it is ultra vires of the Constitution and other provisions. Hence the prayer in this regard is liable to be rejected. Consequently I find no reason to interfere with exhibit P3 assessment invoking jurisdiction under article 226 of the Constitution of India. However, it is made clear that the petitioner has got liberty to approach the statutory appellate authority by taking all factual contentions against such assessment, apart from the contention regarding validity of section 17B on the factual matrix of the case. It is also made clear that the question regarding liability for payment of interest u/s 23 of the KGST Act also can be agitated by the petitioner in such appeal. If such appeal is filed, the appellate authority shall consider the same untrammelled by any observations made herein. It is further made clear that if the petitioner has not filed any statutory appeals so far, the petitioner will be given liberty to file appeal against exhibit P3, within a period of one month from today along with petition seeking condonation of delay. The appellate authority shall consider the time spent before this court for getting the writ petition disposed as a valid ground for condonation of delay. Needless to say that the petitioner is at liberty to seek appropriate interim relief from the statutory authority if any such appeal is filed. The writ petition is disposed of with the above observations.