
(2003) 09 KL CK 0001

In the High Court Of Kerala

Case No : T.R.C. No's. 103, 104 and 105 of 2003

Premier Agro Products (P) Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 04-09-2003

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 10, 5
Kerala Surcharge on Taxes Act, 1957 — Section 3

Citation : (2005) 139 STC 37

Hon'ble Judges : J.M. James, J;G. Sivarajan, J

Bench : Division Bench

Advocate : M.C. Sen, M.P. Sreekrishnan and Shahna Karthikeyan, for the Appellant; Georgekutty Mathew, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

G. Sivarajan, J.—The matter arises under the Kerala General Sales Tax Act, 1963 (for short "the Act").

2. The assessee is the revision petitioner. The State is the respondent. The assessment years concerned are 1994-95, 1995-96 and 1996-97. The question that arises for consideration is as to whether surcharge under the Kerala Surcharge on Taxes Act, 1957, can be levied when the sales tax payable under the Act is exempted by virtue of the provisions of the notifications issued u/s 10 of the Act. Incidentally the question as to whether, for the purpose of granting exemption under the notification u/s 10 of the Act, surcharge should be taken into account also arises for consideration. The facts which are necessary for determination of the said questions are set out below :

3. The assessee is engaged in the manufacture and sale of maida, atta, suji and bran from wheat purchased from various dealers including the Food Corporation of India. It is a small-scale industrial unit registered with the General Manager, District Industries Centre, Palakkad. It was also granted exemption from payment of sales tax under the notification issued u/s 10 of the Act as per

proceedings No. 10090 of 1993 D.Dis. dated February 21, 1994 for the period from June 9, 1993 to June 8, 2000 on a sum of Rs. 1,48,70,691. In the assessment for the three years mentioned above, the assessee contended that since no tax was payable on the sales turnover of the finished products manufactured by it in the State it is not liable to assessment under the Kerala Surcharge on Taxes Act. The assessing authority, however, rejected the said contention and reckoned surcharge also in the computation of tax though no sales tax was payable under the Act. The surcharge amount was also deducted from the exemption available under the eligibility certificate. Being aggrieved by the assessment, the assessee filed appeals before the Additional Appellate Assistant Commissioner (Commercial Taxes), Palakkad, who by a common order dated February 28, 2001 (annexure B) upheld the assessment of surcharge for the three years. In second appeal, the Sales Tax Appellate Tribunal, Additional Bench, Palakkad, confirmed the orders of the assessing authority as upheld by the first appellate authority following the decision of a division Bench of this Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.P. Paper Products, .

4. In these tax revision cases the assessee has raised the following question of law :

"Whether surcharge under the Kerala Surcharge on Taxes Act is leviable on the amount of tax exempted u/s 10 of the KGST Act, 1963 and whether the surcharge tax can be levied and adjusted against the amount of total tax exempted ?"

5. Sri M.C. Sen, learned counsel appearing for the petitioner, submitted that surcharge under the Kerala Surcharge on Taxes Act can be levied only when tax is payable under the Act and that in the present case the assessee was not liable to pay sales tax on its sales turnover in view of the exemption granted under the notification issued u/s 10 of the Act and the eligibility certificate issued by the competent authority. The counsel also submitted that the Tribunal was not justified in upholding the adjustment of the surcharge from the tax exemption granted. The counsel in support of his contention relied on the decision of the Supreme Court in Ashok Service center and Others Vs. State of Orissa, , and the decisions in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.P. Paper Products, and in Sales Tax Officer and Others Vs. Ragam Plastics and Others, .

6. The learned Government Pleader appearing for the respondent, on the other hand, submitted that since the exemption granted under the notification issued u/s 10 of the Act is not on the goods but only on the tax payable the assessing authority is bound to compute the tax in accordance with law and the tax so assessed has to be adjusted from the exemption granted under the eligibility certificate. The Government Pleader also relied on the decision of this Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.P. Paper Products, and other decisions and contended that the Tribunal has rightly

rejected the claim made by the assessee. In order to appreciate the rival contentions it is necessary to refer to the relevant provisions of the Act and the Kerala Surcharge on Taxes Act and the notifications issued u/s 10 of the Act under which the assessee has claimed the exemption.

7. Section 5 of the Act, which is the charging provision for levy of tax provides that every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than two lakhs rupees and every casual trader or agent of a nonresident dealer, whatever be his total turnover for the year, shall pay tax on his taxable turnover for that year in the case of goods specified in the First or Second Schedule, at the rates and only at the points specified against such goods in the said Schedules. "Taxable turnover" defined in Section 2(xxv) means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into territory of India.

8. Rule 9 of the Kerala General Sales Tax Rules, 1963, provides for determination of taxable turnover. Clause (e) of Rule 9 provides for deduction from the total turnover of the dealer all amounts for which goods exempted by a notification u/s 10 are sold or purchased, as the case may be, provided that the terms and conditions, if any, for the exemption in the notification are complied with. Thus the assessing authority is bound to compute the taxable turnover of the dealer by making an assessment of the tax payable under the Act.

9. Section 3 of the Kerala Surcharge on Taxes Act reads as follows :

"3(1). The tax payable under the Kerala General Sales Tax Act, 1963, shall, in the case of a dealer whose turnover,-

(a) is not less than one lakh rupees but does not exceed ten lakhs rupees in a year, be increased by a surcharge at the rate of five per centum, and

(b) exceeds ten lakhs rupees in a year, be increased by a surcharge at the rate of ten per centum, of the tax payable for that year, and the provisions of the Kerala General Sales Tax Act, 1963, shall apply in relation to the said surcharge as they apply in relation to the tax payable under the said Act :

Provided that where in respect of declared goods as defined in clause (c) of Section 2 of the Central Sales Tax Act, 1956, the tax payable by such dealer under the Kerala General Sales Tax Act, 1963 together with the surcharge payable under this sub-section exceeds four per centum of the sale or purchase price, the rate of surcharge in respect of such goods shall be reduced to such an extent that the tax and the surcharge together shall not exceed four per centum of the sale or purchase price.

(2) Notwithstanding anything contained in Sub-section (1) of Section 22 of the Kerala General Sales Tax Act, 1963, no dealer referred to in Sub-section (1) shall

be entitled to collect the surcharge payable under the said Sub-section.

(3) Any dealer who collects the surcharge payable under Sub-section (1) in contravention of the provisions of Sub-section (2) shall be punishable with fine which may extend to one thousand rupees and no court below the rank of a Magistrate of the first class shall try any such offence."

10. By virtue of Section 3 the tax payable under Sub-section (1) of Section 5 of the Act, in the case of a dealer whose turnover is not below rupees one lakh but does not exceed ten lakh rupees in a year, is increased by a surcharge at the rate of five per centum and where the turnover exceeds rupees ten lakhs in a year is increased by a surcharge at the rate of 10 per centum of the tax payable for that year.

11. From the proceedings issued by the General Manager, District Industries Centre, Palakkad, referred to in the assessment order it is clear that the assessee had claimed the benefit of exemption under S.R.O. No. 1729 of 1993 issued u/s 10 of the Act. Under the said notification the Government of Kerala in exercise of the powers conferred u/s 10 of the Act in the public interest has granted tax exemptions to industrial units on the sale or purchase of goods by such industrial units subject to the conditions and restrictions specified thereunder. Under clause 1 in the case of new industrial units under small-scale industries an exemption was granted for a period of seven years from the date of commencement of commercial production (a) in respect of the tax payable by such units under the Act on the turnover of sale of goods manufactured and sold by them within the State ; and on the turnover of goods taxable at the point of last purchase in the State which are used by such units for manufacturing other goods for sale within the State or inter-State and (b) in respect of the surcharge payable u/s 3 of the Kerala Surcharge on Taxes Act, 1957 in relation to the goods referred to in sub-clause (a) above. Clause 10 of the said notification provided for the conditions and restrictions for grant of the above relief. Under clause 10(i) in the case of new industrial units under small-scale industries, the aggregate exemption in respect of sales tax, purchase tax, surcharge and Central sales tax payable together shall not exceed 100 per cent of the fixed capital investment of the unit. Clause 10(viii) provides that the small-scale industrial units claiming such exemption shall produce the proceedings of the District Level Committee consisting of the District Collector (Chairman), the Deputy Commissioner of Agricultural Income Tax and Sales Tax (Member) and the General Manager, District Industries Centre (Member Secretary) having jurisdiction over the district. Thus it is clear that tax exemption under the above notification was available both in respect of the tax payable under the Act and under the Kerala Surcharge on Taxes Act provided the eligibility certificate contemplated under Clause 10(viii) is obtained and produced before the assessing authority. It must also be noted that an exemption granted under the notification, in the case of new industrial units under small-scale industries is limited to 100 per cent of the fixed capital investment of the units. From the said notification it is clear that

unlike in the case of Government order dated April 11, 1979 issued by the Industries Department which was the subject-matter of the decision of the Supreme Court in *Pournami Oil Mills and Others Vs. State of Kerala and Another*, which granted blanket exemption from payment of sales tax for a period of five years, under all the statutory notifications (S.R.O. Nos. 968 of 1980, 499 of 1990 and 1729 of 1993) the exemption was geared to the capital investment in plant and machinery. It must also be noted that the exemption was not in respect of the goods but was only in respect of the tax payable. This notification clearly contemplates an assessment under the Act which necessarily takes in the computation under the Kerala Surcharge on Taxes Act also. It is only after the computation the question of exemption granted under the notification is considered. There cannot be any doubt that in the computation of tax under the Act necessarily the computation of tax under the Kerala Surcharge on Taxes Act is contemplated and by virtue of the provisions of Sub-clause (b) of clause 1 exemption is also granted in respect of the surcharge payable u/s 3 of the Kerala Surcharge on Taxes Act, 1957 in relation to the goods referred to in Sub-clause (a) above.

12. In the present case, as already noted, the assessing authority in all the three assessment orders have computed the tax payable under the Act. For e.g., for the assessment year 1994-95 the taxable turnover was fixed at Rs. 11,36,55,460, sales tax at the rate of 4 per cent on the said turnover came to Rs. 45,46,218.40 and surcharge at the rate of 10 per cent on the sales tax amount came to Rs. 4,54,621.84. The total tax thus came to Rs. 50,00,840.24. After adjusting the tax already collected Rs. 95,544 the balance amount of Rs. 49,05,296 was adjusted from the tax exemption. According to us, the procedure adopted by the assessing authority was perfectly in order.

13. In fact the very question arose for consideration before this Court in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.P. Paper Products*, . The assessee in the case was a registered small-scale industrial unit engaged in the manufacture and sale of paper covers. The unit was started after April 1, 1979 and was eligible for the exemption in respect of the tax payable under the KGST Act on the turnover of the sale of goods produced and sold by the unit for a period of five years from the date of commencement of sale of such goods in terms of the Government Notification S.R.O. No. 968 of 1980 subject to the conditions therein. The question arose as to whether for the purpose of granting such exemption the additional sales tax and surcharge should also be taken into account. The assessee was eligible for tax exemption to a sum of Rs. 39,734 only. The amount eligible for exemption carried forward from 1979-80 was Rs. 38,398. The aggregate of the tax and the additional tax due for the year 1980-81 was Rs. 28,371. Exemption was granted in respect of this amount and the balance Rs. 10,027 carried forward for 1981-82. The surcharge was computed at Rs. 1,302.98 and a demand was issued for this amount. For the assessment year 1981-82 the total of the tax and additional tax was computed at Rs. 32,579. The eligible amount for exemption carried forward from 1980-81

was Rs. 10,027. The balance Rs. 22,552 and the surcharge of Rs. 1,480.86 had been included in the demand. The assessee contended that when the tax is exempted no additional tax and surcharge could be due. This was not accepted by the assessing authority and by the first appellate authority. The Tribunal, however, relying on the decision of the Supreme Court in *Ashok Service Centre v. State of Orissa* (supra), which held that any dealer who is not liable to pay tax under the principal Act either by reason of his not having sufficient gross turnover of goods or by reason of exemption given u/s 7 of the principal Act took the view that the assessee is not liable to pay the additional sales tax. The court also held that when the sales turnover is exempted under the notification dated September 29, 1980 issued u/s 10 of the Kerala General Sales Tax Act additional sales tax is not leviable and when there is no tax payable by the dealer no surcharge can also be levied. The division Bench considered the question with reference to the provisions of the two enactments and the Notification S.R.O. No. 968 of 1980. It was observed that what is exempted is only the tax payable and not the goods and therefore the tax has to be computed in accordance with the provisions of the statute on the turnover of the sale of such goods and the tax so computed has to be deducted from the amount of exemption granted under the eligibility certificate issued by the General Manager, District Industries Centre. In computing the tax thus payable, it is observed that the liability of the assessee has to be determined. It was further observed that the Kerala Surcharge on Taxes Act, 1957 provides in Section 3 that the tax payable under the KGST Act, 1963 shall be increased by a surcharge at the rates specified. When there is no liability to pay the tax by the dealer for the year there cannot be a levy of surcharge in respect of tax not payable. The liability to pay surcharge arises only when there is liability to pay the tax. It is only in the case of specified assessee the tax is increased by a surcharge. When the turnover is statutorily exempted from sales tax, there is no liability to pay surcharge also as the levy presupposes the liability to pay sales tax. Thus for the purpose of computing the eligibility for exemption in terms of the Government notification, the assessing authority cannot issue a separate demand for the surcharge after allowing exemption in respect of the tax and additional tax payable. If the amount of tax and additional tax computed is eligible for complete exemption, there cannot be a levy of surcharge for that year. Finally the division Bench observed thus :

"This does not, however, mean that for the purpose of determining the cumulative tax concession the amount of surcharge leviable is to be left out of consideration. The expression "tax concession" is significant. It signifies the benefit derived by the assessee by virtue of the notification in payment of tax. When the sales tax and additional sales tax and surcharge could be properly levied if such exemption was not allowed, the aggregate amount under these three counts are to be taken into account for the purpose of computing the total concessions. We are, therefore, of the view that it is open to the assessing authority to compute the tax including the additional tax and surcharge for the purpose of granting exemption in accordance with the notification, but there

cannot be a demand for surcharge in case the assessee is eligible for the exemption from payment of sales tax."

14. The Supreme Court in Ashok Service Centre's case supra was concerned with the question whether the levy of additional tax under the Orissa Additional Sales Tax Act, 1975 as amended by the Orissa Additional Sales Tax (Amendment) Act, 1979 which provided that the tax payable by a dealer for a year under the Orissa Sales Tax Act, 1947 shall be increased by an additional tax at the rate of (a) two per cent of the tax, if his gross turnover for that year does not exceed one lakh of rupees, (b) three per cent of the tax, if his gross turnover for that year exceeds one lakh of rupees but does not exceed five lakhs of rupees and (c) five per cent of the tax, if his gross turnover for that year exceeds five lakhs of rupees.

15. It was the contention of the assessee in that case that Section 8 of the principal Act prohibits the levy of tax at more than one point in the same series of sales or purchases by successive dealers in the State of Orissa to the additional tax leviable under the Act as amended in 1979. The High Court negatived the said contention on the ground that since both the principal Act and the Act as amended in 1979 had been passed by a competent Legislature providing for a different base and for a different scheme and because they happened to be two independent Acts, it was not open to the assessee to rely upon any of the provisions of the principal Act relating to incidence and levy of tax in support of their contention. The Supreme Court observed as follows :

"In view of the foregoing, we hold that any dealer who is not liable to pay tax under the principal Act either by reason of his not having sufficient gross turnover or by reason of exemption given u/s 7 of the principal Act is not liable to pay additional tax under the Act. If a dealer is exempted by the State Government under the second proviso to Section 3(1) of the Act he is also not liable to pay the additional tax under the Act. If the turnover of a dealer relating to any sales or purchases of goods is exempted u/s 6 of the principal Act, such turnover cannot be subjected to the levy of additional tax under the Act by virtue of Section 3(2) of the Act. The Government Notification S.R.O. No. 410 of 1979 dated March 23, 1979, issued under the second proviso to Section 3(1) of the Act exempting the turnover relating to goods whose turnover is exempted from payment of tax u/s 6 of the principal Act from payment of additional tax under the Act is, therefore, redundant. The turnover in respect of goods whose sales or purchases are not taxable under the principal Act in the hands of any dealer by reason of Section 8 of the principal Act is not liable to the payment of additional sales tax under the Act. The turnover in respect of sales and purchases of declared goods is not taxable under the Act by reason of the first proviso to Section 3(1) of the Act. Any other turnover which is exempted by the State Government under the second proviso to Section 3(1) of the Act is also not taxable under the Act. The levy of the additional tax on the gross turnover of a dealer u/s 3 of the Act is subject to these conclusions."

16. A division Bench of this Court in *Sales Tax Officer and Others Vs. Ragam Plastics and Others*, considered the question whether new industrial units entitled to a limited exemption from sales tax as per the notification of the Government S.R.O. No. 968 of 1980 are excluded from the benefit of a lower rate of tax as provided for in Section 5(3) on the ground that no tax is payable by such small-scale industrial units because of the exemption. The division Bench after considering the provisions of Section 10 of the Act held that in order to attract the proviso, the finished products should not be liable to tax either under the Kerala General Sales Tax Act or under the Central Sales Tax Act or when such finished products are exported out of the territory of India. The words "liable to tax under this Act" mentioned along with the liability under the Central Sales Tax Act or liability under export sale would indicate that the proviso will apply to exclude Section 5(3) only in the case of a non-applicability of "the Act", as in the case of liability under the Central Act or liability for export sale. Since the assesseees are given limited exemption by the notification from payment of sales tax in respect of their turnover, it cannot be construed that there is "no liability" to tax under "the Act". The second proviso to the notification states that the cumulative sales tax concession granted to a unit at any point of time within this period shall not exceed 90 per cent of the cumulative gross fixed capital investment of the unit. Therefore, Section 5(3) of the Act would apply to the assesseees and the goods manufactured by them are liable to tax under the Act though tax is not payable by virtue of the notification exempting the small-scale industrial units for a limited period on complying with certain conditions.

17. A Full Bench of this Court in *M.R.F. Limited v. Assistant Commissioner, (Assmt.)-II, Sales Tax Special Circle [1995] 98 STC 233 SC : 1995 (1) KLT 809* considered the validity of the provisions of Section 29A(2B) of the Act. In that context the Full Bench considered the meaning of the expression "tax payable" used in the said sub-section. In paragraph 14 of the said judgment it is observed as follows :

"14. In the light of the above rival contentions, it is necessary to consider about the proper meaning to be assigned to the word "payable" used in sub-section. According to Supreme Court, the word "payable" is somewhat indefinite in import and its meaning must be gathered from the context in which it occurs (see *New Delhi Municipal Committee Vs. Kalu Ram and Another*, . A Full Bench of the High Court of Madras has also held that the word payable has "both a primary and a secondary meaning" or a "basic" and "extended meaning". After referring to the several dictionary meanings, the Full Bench has held that the term "payable" has two meanings (i) owing, and (ii) payable at a particular point of time, and when the terra is used without any qualification, payable means "payable at once" (See *S.P.L.P. Narayanan Chettiar Vs. M.A.R. Annamalai Chettiar*, . The meaning of the word "payable" has been given in "Black's Law Dictionary" as thus :

"Payable-Capable of being paid ; suitable to be paid ; admitting or demanding

payment ; justly due ; legally enforceable. A sum of money is said to be payable when a person is under an obligation to pay it. Payable may therefore signify an obligation to pay at a future time, but, when used without qualification, term normally means that the debt is payable at once, as opposed to "owing".

It is clear from the above extract that the word "payable" may signify "an obligation to pay at a future time" as well as "an obligation to pay at once".

18. As already noted, Section 3 of the Kerala Surcharge on Taxes Act, 1957 provides for levy of surcharge on sales and purchase taxes. It provides that the tax payable u/s 5 of the KGST Act, 1963 by a dealer shall be increased by a surcharge. The notification S.R.O. No. 1729 of 1993, clause I(b) thereof clearly provides for an exemption in respect of surcharge payable u/s 3 of the Kerala Surcharge on Taxes Act, 1957 in relation to the goods referred to in sub-clause (a). It must be noted that the exemption from payment of sales tax is also provided in sub-clause (a) of clause (1) of the said notification in respect of the tax payable by such units on the turnover of sale of goods manufactured and sold by them within the State and on the turnover of goods taxable at the point of last purchase in the State which are used by such units for manufacturing other goods for sale within the State or inter-State. It must also be noted that the exemption granted under sub-clause (a) both in respect of the sales tax and in respect of the surcharge so far as a new industrial unit under small-scale industries is concerned is limited as per clause 10(i) to cent per cent of the fixed capital investment of the unit. Further, in order to get the benefit of exemption under this notification clause 10(viii) provides that the unit shall produce the proceedings of the District Level Committee having jurisdiction over the district. As already noted, it must also be noted that the exemption granted under Notification S.R.O. No. 1729 of 1993 is not a blanket exemption. It is only a conditional one and limited to cent per cent of the fixed capital investment of the unit. Thus as already noted the assessing authority under the Act is obliged to compute the tax payable under the KGST Act read with the provisions of the Kerala Surcharge on Taxes Act. It is only thereafter the question of exemption granted under the eligibility certificate has to be looked into and appropriate adjustments made. In this context, it is also relevant to note that the earlier Notification S.R.O. No. 968 of 1980 had granted exemption only in respect of the tax payable under the Act on the turnover of the sale of goods produced and sold by new industrial units under the small-scale industries and the cumulative sales tax concession granted to a unit at any point of time within the period of five years shall not exceed 90 per cent of the cumulative gross of the fixed capital investment of the unit. It must also be noted that S.R.O. No. 1729 of 1993 grants not only exemption in respect of the tax payable under the KGST Act but also granted exemption in respect of the tax payable under the Kerala Surcharge on Taxes Act. According to us, the decision rendered by the division Bench of this Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.P. Paper Products, , mentioned above rendered in the context of the Notification S.R.O. No. 968 of 1980 strictly has no application. However, the

observations made in paragraph 9 of the said judgment already extracted would squarely apply to the present case. We are also of the view that the decision rendered by the Supreme Court in) Ashok Service Centre's case (supra) mentioned above and relied on by the assessee also has no application having regard to the wordings of the Notification S.R.O. No. 1729 of 1993. The expression "tax payable" used in the notification in clause I(a) and (b) of the Notification S.R.O. No. 1729 of 1993 and the said expression occurring in Section 3 of the Kerala Surcharge on Taxes Act must be understood in this context only as the liability to tax determined under the Act and not the ultimate amount payable as per the assessment.

In these circumstances, we hold that the conclusion reached by the Tribunal is correct. There is no merit in these revisions. They are accordingly dismissed.