

(2005) 02 KL CK 0025
In the High Court Of Kerala
Case No : W.A. No. 1566 of 2003

Reliance Generators (P) Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 22-02-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 301, 303, 304
Kerala General Sales Tax Act, 1963 — Section 10, 12, 2, 3, 4

Citation : (2005) 2 KLT 573 : (2005) 141 STC 82

Hon'ble Judges : M.N. Krishnan, J; K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : K. Ramakumar and T.V. Lakshmanan, for the Appellant; Raju Joseph, Spl. Government Pleader (Taxes), for the Respondent

Final Decision : Allowed

Judgement

K.S. Radhakrishnan, J.—Petitioner is engaged in the business of supplying, installing, testing and commissioning of Diesel Generating Sets. Petitioner is registered as a non-resident dealer with the Sales Tax Officer, Works Contract, Thiruvananthapuram. Petitioner has filed returns under the Kerala General Sales Tax Act and has been assessed accordingly. Petitioner is aggrieved by the notification SRO No. 949/2002 by which Government have decided to withdraw the exemption granted to various items including generator in respect of tax payable u/s 3 of the Kerala Tax on Entry of Goods into Local Areas Act, 1994 by dealers who are registered under the Kerala General Sales Tax Act, 1963 on which they are paying sales tax u/s 5 of the Kerala General Sales Tax Act, 1963. Notification SRO No. 949/02 according to the petitioner, is unconstitutional, discriminatory and violative of Articles 14, 19(1)(g), 301, 303 and 304 of the Constitution of India.

2. Petitioner has undertaken various contracts in the State of Kerala for commissioning of diesel generating sets as per the specifications prescribed by Bharat Sanchar Nigam Ltd. and other companies. Petitioner brings diesel

generating sets and its components from outside the State of Kerala and carry to the work site and perform their contract. The Kerala Tax on Entry of Goods into Local Areas Act was enacted to provide for the levy of tax on the entry of goods into local areas for consumption, use or sale therein. Section 2(d) of the Act states that entry of goods into local area means entry of goods into local area from any place outside the State for use or sale therein. Section 2(ee) says that goods means the goods mentioned in the Schedule. Section 3 is levying section which says that tax shall be levied and collected on the entry of any goods into any local area for consumption, use or sale therein and the tax on such goods shall be on such rate or rates as may be fixed by the Government by notification on the purchase value of the goods but not exceeding the rates specified for the goods in the first Schedule to the KGST Act. Section 4 says that where an importer of any goods liable to pay tax under the Act, being a dealer in such goods becomes liable to pay tax under the KGST Act as a result of the sale of such goods, then amount of tax payable under the KGST Act shall be reduced by the amount of tax paid under the Entry Tax Act. The Schedule annexed to the Act enumerated the goods liable to entry tax. Generator was included by SRO No. 296/98 as entry 19.

3. Government had in exercise of the powers conferred by Section 12 of the Kerala Tax on Entry of Goods into Local Areas Act, 1994 and in supersession of the Notification G.O.(P) No. 155/94/TD dated 25th November, 1994 as subsequently amended, in public interest exempted tax payable u/s 3 of the Act by dealers who are registered under the Kerala General Sales Tax Act, 1963 on the import of goods specified in the Schedule to the Act, in respect of which they pay sales tax u/s 5 of the Kerala General Sales Tax Act. Section 5 of the KGST Act provides for the imposition of sales tax on the sale of goods under different circumstances, provided under different Schedules to the KGST Act. Section 10 of the KGST Act enables the Government to grant exemption and the concessional rate of tax. Government in exercise of the said powers issued SRO No. 1091/99 by which tax payable for the generator is at the rate of 4%. Under SRO No. 590 of 1996 petitioner would not be liable to pay entry tax and petitioner would be paying only sales tax under the KGST Act, tax at 4%. SRO No. 590/96 has treated the importer and the local dealer equally which is perfectly in line with Articles 14, 19(1)(g), 301, 303 and 304 of the Constitution of India.

4. Petitioner is now aggrieved by the notification SRO No. 949/02 which is extracted below for easy reference:

"SRO No. 949/2002:-- In exercise of the powers conferred by Section 12 of the Kerala Tax on Entry of Goods into Local Areas Act, 1994 (15 of 1994), and in Supersession of notification issued in G.O.(P)No. 130/96/TD dated 31st July, 1996, published as SRO No. 590/96 in Kerala Gazette Extra Ordinary No. 944 dated 31st July 1996, the Government of Kerala having considered it necessary in the public interest so to do, hereby make an exemption in respect of tax

payable u/s 3 of the said Act by dealers who are registered under the Kerala General Sales Tax Act, 1963 (15 of 1963) on the import of goods other than Marble slabs, Marble Tiles, Cudappa stones and Slabs, Granite slabs and Tiles and Generators specified in the Schedule to the Act, in respect of which they pay Sales Tax u/s 5 of the Kerala General Sales Tax Act, 1963.

Explanatory Note

(This does not form part of the notification, but is intended to indicate its general purport)

The Government had decided to withdraw the exemption, on the import of Marble slabs, Marble Tiles, Cudappa stones and slabs, Granite slabs and Tiles, Generator in respect of the tax payable u/s 3 of the Kerala Tax on Entry of Goods into Local Areas Act, 1994 (15 of 1994), by dealers who are registered under the Kerala General Sales Tax Act, 1963 (15 of 1963) on which they are paying Sales Tax u/s 5 of the Kerala General Sales Tax Act, 1963.

This notification is intended to achieve the above object".

Petitioner submitted the above notification is illegal and discriminatory. Counsel appearing for the Writ Petitioner Sri. T.V. Lakshmanan submitted that the notification is violative of Article 304(a) of the Constitution of India and has the effect of imposing entry tax on the importers of generators while the local dealers supplying local generators are eligible for concessional rate of tax and exemptions provided u/s 5 of the KGST Act. Counsel submitted that notification SRO No. 949/02 removing generators from the exemption of SRO No. 590/96 has created a hostile discrimination as against the importers of generators by making them pay a higher rate of tax even in situations where the dealers supplying locally manufactured generators would be enjoying concessional rate of tax and the exemption. Petitioner in support of his contention placed considerable reliance on the decision of the Apex Court in *Firm ATB Mehtab Majid & Co. v. State of Madras* (1963) 14 STC 355(Mad) *H. Anraj v. Government of Tamil Nadu* 1986 (6) STC 165(Mad) *Shree Mahavir Oil Mills and Anr. v. State of Jammu & Kashmir and Ors.* 1997 (104) STC 148(J&K) etc.

5. Learned senior Government Pleader Sri. Raju Joseph, on the other hand placed considerable reliance on the decision of the Apex Court in *Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another*, . Counsel also submitted that the Government have got the power u/s 12 of the Kerala Tax on Entry of Goods into Local Areas Act, 1994 to grant exemption and exclude items in public interest. Counsel submitted State have necessarily to develop themselves economically so as to secure economic unity and to minimise the inequalities and imbalances between State and State and region and region. If the power to grant exemption has been conferred for achieving these objects on all States, it is not possible to assail these notifications as violative of Article 304 and the Article cannot be interpreted in isolation of other relevant articles.

6. The Supreme Court in *Sree Mahavir Oil Mills case* (supra) with reference to *Video Electronics case* held that the limited exemption carved out therein cannot be widened or expanded to cover cases of different kind. In *Sree Mahavir Oil Mills case* Supreme Court has examined the scope of clause (a) of Article 304 of the Constitution of India. The Court examined the scope of the notification SRO No. 93/1991 granting exemption to local manufacturers/producers of edible oil and held that the notification is violative of Articles 301 and 304(a) of the Constitution of India. The Court held that the States are free to encourage and promote the establishment and growth of industries within their States by all such means as they think proper but they cannot, in that process, subject the goods imported from other States to a discriminatory rate of taxation, i.e., a higher rate of sales tax vis-a-vis similar goods manufactured/produced within that State and sold within that State.

7. We are inclined to apply the same principle to the case on hand. Dealers of imported generators outside State of Kerala are subjected to higher rate of tax compared to that of local dealers manufacturing generators. This in our view is clearly discriminatory. States are free to encourage and promote the establishment and growth of industries within their States by all means as they think proper, but they cannot in that process subject the goods imported from other States to a discriminatory rate of taxation, i.e., higher rate of sales tax compared to similar goods manufactured/produced within that State and sold within that State. Neither the notification SRO No. 949/02 nor the explanatory note does disclose the public interest sought to be achieved by the notification. Article 304(a) does not prevent levy of tax on goods. What it prohibits is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The prevalence of differential rate of tax on sales of the same commodity cannot be regarded in isolation of the object to discriminate between one State and another. In *ATB Mehtab Majid & Co. case* the Court struck down the notification as violative of Article 304(a) of the Constitution. The legality of the notification SRO No. 949/02 has to be tested in the light of Section 4 of the Entry Tax Act read with Article 304(a) of the Constitution of India. Notification SRO No. 949/02 has in fact superceded the exemption granted by SRO No. 590/96 and has the effect of taking away of the exemption granted, with the result the importers of generators will have to pay higher rate of tax while the dealers of locally manufactured generators would be enjoying concessional rate of tax and exemption. Dealers paying tax u/s 5 of the KGST Act and dealers importing generators and paying tax u/s 5 of the KGST Act in our view has to be classified as a Single class as was done vide SRO No. 590/96. SRO No. 590/96 treated the importer and the local dealer equally, which has been upset by notification SRO No. 949/02, which in our view is discriminatory and violative of Articles 14 and 304(a) of the Constitution of India. We have therefore no hesitation to hold that the notification SRO No. 949/02 excluding generators from the purview of SRO No. 590/96 violates Article 14 and 304(a) of the Constitution of India and is so

declared. SRO No. 949/02 which takes away the benefit of SRO No. 590/96 is declared illegal. However, we hold that the appellant is not entitled to any amount by way of remission or otherwise by virtue of the declaration of this judgment and this declaration would be prospective. In Sreekrishna Marbles and Granites Vs. State of Kerala, the learned Single Judge had no occasion to consider validity of notification in the light of Article 304(a) of the Constitution of India.

Writ Appeal is allowed as above. Judgment of the learned Single Judge is accordingly set aside.