

(2009) 05 KL CK 0134
In the High Court Of Kerala
Case No : W.A. No. 1001 of 2009

Sales Tax Officer

APPELLANT

Vs

Akay Flavours and Aromatics Ltd.

RESPONDENT

Date of Decision : 28-05-2009

Acts Referred:

Central Sales Tax Act, 1956 — Section 5(1), 5(3)
Kerala General Sales Tax Act, 1963 — Section 45A

Citation : (2009) 4 KLT 152

Hon'ble Judges : C.N. Ramachandran Nair, J; C.K. Abdul Rahim, J

Bench : Division Bench

Advocate : Mohammed Rafiq, Government Pleader, for the Appellant; Joseph Markose and Mithun Markose, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—Writ Appeal is filed by the State against judgment of the learned Single Judge cancelling the penalty levied on the respondent u/s 45A of the K.G.S.T. Act for irregular claim of sales tax exemption for period beyond the period of eligibility under notification S.R.O. 1727/1993. We have heard Government Pleader appearing for the appellant and Senior Counsel Sri. Joseph Markose appearing for the respondent.

2. Respondent-assessee set up a new 100% export oriented unit within Kerala which was entitled to 5 years exemption from payment of sales tax under notification S.R.O. 1727/1993. The relevant provision namely, Item 8 of Schedule 6 of the notification is extracted hereunder for easy reference:

----- SI.
Name of goods and the name of Industrial Conditions No. undertakings/
manufacturers to which such goods are sold/by which such goods purchased.

8.
Industrial raw-materials, plant and 1. The exemption shall be for a
machinery(including components), period of five years from the date spare
parts, tools and consumables, of approval of such units other than petroleum

products falling by the Central Government, under Item 97 of the First Schedule 2. The seller shall obtain and to the Kerala General Sales Tax Act, produce a certificate in the Form in relation thereto to 100% export in Annexure-I oriented Units for use in the manufacture of goods.

3. The unit got initial permission to set up the industry from the Central Government on 16.12.1993. However, the case of the respondent is that this is not the date of approval of the unit by Central Government, but later date i.e. 27.10.1994 when the green card for approval for commencement of operation of the industry was issued by the Central Government. The crucial question is what is the date with reference to which the five years' sales tax exemption is available to the 100% export oriented unit. While the case of the respondent is that the approval is the later communication issued from Central Government which is after the unit commenced commercial production, the case of the Government Pleader is that date of approval of the unit by Central Government means the first letter of permission issued on 16.12.1993. Counsel for the respondent pointed out similar notifications granting tax benefits provide for exemption from date of commencement of commercial production. According to him, in order to have effective exemption for five years, the exemption has to be from the date of commencement of commercial production. However, we are unable to accept this contention because exemption available under the notification is not only for raw materials purchased for manufacture and products manufactured for sale, but on plant and machinery, spare parts, tools etc. The scope of the terms "date of approval of the unit" has to be considered with reference to the scope of exemption visualised in the notification. After getting permission, the industrial unit necessarily has to purchase plant and machinery for setting up the industry and commercial production starts only after setting up of the plant and machinery and after successful trial runs. An export oriented unit gets statutory exemption on product sales because sales are mostly export sales falling under Sections 5(1) and 5(3) of the CST Act. Therefore, effectively the exemption under notification has to be claimed for the raw materials purchased on which tax is payable either at sale point or at purchase point. Of course exemption on product sales under notification can be claimed for permissible quantity of domestic area sales available to export oriented units. Therefore, in our view, the Government consciously granted exemption from the date of approval of the unit so that the unit gets exemption on purchase of plant and machinery which goes to reduce the capital cost. This is clear from the notification which specifically provides exemption for plant and machinery which would not otherwise be available, if notification is given the interpretation claimed by the respondent i.e. from date of commencement of commercial production, which is the subsequent approval granted by the Government through issue of a green card. When exemption is granted for plant and machinery, the date of approval referred to in the notification necessarily has to be the date on which Government permitted setting up of the plant pursuant to

which plant and machinery are purchased, the contention of the Government Pleader is that date of approval of the unit by the Central Government for the purpose of notification is the date of initial approval pursuant to which plant and machinery are purchased so that benefit of notification is fully and effectively available to the respondent. In fact, in our view this interpretation serves the respondent better because they could have availed sales tax exemption on purchase of plant and machinery as well. In any case we do not think penalty could be sustained in this case without a finding that the respondent availed exemption for period during which they were not entitled to benefit under the notification. The learned Single Judge assumed that exemption is claimed only for the five years in terms of the notification and infraction happened to be there only because of the bona fide interpretation of the date of approval by the respondent. This will be disclosed only by looking at the purchase bills of plant and machinery and if it is shown that the respondent has claimed exemption for purchase of plant and machinery by issuing declaration in terms of the notification to the suppliers, then respondent cannot contend that period of exemption does not commence from date of initial approval granted by the Central Government as contended by the State. Even though Counsel for the respondent brought to our notice judgment in Writ Appeal No. 2241/2008 (against the very same judgment impugned in this appeal i.e. W.P. (C) No. 32677/2004) by another Division Bench of this Court, we notice that this Court has only rejected respondent's appeal for the reason that the contested amount is as low as Rs. 8,000/- and the merits of the case is not gone into. So much so, this Writ Appeal by the State is maintainable. Since none of the authorities have considered tax exemption, if any, claimed by the respondent in regard to purchase of plant and machinery, we set aside the judgment of the learned Single Judge and penalty orders and restore the matter to the Assessing Officer to call for records and verify the purchase bills pertaining to plant and machinery and if respondent has not claimed benefit of exemption for such purchases, then cancellation of penalty will stand sustained and there is no need to levy penalty on the respondent because claim of exemption is only for five years and based on the bona fide interpretation of the notification. On the other hand if the respondent has availed tax exemption on purchase of machinery under same notification by issuing declaration, then certainly penalty will be considered for claiming exemption for purchases for any period beyond five years from the date of initial approval. Fresh orders will be issued after giving opportunity to the respondent. The Writ Appeal is disposed of as above.