(2004) 04 KL CK 0008

In the High Court Of Kerala

Case No : Writ Petition No''s. 33312 and 33868 of 2003

Sanjo Poultry Farm APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 06-04-2004

Acts Referred:
Kerala General Sales Tax Act, 1963 — Section 3, 5D

Citation : (2005) 1 KLT 379

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Advocate : K.I. Mayankutty Mather, Sunil Shanker and A. Kumar, for the Appellant; Raju Joseph, Sp. Government Pleader, for the Respondent

Judgement

G. Sivarajan, J.—These two Writ Petitions raise the question regarding the liability to entry tax on the import of "day-old-chicks" from the nearby States u/s 3 of the Kerala Tax on Entry of Goods into Local Areas Act, 1994 (for short "the Act"). The petitioners in both these cases are stated to be the owners of poultry farms in the State for rearing chicks. They are also registered dealers both under the Kerala General Sales Tax Act, 1963 and under the Central Sales Tax Act, 1956 (hereinafter referred to as "the K.G.S.T. Act" and "the C.S.T. Act") respectively. According to the petitioners, they are not liable to pay entry tax on the import of "day-old chicks" from the nearby States for the purpose of rearing them in their farms since their sales of chicken so reared and its meat are exempted from sales tax by virtue of the Notification S.R.O. No. 1090 of 1999 as amended by S.R.O. No. 7 of 2002. Their grievance is that in spite of the above legal position the check-post authorities in the State are consistently detaining the day-old chicks brought from the neighbouring States on the premise that the same is liable to entry tax as a matter of course and that they are insisting for payment of entry tax for onward transportation of chicks.

2. The petitioners, for the purpose of establishing that there is no liability under the K.G.S.T. Act to pay tax on the turnover of sale of chicken and its meat, is

relying on the Notification S.R.O. No. 1090 of 1999 as amended by S.R.O. No. 7 of 2002. It is stated that under the aforesaid notifications poultry farmers within the State are exempted from payment of sales tax on the turnover of sale of poultry reared by them in their own farms within the State whether hatched by them or not but run on land owned by them and the meat obtained therefrom. The Notification S.R.O. No. 7 of 2002, entry No. 14(ii) also states "own farm does not include farm run on land taken on lease, mortgage, licence or any other arrangement". According to the petitioners they fall under the said clause and therefore there is no liability or payability to any tax under the K.G.S.T. Act in respect of their sale of live chicken though the commodity is taxable under the residuary entry contained in the First Schedule to the K.G.S.T. Act. They also relied on the decision of a Division Bench of this Court in Emmvee Solar Systems Pvt. Ltd. v. Sales Tax Inspector (2003 (3) KLT 107 : (2003) 3 KHCACJ 15) and stated that where there is no liability under the K.G.S.T. Act itself on account of the exemptions under the notifications there is no loss of revenue caused to the State of Kerala in the subject transaction and resultantly there can be no liability to entry tax also.

3. It is also stated that the Government in exercise of the powers vested u/s 3 of the Act issued S.R.O. No. 204 of 2002 and for the first time included "live chicken and meat" as a taxable commodity under the Act vide entry 32 of the Schedule and further, by S.R.O. No. 489 of 2003 the Schedule was again amended wherein "live chicken and meat" was included as entry 30 taxable at the rate of 8 per cent. With reference to the charging provision Section 3 of the Act read with the Schedule it is stated that no entry tax is leviable in respect of day-old chicks brought into the State by the petitioners as there is a clear distinction between chicks and chicken. It is stated that what is made taxable under the Act is only "live chicken and meat" and that even assuming that chicks are to be treated as chicken, still no levy of entry tax is possible against the petitioner as there is no payability to sales tax under the K.G.S.T. Act. The petitioners also relied on entry 14(i) of S.R.O. No. 1090 of 1999 and entry 24 of the Third Schedule to S.R.O. No. 1727 of 1993 which refers to sale of chicks and poultry which would show that the Government itself was of the view that chicks and chicken are different commodities.

4. I have heard the learned counsel appearing for the petitioners and Sri. Raju Joseph, learned Special Government Pleader (Taxes) appearing for the respondents. The counsel for the petitioners submitted that chicks and chicken are different commercial commodities, that nobody will buy chick for chicken, that chicks are bought and brought from outside the State only for the purpose of rearing them in the petitioners'' farm, that the notifications issued by the Government itself have treated chicks and chicken as two different and distinct commercial commodities. The counsel further submitted that the petitioners'' case falls under Clause (ii) of entry 14 of the Notification S.R.O. No. 1090 of 1999 as amended by S.R.O. No. 7 of 2002 and therefore since there is no liability or payability to tax on the sale of chicken under the K.G.S .T. Act reared by them

in their poultry farm and there is no liability to entry tax under the Act in view of the decision of the Division Bench of this Court mentioned supra. The Special Government Pleader, on other hand, submitted that exemption granted as per the Notifications S.R.O. No. 1090 of 1999 and S.R.O. No. 7 of 2002 are not to the goods as such but only to the dealers who fall within the description in the notifications and further it is available only if poultry farm is conducted in properties owned by such poultry farmers. The Special Government Pleader further submitted that there is no exemption from liability to tax or reduction in the rate of tax on the sale of chicken generally in that it falls under the residuary entry in the First Schedule to the K.G.S.T. Act taxable at 8 per cent. The Special Government Pleader further submits that chicken includes chicks as well and that exemption under the K.G.S.T. Act by virtue of the notification is available only in respect of chicks hatched within the State. The Special Government Pleader also submitted that the provisions of S.3 as it stood prior to its amendment by the Kerala Finance Act, 2003 used the expressions "the rates specified" but the said expressions were changed by the Finance Act, 2003 by using the expressions "the tax payable" only for the purpose of including the additional sales tax applicable as per Section 5D along with the Schedule rate. It is further stated that this amendment was necessitated in view of the fact that in many cases it is decided that the tax applicable as per the K.G.S.T. Act is the rate applicable as per Schedule and not as per notification. The Special Government Pleader further submitted that if the entry of chicks into Kerala is not taxed under the Entry Tax Act it will no doubt affect the farmers of Kerala and so a broad interpretation should be given to the term "chicks" and "live chicken" and that the terms "chicks" and "live chicken" should be treated as one and the same commodity. He further submitted that the K.G.S.T. Act and the Kerala Tax on Entry of Goods into Local Areas Act, 1994 are two independent statutes and exemption notification issued under one statute, is not applicable to another statute. He further submitted that if entry 30 of the Schedule to the Act is broadly interpreted chicks will also come within the definition of "live chicken". The Special Government Pleader also relied on a decision of the Supreme Court in Royal Hatcheries (Pvt.) Ltd. v. State of A.P. [1994] 92 STC 239) where it was held that chicks are general goods and not livestocks and the selling dealer is liable to pay sales tax on the sale of day-old chicks.

5. I have considered the rival submissions. The petitioners in both these cases did not challenge any proceedings of the authorities under the Act. They have only sought for a declaration that the day-old chicks bought and brought by the petitioners from outside the State into the State are not exigible to entry tax under the Kerala Tax on Entry of Goods into Local Areas Act, 1994 and for a writ of prohibition restraining the respondents from collecting entry tax on "day-old chicks" brought into the State of Kerala by the petitioners from outside the State for rearing in their own farms, without compelling them for payment of entry tax and also to refrain from detaining the consignment at the check-posts.

6. The fact that "chicks" are exigible to tax under the K.G.S.T. Act under the

residuary entry in the First Schedule thereto is not in dispute. The only case is that by virtue of the exemption Notifications S.R.O. No. 1090 of 1999 as amended by S.R.O. No. 7 of 2002 the petitioners are exempted from payment of sales tax on the turnover of sale of poultry reared by them in their own farms within the State and the meat obtained therefrom and therefore having regard to the purpose, viz., to curb the evasion of sales tax with which the Act is enacted and in view of the decision of the Division Bench of this Court in Emmvee Solar Systems'' case (supra) they are not liable to pay entry tax on the purchase of turnover of chicks. They have also got a case that by virtue of the amendment to Section 3 of the Act since the expression "the rates specified" for the goods in the First Schedule to the K.G.S.T. Act was substituted by the expression "the tax payable" for the goods as per the K.G.S.T. Act, 1963 after the amendment, since no tax was payable on the sales turnover of chicken under the K.G.S.T. Act the charging section is not attracted. The petitioners have also got a case that as per entry 30 of the Act since, live chicken and its meat alone are exigible to tax under the Act, chick being different from chicken is not covered by the said entry and consequently there is no liability to pay any tax under the Act on the import of chicks.

7. Section 3 of the Act which is the charging section as amended by the Finance Act, 2003 reads as follows:

" Section 3 : Levy of tax.- (1) Subject to the provisions of this Act, there shall be levied and collected a tax on the entry of any goods into any local area for consumption, use or sale therein. The tax on such goods shall be at such rate or rates as may be fixed by Government, by notification, on the purchase value of goods not exceeding the tax payable for the goods as per the Kerala General Sales Tax Act, 1963:

Provided that no tax shall be levied and collected in respect of any motor vehicle which was registered in any Union Territory or any other State under the provisions of the Motor Vehicles Act, 1988 (Central Act 59 of l988), prior to a period of fifteen months or more from the date on which it is registered in the State:

Provided further that no tax shall be levied and collected in respect of any goods which is the property of the Central Government or which is used exclusively for purposes relating to the defence of India.

(2) The tax shall be payable by the importer in such manner and within such time as may be prescribed."

As per the said section the tax shall be levied and collected on the entry of any goods into any local area for consumption, use or sale therein. The section provides that the tax on such goods shall be at such rate or rates as may be fixed by the Government by notification. It must be based on the purchase value of the goods not exceeding the tax payable for the goods as per the K.G.S.T. Act, 1963. There is no doubt that the goods, viz., chicks are brought to this State either for consumption, use or sale therein. The rates are fixed by the Government by notification. There is no dispute that the rates fixed for chicken and its meat in entry 30 of the Schedule to the Act is 8 per cent. There is also no dispute that this rate does not exceed the rate of tax payable as per the residuary entry in the First Schedule to the K.G.S.T. Act which is 8 per cent leave alone the additional tax u/s 5D of the K.G.S.T. Act. The contention of the petitioners is that prior to the amendment of Section 3 of the Act the wording of Section 3 of the Act was "not exceeding the rates specified for the goods in the Schedule I to the K.G.S .T. Act" which clearly refers to the rates in the Schedule, but after the amendment there is no reference to any Schedule to the K.G.S.T. Act but the reference is to "the tax payable for the goods as per the K.G.S.T. Act". According to the petitioners there is distinction between the rates specified for the goods and the tax payable for the goods, for, the former deals with the rate specified in the Schedule without any reference to the payability while the latter deals with payability of tax only and therefore unless tax is payable there cannot be a liability to entry tax under the Act. I am unable to accept the said contention of the petitioners, for, if such a contention is accepted the words "tax on such goods shall be at such rate as may be fixed by the Government by notification" used in Section 3 will be rendered meaningless and otiose. The notification issued u/s 3 will also be meaningless. Here it must be noted that the words in Section 3 mentioned above are with regard to the measure of tax and the further words in Section 3 "not exceeding the tax payable for the goods as per the Kerala General Sales Tax Act" specify the outer-limit in the fixation of the rate by the Government by notification. Entry Tax Act is an enactment made by the State Legislature in exercise of the powers vested in it under entry 52 of List II of the Seventh Schedule to the Constitution. Of course the Entry Tax Act has got an intimate connection with the K.G.S .T. Act in many respects as held by a Division Bench of this Court in Emmvee Solar Systems Pvt. Ltd. ''s case (supra) for, the purpose of the said enactment was to curb the evasion of sales tax on account of the purchase of goods by persons from outside the State. That does not mean that the Government has no power to fix the rate of entry tax for the purpose of Section 3 of the Act.

8. The stand of the Government that Section 3 of the Act was required to be amended in view of certain decisions which have taken the view that additional sales tax due on sales tax cannot be reckoned while fixing the rate of entry tax u/s 3 of the Act. According to the Government it is only to get over such a situation and to take in the additional sales tax liability also for the purpose of fixing the rates of entry tax the section was amended and the words "the rates specified for the goods in the Schedule I to the K.G.S.T. Act" were substituted by the words "the tax payable for the goods as per the K.G.S.T. Act, 1963". The expression "tax payable" used in Section 3 must be understood in the context as the liability under the Act and the same cannot be made to depend on the actual liability of a dealer on the facts and circumstances of each case. The position is that whereas under the provisions of S .3 as it stood prior to the amendment of the said

section by the Finance Act, 2003 the rate of tax to be fixed by the Government by notification for the purpose of Section 3 cannot exceed the rate of tax specified for the goods in the First Schedule to the K.G.S.T. Act which means the additional tax leviable u/s 5D of the K.G.S.T. Act could not have been reckoned for fixing the rate of entry tax but by virtue of the amendment made to Section 3 by the Finance Act, 2003 additional sales tax u/s 5D of the K.G.S .T. Act can also be reckoned for determining the Schedule rate. The amendment, according to me, does not carry any further.

9. Though the counsel for the petitioners have relied on the decisions of the Calcutta High Court in Durga Prosad Khaitan v. Commercial Tax Officer [1957] 8 STC 105 HC), the Andhra Pradesh High Court in G. Lakshminarayana v. Commercial Tax Officer [1974] 33 STC 558 HC) and the decision of the Allahabad High Court in M.A. & Company v. Assistant Commissioner (Judicial), (Sales Tax) [1964] 15 STC 487 HC) and other castes regarding the meaning of the expressions "tax payable" in the view which I have already taken it is unnecessary to deal with those decisions. However, it can be seen from the decision in M.A. and Company Vs. Assistant Commissioner (Judicial) Sales Tax and Another, it was observed that the sales 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, 1948, it is stated, is the sale of goods or their supply or distribution by way of sale and that it is not necessary to wait till the assessment has been completed in order to be able to say that a tax has become payable. The Division Bench observed that 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. This decision also accords with the view which I have taken hereinabove.

10. Now coming to the next question as to whether chick and chicken are one and the same commodity Entry 30 of the Schedule to the Act is "live chicken and meat". Chicks are not specifically mentioned in the entry. Thus if chicks and chicken are different and distinct commercial commodities certainly chicks will be outside the purview of the said entry. There is no residuary entry also in the Schedule to the Act. Thus the question is whether the expression "live chicken" in Entry 30 will take in chicks also. Of course in the notifications S.R.O. No. 1090 of 1999 and in S.R.O. No. 7 of 2002 as also in S.R.O. No. 1729 of 1993 all issued u/s 10 of the K.G.S.T. Act refer to sale of poultry and chicks and sale of chicks and chicken. It is on that basis the petitioners contend that chicks and chicken are distinct and different commodities. As already noted, the Entry Tax Act and the K.G.S.T. Act are two different Acts enacted under two different legislative entries, viz., the entry 52 and entry 54 respectively of List II of the Seventh Schedule to the Constitution.

11. In Websters Dictionary Deluxe Encyclopaedia 7th Edn., the meaning of the

word "chick" is "newly hatched chicken, any very young bird" and the word "chicken" means "the domestic fowl, gallus, or its flesh as food". In the Concise Oxford Dictionary of Current English 5th Edn. the word "chick" is defined as "young bird before or after hatching" and the word "chicken" means "young bird, especially of domestic fowl, flesh of this".

12. The Supreme Court in Royal Hatcheries (Pvt.) Ltd. v. State of Andhra Pradesh [1994] 92 STC 239) AP, considered the question as to whether chicks are domestic animals so as to be classified under the head "livestock". It was held that chicks are referred to as birds and not as animals and chicks cannot certainly be included in the said expression. It was further held that the chicks sold by the assessee therein are not included within the meaning of Clause (xxvi) of Rules 5(2) of the Andhra Pradesh General Sales Tax Rules, 1957 which deals with "livestocks". The dictionary meaning of the words chick and chicken tallies with the meaning of the expression chick as a bird judicially interpreted by the Supreme Court. According to me, both chick and chicken will fall within entry 30 of the Schedule to the Act "live chicken and meat". Thus the contention on behalf of the petitioners that these are two different commercial commodities and that chicks are not exigible to tax under the Act cannot be sustained.

13. The only other contention to be dealt with is as to whether by virtue of the exemption available to poultry farmers in the State on the sales turnover of poultry reared by them in their own farm within the State and the meat obtained therefrom under the notifications issued u/s 10 of the K.G.S.T- Act the petitioners are entitled to exemption from payment of entry tax under the Act. S.R.O. No. 7 of 2002 issued with retrospective effect from April 1,2000 reads thus:

-- "Sl. Name of Turnover which is Conditions and No. dealer exempted restrictions -- 14(i) Hatcheries Turnover of sale of chicks hatched Nil within the State by them within the State (ii) Poultry fanners Turnover of the sale of poultry reared Nil within the State them in their own farm within the State, whether hatched by them or not, but run on land owned by them, and the meat obtained therefrom.

Own farm does not include the farms run on land taken on lease, mortgage, licence or any other arrangement."

14. S.R.O. No. 1090 of 1999 was also similarly worded except the last sentence above, viz., "own farm does not include farm run on land taken on lease, mortgage, licence or any other arrangement". The petitioners'' case is that their case fall under Clause (ii) of entry No. 14 extracted above. Here, it must be noted that exemption is not to the goods as such but to the poultry fanners within the State. That apart, the exemption is on the turnover of sale of poultry reared by them in their own farm within the State whether hatched by them or not. The poultry farm must be run on land owned by them. By virtue of the last,

limb of entry 14 the ownership of the farm must be absolute ownership of the land in which the poultry farm is situated. Thus various factual circumstances have to be established forgetting the benefit of exemption from payment of sales tax under this notification. When the petitioners bring day-old, chicks from outside the State the liability to entry tax is attracted immediately on its entry in the State. It will not be possible for the check-post authorities to go into the question as to whether all the ingredients of entry 14(ii) of the notification are satisfied so as to consider the question as to whether the petitioners are entitled to get exemption from payment of sales tax on the sale of chicken and its meat by them. Even assuming (I have not considered) that the petitioners are entitled to exemption from payment of sales tax under the K.G.S.T. Act by virtue of the aforesaid notifications still a question may arise as to whether the chicks brought from outside State is entitled to such exemption. Here, it must be noted that it is not the case of the petitioners that the chicks brought from outside the State is sold as such. It is their case that the chicks so brought are reared in their respective poultry farms and are sold as chicken. Though chicks and chickens are one and the same commercial commodities for the purpose of entry tax chicks and chickens are distinct and different commercial commodities for the purpose of sales tax in that they are separately dealt in the notifications and therefore the question may also arise as to whether entry tax can be levied on the entry of chicks into local areas in the State.

15. As I have already noted the question regarding the exigibility to tax under the Act can be decided only after resolution of the disputed questions of facts which I have already mentioned. In these circumstances, it will not be possible for this Court to straight away adjudicate the question regarding the exigibility to entry tax under the Act as sought for by the petitioners.

16. I accordingly hold that this is a matter which the petitioners have necessarily to raise it before the Assessing Authority under the Act and it is for the said authority on the basis of materials and evidence to adjudicate the said question in accordance with law. I direct the petitioners to pursue their remedies available under the Act. I make it clear that I have not considered the merits of the contentions of the petitioners that in view of the notifications issued u/s 10 of the K.G.S.T. Act they have no liability to pay sales tax under the said Act and consequently there is no liability to pay entry tax.

17. Since the petitioners are registered dealers both under the K.G.S.T. Act and under the C.S.T. Act and since the Assessing Authority both under the K.G.S.T. Act and under the Act is one and the same and further in view of the fact that the petitioners are regularly purchasing chicks from outside the State for the purpose of their business it is a matter for consideration by the Assessing Authority concerned as to whether the petitioners can be given a certificate periodically to the effect that the petitioners are entitled to the benefit of Notification S.R.O. No. 7 of 2002 insofar as the sales tax liability is concerned and if any such certificate is obtained from the Assessing Authority and carried

with the consignment the check-post authorities, after inspecting the goods and on finding that the goods under consignment are day-old chicks, will release the goods on the petitioners filing a statement containing all the required particulars without insisting for payment of entry tax on the respective consignments. However, the sales tax authority under the Act can demand security deposits to ensure that in case the demand is sustained ultimately the same can be recovered from the petitioners. This is only by way of interim measure.

Writ Petitions are disposed of as above.

