
(2006) 11 KL CK 0048
In the High Court Of Kerala
Case No : W.A. No. 1162 of 2006

Saraswathi Abharanasala

APPELLANT

Vs

Corporation Bank and Another

RESPONDENT

Date of Decision : 07-11-2006

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 44, 44(4), 59A

Citation : (2007) 1 ILR (Ker) 474 : (2009) 19 VST 73

Hon'ble Judges : K.P. Balachandran, J;K.A. Abdul Gafoor, J

Bench : Division Bench

Advocate : S.V. Balakrishna Iyer and P.B. Krishnan, for the Appellant; T.K. Ananda Padmanabhan and V.V. Ashokan, Special Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K.A. Abdul Gafoor, J.—The appellant approached this Court with the writ petition seeking a declaration that he would be liable to pay sales tax only at the rate of 0.5 per cent for the transaction he had with the first respondent/bank as reflected in exhibit P2 and seeking refund as tax has been collected at the rate of one per cent. He has also sought to quash exhibit P3 communication issued by the first respondent/bank rejecting his claim for refund on the basis of a letter of the Assistant Commissioner (Assessment), Commercial Taxes, which is produced by the first respondent as exhibit R1(B). The learned single judge after hearing both sides found that the dispute ought to have been resolved resorting to the provisions contained in Section 59A(d) of the Kerala General Sales Tax Act, 1963. It is submitted by the appellant that the said provision is applicable only in respect of the dispute as to the rate of tax. As the rate of tax is finally notified in exhibit P1 at 0.5 per cent, there arises no question of any dispute on the rate of tax to attract the said statutory provision for resolving dispute. Therefore, the learned single judge went wrong and therefore, he would have been granted the relief prayed for.

2. He also submits that he had long pending transaction of purchase of gold from the first respondent/bank who alone was on the party array when the original petition was filed. He had transaction worth Rs. 42,37,48,518 during the period from April 6, 1999 to December 10, 1999 in the assessment year 1999-2000. At that time, the rate of tax was as provided in S.R.O. No. 1728/1993 dated January 1, 1994 amended by S.R.O. No. 301/1999 dated April 1, 1999, at the rate of one per cent in respect of sale of bullion to persons other than manufacturers or exporters of jewellery. Therefore, he paid and the first respondent/bank collected tax at the rate of one per cent. Later, by exhibit P1 notification S.R.O. No. 1075/1999 dated December 27, 1999 the relevant entry in column 3, Schedule IV of S.R.O. No. 1728/1993 as amended by S.R.O. No. 301/1999 was further amended as follows:

Sale of bullion and specie to any registered dealer within the State.

3. Therefore, the appellant not being a manufacturer also became liable to pay sales tax only at the rate of 0.5 per cent. Exhibit P1 though dated December 28, 1999, made clear that "this notification shall be deemed to have come (sic) into force on the 1st day of April, 1999". Therefore, according to the appellant the tax paid by him at the rate of one per cent for the transactions from April 6, 1999 to December 10, 1999 was in excess of the permissible rate in exhibit P1 which came into force with effect from April 1, 1999. He accordingly, made application for refund of the tax thus paid in excess, to the first respondent/bank, who realised that excess collection. This was admittedly before the date due for the final annual return to be filed by the first respondent. The first respondent took the matter with the assessing authority who gave a reply in exhibit R1(B) dated March 3, 2000 to the effect that "according to the said original Notification S.R.O. No. 1728/1993, tax if any collected at the higher rate shall be paid over to the Government and tax if any paid over to the Government shall not be refunded. So you may please inform your customer accordingly". The bank in turn communicated this to the appellant in exhibit P3 to take note of the same for his information. It was in the above circumstances, he approached this Court seeking direction against the bank to refund the tax to the tune of Rs. 20,97,261 stated to be collected in excess of the permissible rate.

4. It is an agreed fact before us by the counsel for the appellant, the counsel for the bank as well as the Special Government Pleader appearing for the assessing authority that the tax payable at the relevant period in terms of exhibit P1 is only 0.5 per cent. It is also agreed by all that during the period mentioned in exhibit P2 tax had been collected from the appellant at the rate of one per cent. But it is maintained by the Special Government Pleader that the tax once collected and paid over to Government cannot be refunded going by the residuary clause in the original notification, namely, S.R.O. No. 1728/1993 which reads as under:

Tax if any collected at the higher rate shall be paid over to the Government and the tax if any paid over to Government shall not be refunded.

5. This clause is a part of the general Notification S.R.O. No. 1728/1993 which stands amended by several other notifications including S.R.O. No. 301/1999 dated April 1, 1999 and exhibit P1 dated December 28, 1999. Therefore, this residuary clause is applicable even in respect of the tax collected from the appellant/petitioner though he was liable to pay going by exhibit P1 only at the rate of 0.5 per cent. Therefore, the reply given to the bank in exhibit R1(B) is justified and the appellant cannot get refund as claimed, the Special Government Pleader submits. In this respect, he has relied on the decision in Assistant Commissioner (Assessment) v. Associated Cement Companies Ltd. [1998] 108 STC 219 sc : [1997] KLJ 265, APAR Ltd. v. Assistant Commissioner [2000] 8 KTR 363 and Kokkala Arecanut Commission Agent Association Vs. Commissioner of Commercial Taxes, which are to the effect, according to him, that tax once paid cannot be refunded, when there is specific provision in the notification to that effect.

6. It is submitted by the counsel for the bank that when the Government had informed based on a clause contained in the notification that the tax paid over cannot be refunded, the bank did not have any liability other than to inform that fact to the appellant and therefore, the bank is not liable to refund any amount to the appellant.

7. It is further submitted that even as admitted by the appellant, at the time of the transaction made mention of in exhibit P2, the rate of tax payable by him was one per cent and the bank was entitled to collect the same from him, he being a customer of the bank. The entire tax collected had been paid over to Government. In such circumstances, there is no liability for the bank to effect any refund, it is submitted.

8. It is submitted in reply by the appellant that the clause referred to by the Government Pleader as contained in S.R.O. No. 1728/1993 and extracted above is a clause applicable to the transaction mentioned in Schedule VII to that notification alone and it cannot have any application to Schedule IV. It is further submitted that even if, it is applicable to Schedule IV in the light of the special provision contained in exhibit P1 that the said notification shall be deemed to have come into force from April 1, 1999, that special provision in the notification shall prevail over the other general provision relied on by the Government Pleader. In answer to the contention of the bank, he submits that he had immediately after the issuance of exhibit P1 notification requested the bank to refund the excess tax collected in excess of the revised rate as contained in exhibit P1. This was long before the close of the relevant assessment year and long before the date due for the final return to be filed by the bank.

9. It is further submitted that the reply given by the assessing officer to the bank as contained in exhibit R1(B) was also on March 3, 2000, before the close of the assessment year concerned. Therefore, the bank ought to have claimed the refund from the assessing authority by filing the final annual return due in May 2000, rather than sleeping over the communication contained in exhibit R1(B).

Had the bank acted in terms of law, necessarily, it could have adjusted the tax due finally in the annual return and paid over the amount to the appellant. Instead, they have only intimated the appellant as per exhibit P3 dated June 6, 2000, i.e., after the due dates for the annual return that the Government had intimated them that amount once paid over would not be refunded. Had this communication been given in time, when the bank received exhibit R1(B) dated March 3, 2000, the appellant could have again appraised the bank of its opportunity to get refund by filing appropriate annual return. Therefore, it is submitted that when the Government had reduced the liability of the appellant with regard to the tax payable on the transaction that he had with the first respondent/bank, the benefit arisen out of it should not have been denied. In other words, the benefit that accrued to him in exhibit P1 should not have been deprived of, it is submitted. Therefore, he is entitled for refund, the counsel submits.

10. The learned single judge had conceived the dispute as one coming within Section 59A(d). When it is agreed before us that as per exhibit P1 the tax payable by the appellant and the tax liable to be collected by the first respondent was only at 0.5 per cent, there arises no question of resolving the dispute, under the said provision, as the dispute is not with respect to the rate of tax. Therefore, the finding in that regard in the impugned judgment cannot be sustained.

11. The entitlement of the appellant to get refund is resisted only on the ground that tax once collected and paid over to Government will not be refunded, relying on the residuary clause contained in the parent notification S.R.O. No. 1728/1993, as the said residuary clause appears at the end and above the signature of Secretary to Government who had authenticated it. Necessarily that residuary clause shall be one governing all the items contained in all the Schedules, as rightly pointed out by the Special Government Pleader.

12. But at the same time, exhibit P1 notification, notwithstanding that residuary clause, provides that, it will have effect from April 1, 1999. The effect of exhibit P1 notification is to amend column 3 of item No. 9 in Schedule IV bringing all types of bullion transaction within the State like sale of bullion and specie to any registered dealer. Necessarily, any transaction of bullion that the appellant did have with the first respondent on and from April 1, 1999 will be liable to tax only at the rate of 0.5 per cent as contained in S.R.O. No. 301/1999 dated April 1, 1999. In this respect, it is worthwhile to extract the Explanatory note to exhibit P1 which reads as under:

As per Notification S.R.O. No. 301/1999 dated March 31, 1999, Government has reduced the rate of tax on the sale of bullion and specie to manufacturers of gold ornaments from one per cent to 0.5 per cent. It has come to the notice of the Government that gold in bulk quantities is sold only through banks within the State and so any jeweller who wishes to make use of the reduced rate will have to effect purchase to the tune of Rs. 25 lakhs at a time. Intermediary dealers who normally buy from the banks and primarily cater to the requirements of local

goldsmith and jewellers will not be in a position to do their activity, since they will not be eligible for the reduced rate of 0.5 per cent when they buy the material from banks or other first sellers within the State. Hence, the Government have decided to make the reduced rate applicable when the bullion and specie are sold to any registered dealer within the State.

13. This Explanatory note makes it clear that the intention and purpose of issuing exhibit P1 to amend column 3 of item No. 9 in Schedule IV of S.R.O. 1728/1993 as amended by S.R.O. 301/1999, is to make those who are the purchasers of gold other than manufacturers of gold ornaments also get the benefit of the reduced rate of tax at 0.5 per cent, instead of one per cent and that was the purpose to give exhibit P1 effect from April 1, 1999, because the S.R.O. No. 301/1999 gave the benefit of reduced rate to the purchasers of bullion and species for manufacturing gold ornaments with effect from April 1, 1999. Necessarily, exhibit P1 is a special provision, bringing the purchasers like the appellant also within the purview of the tax liability of 0.5 per cent also from April 1, 1999. Necessarily, this special provision will have an overriding effect over the general provision in the residuary clause as referred to earlier and relied on by the Government Pleader. It is fundamental that the special provision prevails over the general provision.

14. Therefore, nobody can take shelter under the said general residuary clause in S.R.O. No. 1728/1993 to resist the request for refund, when all admit that on the strength of exhibit P1, the tax liability of the appellant was only at 0.5 per cent for the transaction made mention of in exhibit P2.

15. In this regard, we may have to refer to the contention of the Government Pleader resting on the three decisions referred to above. The decision in Assistant Commissioner (Assessment) v. Associated Cement Companies Ltd. [1998] 108 STC 219 (Ker) : [1997] KLJ 265 is in respect of the turnover tax. The Government Pleader relied on paragraph 19 which reads as under:

Before the conclusion of the arguments, it was brought to our notice that the Government had issued another notification G. O. (MS) No. 38/93/TD dated March 9, 1993 by which exhibit P1 notification was given retrospective effect from the 1st day of April, 1992. But that notification itself stated that any turnover tax paid shall not be refunded. Thus, if tax had been collected from the petitioner-respondent before exhibit P1 notification, they shall not be entitled to refund of the same.

(emphasis supplied)

16. Thus in that case the subsequent notification specifically stated that any turnover tax paid shall not be refunded. When the notification specifically stated so, nobody can claim refund. On the other hand, exhibit P1 notification does not have such clause that any tax paid at the rate applicable prior to exhibit P1 during the period of its retrospectivity will not be refunded. Therefore, Associated Cement Companies case [1998] 108 STC 219 (Ker) : [1997] KLJ 265 cannot be

taken as an authority to contend that one cannot claim refund in every situations. The notification which formed subject-matter in Associated Cement Companies case [1998] 108 STC 219 (Ker) : [1997] KLJ 265 was one which specifically stipulated that any tax paid in excess of the liability shall not be refunded.

17. The Associated Cement Companies case [1998] 108 STC 219 (Ker) : [1997] KLJ (TC) 265 was again considered in APAR Ltd. v. Assistant Commissioner [2000] 8 KTR 363. There also the notification dated March 9, 1993 which was subject-matter of the case had retrospective operation from April 1, 1992 with an added proviso that turnover tax, if any, paid shall not be refunded. So on that basis itself, nobody could have claimed any refund. Therefore, on the basis of clause contained in the notification, it does not have any application to the case on hand.

18. The other remaining ruling relied on by the Government Pleader is that in Kokkala Arecanut Commission Agent Association Vs. Commissioner of Commercial Taxes, . It is with respect to the refund claimed on the basis of exemption. There also the Notification S.R.O. No. 127/2000 considered in that case contained two specific clauses that is, (1) tax, if any, already collected in the higher rate shall be paid over to the Government and (2) tax, if any, already paid shall not be refunded. It was in the above circumstances, the refund was denied.

19. These three cases are thus in relation to notifications which specifically - contained a non-refund clause in respect of the tax already collected. As already noticed, exhibit P1 while giving it retrospectivity from April 1, 1999 did not have such a specific non-refund clause. Necessarily, these decisions cannot have any bearing on the case on hand.

20. The further contention raised not only by the Government Pleader, but also by the counsel for the bank is that the appellant could not have claimed any refund at all having once paid tax as admissible as per the law in force at the time of the transaction. If at all he could seek any remedy, it is not by way of writ petition. The decision in Mahavir Machinery Corporation v. State of Uttar Pradesh [1991] 82 STC 345 (All) is much relied on. Paragraph 2 thereof reads as follows (at page 346 of STC):

Having heard the learned Counsel for the petitioner we are of the opinion that no relief can be granted to the petitioner in these proceedings. Assuming without deciding that the ordnance factory realised sales tax from the petitioner in excess of the tax legally leviable on such sales, the position is that u/s 29A of the U.P. Sales Tax Act, 1948, the party realising sales tax in excess of the amount leviable in law is bound to deposit the excess amount in the Government treasury and under Sub-section (3) of the same provision it is open to any person who claims to have paid excess sales tax to make an application for the refund of the amount realised in excess and the State Government is liable to

make the refund subject to the condition laid down u/s 29A of the Act.

21. A reading of this dictum reveals that Section 29A(3) enabled any person who claims to have paid excess sales tax to make application for refund. The Allahabad Court had considered the person realising the tax and any person who claimed to have paid excess tax differently. The provisions enabling any person to claim refund were also considered in that decision. On the other hand, Section 44 of the Kerala General Sales Tax Act, 1963 enables only a dealer to claim refund. In this case, the appellant was never a dealer in respect of the transaction in exhibit P2. He was only a purchaser and the first respondent/bank was the dealer. Necessarily, going by the statutory provisions, available in Kerala, the appellant could not have claimed any refund.

22. Now, we will deal with the contention of the bank that it had levied tax from the appellant during the transaction mentioned in exhibit P2 at the rate applicable then in terms of S.R.O. No. 301/1999. Any purchaser of bullion who was a manufacturer of gold ornaments alone was entitled to pay tax at the rate of 0.5 per cent going by S.R.O. No. 301/1999. Admittedly, the appellant was not a purchaser of bullion for the purpose of manufacture of gold ornaments. Therefore, he was liable to pay tax at the normal rate for bullion transaction of one per cent. This was reduced to 0.5 per cent in case of the persons like the appellant also as per exhibit P1 dated December 28, 1999. Therefore, the tax collected by the bank was as per the rate prevailing then. As exhibit P1 had retrospective operation, the bank took up the matter with the assessing authority who maintained that the tax once remitted or paid over to Government could not be refunded, in exhibit R 1(B). Therefore, the bank did not have any other liability except to communicate exhibit R 1(B) to the appellant.

23. We are unable to accept this contention. Admittedly, the appellant had written to the first respondent/bank, immediately after the issuance of exhibit P1 notification for refund of the excess tax collected from him, going by exhibit P1 notification. The bank had also, as is revealed by exhibit R1(B) taken up this matter on January 19, 2000 with the assessing authority, the additional respondent No. 2, who maintained the view that, tax, if any, paid over to Government shall not be refunded. All these are far earlier than the closer of the assessment year concerned, viz., 1999-2000 during which the transaction had occurred and further, long before the date fixed for filing the annual return, i.e., March 15, 2000. In the final return, the bank could have returned the real liability during that year taking into account the retrospectivity of exhibit P1 and could have claimed refund from the advance tax already remitted and paid over that amount to the appellant. The appellant had incurred a huge liability of Rs. 20,97,763 which is the excess tax paid. Exhibit P1 is to give benefit to the persons who purchased bullion. When the Legislature or the Government had given that relief with retrospective effect, necessarily, that relief shall reach the concerned eligible citizen. The bank had opportunity to file the return showing the real tax liability based on exhibit P1 and claim refund in terms of Section 44

and could have paid over the amount to the appellant, the customer of the first respondent. If that had been claimed, necessarily, the assessing authority would have refunded it with 10 per cent interest as provided in Section 44(4). Thus, there was a great lapse on the part of the first respondent-bank which resulted ultimately in loss to the appellant. The first respondent/bank is a public sector undertaking, which has to protect the interest of the citizen who transacts with that bank. There is no provision enabling a tax-payer who pays tax to the dealer to get it refunded. Therefore, it was the liability of the first respondent/bank, an authority which had collected the tax in excess of the rate provided in exhibit P1 to seek refund and pay it over to the appellant. That lapse on the part of the first respondent shall not result in a loss being incurred by the appellant. Therefore, allowing this appeal the first respondent is directed to refund the amount so collected in excess from the appellant. Accordingly, we direct the first respondent/ Corporation bank, Kozhikode represented by its Manager, to refund the amount shown in exhibit R1(A), viz., Rs. 20,97,763.50 with 10 per cent interest as provided for in Section 44(4) of the Kerala General Sales Tax Act, 1963, to the appellant, at any rate, within two months from today. Anyhow, this will not prejudice the rights of the first respondent to claim refund if the law provides for, from the assessing authority or the Government.