

(2001) 06 KL CK 0044
In the High Court Of Kerala
Case No : O.P. No. 16836 of 2000

Siemens Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 13-06-2001

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 3, 4, 5
Constitution of India, 1950 — Article 246, 265, 286(1), 286(2), 366
Income Tax Act, 1961 — Section 194
Kerala General Sales Tax Act, 1963 — Section 5, 5(1), 7, 7(7)
Kerala General Sales Tax Rules, 1963 — Rule 10, 21(13), 22A, 22A(1), 22A(2)

Citation : (2001) 06 KL CK 0044

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Advocate : Chitra Venkettaraman and Jose Joseph, for the Appellant; B.S. Krishnan and P.K. Santhamma, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

G. Sivarajan, J.—The matter arises under the Kerala General Sales Tax Act, 1963 as amended for short "the Act" and under the Kerala General Sales Tax Rules, 1963 as amended for short "the Rules".

2. The petitioner is a company registered under the Indian Companies Act, 1956 with its registered office at Worli, Mumbai. It is a registered dealer under the Kerala General Sales Tax Act, 1963 and under the Central Sales Tax Act. It is an assessee on the files of the 3rd respondent. The petitioner is manufacturers-cum-dealers of electrical and electronic goods. They have filed this Original Petition challenging the provisions of sub-s. (7B) of S. 7 of the K.G.S.T. Act and Rules 22A(2) and 22A(5) of the K.G.S.T. Rules as ultra vires and invalid being beyond the scope of legislative competence of the State. They sought for a declaration that sub-s.(7B) of S. 7 of the K.G.S.T. Act and Rr. 22A(2) and 22A(5) of the K.G.S.T. Rules are invalid and unsustainable being beyond the scope of the charging provision contained in S. 5(1)(iv) of the K.G.S.T. Act. They also sought

for quashing Exts. P4, P6, P8 and P14 communications. They further sought for a direction restraining the respondents from deducting any amount towards tax invoking sub-s.(7B) of S. 7 of the K.G.S.T. Act.

3. Sub-s.(7B) of S. 7 as amended by the Kerala Act, 1994 was challenged before this Court in a batch of Writ Petitions O.P. No. 1590 of 1995 and connected cases. A learned Single Judge by judgment dated 17.3.1997 dismissed all the Writ Petitions. The Court relied on the decision of a learned Single Judge in *Symon v. State of Kerala* 1995 (97) STC 283 as affirmed by the Supreme Court in *State of Kerala & Anr. v. Builders Association & Anr.* 1997 (1) KLT 88 : 104 STC 134 (SC) and held that the present sub-s.(7B) confers only a benefit to the assesseees. It must be noted that the said decision has not been challenged in appeal and the same has become final.

4. Smt. Chitra Venkataraman, learned counsel for the petitioner, however, submitted that the Supreme Court considered the validity of S. 13AA of the Orissa General Sales Tax Act which is similar to the provisions under challenge and the said provision was held to be ultravires the charging provisions of the Act. The counsel submitted that in view of the authoritative pronouncement of the Supreme Court, which is binding on all courts under Art. 141 of the Constitution of India sub-s.(7B) of S. 7 as amended by the Kerala Finance Act, 1994 and R.22A(2) and Rule 22A(5) as amended by the K.G.S.T. Rules cannot be sustained. The counsel addressed elaborate arguments with reference to the provisions of sub-s.(7B) of S. 7 and R.22A as they stood both prior to 1.4.1994 and after the decisions rendered by this Court and by the Supreme Court. The counsel submitted that there is no provision in sub-s.(7B) of S. 7 of the Act in R.22A for exclusion of the turnover covered by Ss. 3, 4, 5, 14 or 15 of the Central Sales Tax Act and therefore the aforesaid provisions is ultravires and invalid beyond the scope of the charging provision and beyond the legislative competence of the State.

5. Learned Government Pleader appearing for the respondents based on the averments made in the statement filed on behalf of respondents 2 to 5 submitted that the amended provisions have to be upheld in view of the decision of the Supreme Court in *Builders Association* case and that the latest decision of the Supreme Court rendered in the context of the provisions of S. 13AA of the Orissa General Sales Tax Act will not apply to the instant case. He submitted that the provisions of sub-s.(7B) of S. 7 and R. 22A(2) & (5) are not similar to S. 13AA of the Orissa General Sales Tax Act. He further submitted that the proviso of R.22A(2) and R.22A(3) makes the position clear and that if the petitioner is not prepared to pay the tax under sub-s.(7B) of S. 7, they can approach the assessing authority under sub-r.(3) of R.22A for getting a certificate and that on production of the same, the awarder will make payments without any deduction. He also submitted that sub-s.(7B) is only in the nature of collection of advance tax and that final assessment and adjustment of tax already collected is contemplated under the Rules, which is well within the competence of the State

Legislature. The Government Pleader accordingly submitted that the provisions are valid.

6. The validity of the provisions of sub-ss.(7),n (7A) & 7(B) of S. 7 and R.22A as it stood prior to 1.4.1994 came up for consideration before a learned single Judge in *Symon and Ors. v. State of Kerala* and another 1995 (97) STC 283 (Ker.) and the same was upheld. The Division Bench however did not agree with the said judgment and struck down the provisions of sub-ss.(7), (7A), (7B), (11) and (12) Constitution of Indian and therefore invalid. The Supreme Court reversed the judgment of the Division Bench and upheld its validity in *State of Kerala and Anr. v. Builders' Association & Anr.* (1997 (1) KLT 88 : (1997) 104 STC 134.

7. As already stated, the provisions of sub-s.(7B) as amended with effect from 1.4.1994 itself came up for consideration before a learned Single Judge in O.P. No. 1590/1995 and connected cases and the same was upheld by dismissing the Writ Petitions. Adverting to the amended provisions of sub-s.(7B) the learned Judge observed as follows:

"As per the provision then stood, in the case of works contract, every awarder shall deduct tax due under awarder at every time including the advance payment and remitted to the Government. Clause (iv) of sub-s.(1) of S. 5 states that in the case of transfer of goods involved in the execution of works contract where transfer is in the form of goods at the rates and at the points specified against such goods in the First, Second or Fifth Schedule. Sub-clause (iv) of S. 5 sets out the rates of tax payable by a dealer. Thus the change that has been brought about by the amendment is that instead of the whole payment of tax due being deducted by the awarder, the present provision contemplates reduction of two per cent in the case of civil contract and 5 per cent in respect of other contracts, from the payments made by the awarder. Proviso to sub-r.(2) of R.22A states that no amount under this sub-rule shall be deducted if there is no transfer of goods involved in the execution of the works contract. If a contractor establishes that there is no works contract involved or that he had been paying the tax regularly, he can obtain a certificate in that behalf from the assessing authority to that effect, and on that basis he is entitled to payment of the contract amount without deduction of the sales tax due. There is a provision for adjustment under sub-r.(6) of R.22A."

8. The contention of the petitioner is that in view of the decision of the Supreme Court in *Steel Authority of India Ltd. v. State of Orissa & Ors.* 118 STC 297 which construed the amended provisions of the Orissa General Sales Tax Act similar to the amended provisions of the Kerala General Sales Tax Act and struck down the same as ultravires and beyond the legislative competence of the State, the amended provisions of the Kerala Act is also liable to be declared as such. In view of the said contention, it is necessary to refer to S. 13AA of the Orissa General Sales Tax Act. It reads as follows:

"13AA: Deduction of tax at source from the payment to works contractors:-

(1) Notwithstanding anything contained in S. 13 or any other law or contract to the contrary, any person responsible for paying any sum to any contractor (hereinafter referred to in this section as the "deducting authority") for carrying out any works contract, which involves transfer of property in goods, in pursuance of a contract between the contractor and-

(a) Central Government or any State Government, or

(b) any local authority or (c) any authority or corporation established by or under a statute, or

(d) any company incorporated under the Companies Act, 1956 (1 of 1956) including any State or Central Government undertaking, or

(e) any Co-operative Society or any other Association registered under the Societies Registration Act, 1860 (21 of 1860) shall, at the time of credit of such sum to the amount of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, whichever is earlier, deduct an amount towards sales tax equal to four per cent of such sum in respect of the works contract, if the value of the works contract exceeds rupees one lakh.

(2) While making deduction as referred to in sub-s.(1), the deducting authority shall grant a certificate to the contractor in the form prescribed and shall send a copy thereof to the Sales Tax Officer within whose jurisdiction the works contract is executed.

(3) The amount deducted from the bills or invoices shall be deposited into the Government treasury within one week from the date of deduction in such form or challan as may be prescribed.

(4) Such deposit into the Government treasury shall be adjusted by the Sales Tax Officer towards the sales tax liability of the contractor and would also constitute a good and sufficient discharge of the liability of the deducting authority to the contractor to the extent of the amount deposited.

(5)(a) Where, on an application being made by the contractor in this behalf, the Commissioner is satisfied that any works contract of the nature referred to in sub-s. (1) involves both transfer of property in goods and labour or service, or involves only labour or service and, accordingly, justifies deduction of tax on a part of the sum in respect of the works contractor or, as the case may be, justifies no deduction of the tax, he shall, after giving the contractor a reasonable opportunity of being heard, grant him such certificate as may be appropriate, in the manner prescribed.

Provided that nothing in the said certificate shall affect the assessment of the sales tax liability of the contractor under this Act.

(b) Where such a certificate is produced by a contractor before the deducting

authority, until such certificate is cancelled, by the Commissioner, the deducting authority shall either make no deduction of tax or make the deduction of tax as the case may be, in accordance with the said certificate.

(6) If any person contravenes the provisions of sub-s.(1) or (2) or (3) or of clause (b) of sub-s.(5), the Sales Tax Officer shall, after giving him an opportunity of being heard, by an order in writing impose on such person penalty not exceeding twice the amount required to be deducted and deposited by him into Government treasury."

9. The Supreme Court considered the validity of S. 13AA of the Orissa General Sales Tax Act quoted above in *Steel Authority of India v. State of Orissa & Ors.* 118 STC 297 and the said provision was struck down as being beyond the Orissa State Legislature.

10. The appellant before the Supreme Court was the Steel Authority Of India Ltd. The Supreme Court noted that the contract in that case between the appellant and the works contractor was for the design, engineering, manufacture, supply, transportation, erection, installation, testing and commissioning of basic oxygen furnace plant and the value of the same comprised of the cost of the following items:

"(a) Supply of equipments from States outside Orissa by way of CST Sales, Central Sales Tax paid in Non-Orissa States. Both under Ss. 3(a) and 6(2) of the CST Act - Rs. 317 Crores.

(b) Supply of equipments from other countries outside India on High Seas sales basis under S. 5 of the CST Act - Rs. 16 Crores.

(c) Supply of steel by SAIL - Rs. 18 crores.

(d) Design, Engineering and other services - Rs. 103 Crores.

(e) Fabrication, erection, structural construction, civil construction, etc. - Rs. 78 Crores".

The contract further noted that the appellant deducted sales tax at source as provided under S. 13AA at the rate of 4% in respect of payments to the contractor pertaining to (d) and (e). It did not deduct tax at source in respect of payments under items (a), (b) and (c) for the reason that they were in respect of inter-State sales, outside sales and import sales and, therefore, outside the purview of the Orissa Sales Tax Act.

11. The Commercial Tax Officer did not accept the above and imposed penalty on the appellant. The penalty orders were challenged in the Writ Petition. The High Court upheld the provisions of S. 13AA as amended and sustained the penalty orders. This is how the matter came to Supreme Court. The Supreme Court referred to Entry 54 of List II of the Seventh Schedule and Art. 246 of the Constitution of India, the introduction of clause (29A)(b) in Art. 366 by the Forty-six Amendment to the Constitution, Art. 286 (1) & (2) of the Constitution, Ss. 3,

4 and 5 of the C.S.T. Act and the decision of the Supreme Court in *M/s. Gannodunkerley & Co. v. State of Rajasthan* 88 STC 204 (SC). It was noted that the Supreme Court in the decision mentioned above had held that it is necessary to exclude from the value of a works contract the value of goods which are not taxable by a State in view of Ss. 3, 4 and 5 of the Central Sales Tax Act, 1956 and that the value of goods involved in the execution of a works contract has to be determined after making these exclusions from the value of the works contract. The Court considered the scope of S. 13AA as amended in the above background. The Court analysed the effect of various sub-sections and the forms prescribed under the Rules. The Court also referred to the Constitution Bench decision in *Bhawani Cotton Mills Ltd. v. State of Punjab* 1967 SC 1616 which held as follows:

"If a person is not liable for payment of tax at all, at any time, the collection of a tax from him, with possible contingency of refund at a later stage, will not take the original levy valid; because, if particular sales or purchase are exempt from taxation altogether, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turnover and for levying tax".

In the light of the said discussion, the Supreme Court held as follows:

"There can be no doubt, upon a plain interpretation of S. 13AA, that it is enacted for the purposes of deduction at source of the State sales tax that is payable by a contract on the value of a works contract. For the purposes of the deduction neither the owner nor the Commissioner who issues to the contractor a certificate under S. 13AA(5) is entitled to take into account the fact that the works contract involves transfer of property in goods consequent upon of an inter-State sale, an outside sale or a sale in the course of import. The owner is required by S. 13AA(1) to deposit towards the contractor's liability to State sales tax four percent of such amount as he credits or prays to the contractor, regardless of the fact that the value of the works contract includes the value of inter-State sales, outside sales in the course of import. There is, in our view, therefore, no doubt that the provisions of S. 13AA are beyond the powers of the State legislature for the State legislature may make no law levying Sales tax on inter-State sales, outside sales or sales in the course of import".

12. In dealing with a contention by the learned counsel for the State of Orissa that the preamble to the Orissa Tax Act account of the fact that the statute was limited to the sale or purchase of goods in Orissa the Supreme Court observed that S. 13AA should have been precisely drafted to make it clear that no tax was levied on that part of the amount credited or paid that related to inter-State sales, outside sales and sales in the course of import, particularly after the previous S. 13AA had been struck down by the Orissa High Court for the reason that it was couched in terms wider than were permissible to the State Legislature and that judgment was accepted. The Supreme Court had accordingly struck down the provisions of S. 13AA of the Orissa Sales Tax Act as amended with effect from 4th October, 1993.

13. From the above decision of the Supreme Court, it is clear that in order to sustain a provision for deduction of tax at source in respect of works contract, the following conditions are to be satisfied: (1) There is a transfer of property in goods in execution of works contract, (2) the transaction must be exigible to tax under the State Act, (3) there must be provision for exclusion of the turnover of inter-State sale, outside sale and sales in the course of export/import and (4) the amount collected by way of tax should not exceed the tax due in respect of the said transaction.

14. The Supreme Court has struck down the provisions of S. 13AA on the ground that it did not contain a provision for exclusion of the value of inter-State sales, outside sales and sales in the course of import. It was held that the provisions of S. 13AA are beyond the powers of State Legislature for, the State Legislature cannot make any law levying sales tax on inter-State sales, outside sales or sales in the course of import.

15. Before dealing with the provisions of sub-s.(7B) of S. 7 as amended by the Kerala Finance Act, 1994 and R.22A(2) as amended it must be noted that the Supreme Court in *State of Kerala & Anr. v. Builders Association of India & Ors.* (1997 (1) KLT 88 : 104 STC 134 has upheld the validity of sub-ss.(7), (7A), (11) and (12) of S. 7 of K.G.S.T. Act and Rules 22A and 30A of the K.G.S.T. Rules. Sub-ss.(7) and (7A) were upheld on the ground that they are optional; sub-ss. (7) and (7A). The Supreme Court dealt with the challenge to R.22A of the K.G.S.T. Rules as follows:

"Sub-r.(1) of R.22A says that whether a contractor opts to be governed by sub-ss. (7) and (7A) or whether he is governed by S. 5(1)(iv) of the Kerala Act, tax shall be paid either by the contractor in accordance with the rules or by the person who awards the contract. No one can have any objection to sub-r.(1) since it only says that where tax is payable, it shall be paid either by the contractor or by the awarder according to law. Now, coming to sub-r.(2), it is equally applicable to all the contractors whether they are governed by S. 5(1)(iv) or by sub-s.(7) or (7A) of S. 7. What the sub-rule says is that wherever payment is made by the awarder to the contractor, "the awarder shall withhold an amount equal to the tax due" and remit the same to the assessing authority. It is evident that sub-r. (2) does not provide for deduction of tax at source like the one provided by S. 194-C of the Income Tax Act, 1961. Sub-r.(2) merely says that where tax is due from a contractor, the awarder shall withhold an amount equal to the tax due while making payment to the contractor. In the case of a contractor who has not opted for the alternate method of taxation and is governed by S. 5(1)(iv), this sub-rule means that where tax is due from him according to law and the awarder is apprised of the said fact, the awarder comes under an obligation to deduct the amount equal to the tax due and remit it to the assessing authority. It needs to be emphasised that the sub-rule speaks of "tax due". Of course, so far as the contractor who has opted for the alternate method of taxation under sub-s.(7) or (7A) of S. 7 is concerned, the deduction at the prescribed rate would be at the

time of any and every payment by awarder to him, for in his case tax is due at the flat rate prescribed in the relevant sub-section even at the inception of the contract and at all times, until the tax due is satisfied. We fail to see how can any objection be taken to the sub-rule. Sub-r.(3) is really explanatory in nature. It says that notwithstanding anything contained in sub-r.(2), any contractor who pays tax regularly in accordance with the rules, shall be entitled to payment of the full contract amount without any deduction by the awarder, if he produces a certificate issued by the assessing authority to the effect that no tax is due from him. All these provisions are designed to ensure due realisation of the tax due. No exception can be taken thereto."

16. It must be noted that it is only for the purpose of implementation of the provisions of sub-ss.(7), (7A) and (7B) of S. 7 that R.22A is issued. The Supreme Court has clearly held that R.22A only says that where tax is due from a contractor, the awarder shall withhold an amount equal to the tax due while making payment to the contractor. It is also observed that in the case of a contractor who has not opted for the alternate method of taxation and is governed by S. 5(1)(iv), this sub-r.(2) means that where tax is due from a contractor according to law and the awarder is apprised of the said fact, the awarder comes under an obligation to deduct the amount equal to the tax due and remit it to the assessing authority and emphasis is on tax due. It was observed that sub-r.(3) of R.22A is really explanatory in nature and that all the above provisions are designed to ensure due realisation of tax due.

17. A learned Single Judge (T.L. Viswanatha Iyer, J.) had specifically considered the validity of the provisions of sub-s.(7B) of S. 7 of the Act (as it stood prior to the present amendment) in *Symon v. State of Kerala & Anr.* 97 STC 283 (Ker). The provisions of sub-s.(7B) considered in the above case reads thus: The tax under clause (iv) of sub-s.(1) of S. 5, sub-ss.(7) and (7A) of this section shall be deducted from the payment made by the awarder at every time including advance payment and remit it to Government within seven days in the prescribed manner.

18. Referring to the decisions of the Supreme Court in *Sardar Baldev Singh Vs. Commissioner of Income Tax, Delhi and Ajmer*, *Commissioner of Commercial Taxes and Others Vs. Ramkishan Shrikishan Jhaver and Others*, and in *Chaturbhai M. Patel Vs. Union of India (UOI) and Others*, it was observed that in the case of a taxing statute, it is open to the legislature to enact provisions which would check evasion of tax and that the power to tax includes the power to provide the means to make the realisation of the tax effective. It was further observed that what sub-s.(7B) seeks to achieve is to facilitate the collection of revenue as also prevent loss to the State by recoveries becoming impossible, and that such a provision is incidental and necessary for the effective enforcement of the levy of tax on a deemed sale under sub-clause (b) of clause (29A) of Art. 366 read with entry 54 of the State list to the Constitution. The Court further observed as follows:

"Further, there is in reality no collection of tax in advance, except where any amount is paid as advance to the contractor. In effect, the deduction and payment is only of tax as and when the transfer of property in goods takes place and progressive payments are made to the contractor. Since the levy and collection is related to the factual existence of a contract and a deemed sale, even the deduction of the tax out of advance payments cannot be said to violate entry 54. It must be mentioned here that sales tax need not always be collected at the actual moment of the sale. All that is required is, it should be related to a sale and not to any other event. It cannot be stated, having regard to the existence of the works contract, that no sale takes place. Therefore, the collection of the tax by deductions from the payments made to the contractor cannot be cavilled against. It is only a machinery for collection of the tax and hence valid as was held in *Geeta Prasad Singh & Co. v. State* (1986) 63 STC 337 (Pt.) : *Construction and Construction Vs. Union of India (UOI) and Others*, ; and *Tirath Ram Ahuja Ltd. v. State of Haryana* (1990) 83 STC 523 (P & H). In *Geeta Prasad Singh and Co.* (1986) 63 STC 337, the Patna High Court treated the deduction as akin to recovery of advance tax, which was not a new concept, but one well accepted in the law of taxation (see S. 194C of the Income Tax Act, 1961) *Tirath Ram Ahuja Ltd.* (1991) 83 STC 523 (P & H) also dealt with the matter similarly. I am in agreement with these decisions. Sub-s.(7B) is not in my opinion liable to fail for want of legislative competence.

In respect of contractors who have not opted for payment under sub-ss.(7) and (7A) it was observed as follows:

"Now, what is directed to be deducted and paid is the tax due under clause (iv) of sub-s.(1) of S. 5. S. 5 charges tax on the taxable turnover of a dealer. In the case of a works contract, where the transfer of property in goods takes place in the form of goods, the tax is payable at the rates and at the points specified in the First, Second and Fifth Schedules; and in cases where the transfer takes place in some other form, at the rate specified against such contract in the Fourth Schedule in relation to the contract. The two provisos provide for some exemptions. The charge being on taxable turnover, we have naturally to turn to the definition of that term in S. 2(xxv) to see what is the measure for the levy. It will be seen therefrom that in determining the taxable turnover, of purchases and sales in the course of inter-State trade and in the course of export or import besides other items which are prescribed by the rules, which so far as is relevant, are rules 8(4) and 9. Sub-s.(7B) has to be read with these provisions, S. 5(1)(iv) and S. 2(xxv), and so read, it cannot be branded as arbitrary or bereft of provisions for making admissible deductions. The sub-section is not therefore liable to challenge as such on this ground. If there is any defect, or if all the permissible deductions are not provided for in arriving at the taxable turnover for purposes of Section 5(1)(iv)(b), that will be a matter concerning the vires of that provision, and not a ground for striking down."

20. The learned Single Judge accordingly held that sub-s.(7B) does not suffer

from the vice of unconstitutionality pleaded by the petitioner.

21. Now I shall deal with the challenge to the provisions of Sub-s.(7B) of S. 7 of the Act and R.22A(2) and (5) of the Rules as it stands after 1.4.1994.

22. Sub-s.(7B) substituted by Act 19 of 1994 with effect from 1.4.1994 reads as follows:

"Every awarder shall deduct tax at the rate of two percent in respect of civil contracts and five percent in respect of other contracts from the payments made by him to any contractor liable to tax under S. 5, at every time, including advance payments, and remit it to the Government within seven days from the date of such deduction in the prescribed manner."

R.22A(2) and (5) of the K.G.S.T. Rules as amended read thus:

"22A(2)-Wherever payment is made by the awarder to the contractor either in lump sum for the whole contract or in instalments, he awarder shall withhold an amount equal to two percent of such payment or payments in the case of civil contracts and five percent, in the case of other contracts from such payment or payments and shall remit it to the assessing authority with whom the contractor is registered as a dealer and if he is not so registered, to the assessing authority having jurisdiction over the place of works contract, within seven days of the amount so withheld along with a statement in Form No. 21C.

Provided that no amount under this sub-rule shall be deducted if there is no transfer of goods involved in the execution of works contract".

(5) Any awarder who effects any payment of any contract amount without deduction of the amount prescribed under sub-r.(2), shall be liable to pay the said amount and shall be recovered from him as if it were a tax due from him. All provisions relating to penalty and interest shall apply to such awarder as if he were a dealer liable to pay tax under Act, irrespective of the limit of turnover prescribed under S. 5".

Here it is necessary to refer to the provisions of R.22A(3) and (6) as amended after 1.4.1994.

"22A(3) Notwithstanding anything contained in sub-r.(2) above, any contractor who pays tax regularly in accordance with the rules, on production of a certificate issued to that behalf issued by the assessing authority shall be entitled to payment of the contract amount without deduction of sales tax due on the contract for the period and to the extent or for the works contract specified in the certificate.

(6) The amount deducted by the awarder from the payments due to the contractor and remitted under sub-r.(2) shall be adjusted against the amount finally assessed on the contractor under sub-r.(13) of R.21 and shall be dealt with in accordance with sub-r.(14) thereof".

23. The contention of the petitioner is that there is no specific provision in sub-s.7B of S. 7 or in R.22A for exclusion of the turnover of outside sales, inter-State sales or export sales which are outside the purview of the K.G.S.T. Act and therefore sub-s.(7B) and R.22A(2) & (5) are beyond the legislative competence of the State legislature. The petitioner has also contended that sub-s.7B of S. 7 and R.22A(2) are confiscatory in nature in view of Art. 265 of the Constitution of India.

24. I have extracted the provisions of sub-s.(7B) of S. 7 of the K.G.S.T. Act as it (7B) as amended with effect from 1.4.1994. Sub-s.(7B) of S. 7 of the Act as it stood prior to 1.4.1994 only provided for deduction of the tax under S. 5(1)(iv) or under sub-ss.(7) and (7A) from the payments made to the contractors. But sub-s.(7B) as inserted by the Finance Act 1994 provides for deduction of tax at the rate of 2% in respect of civil contracts and 5% in respect of other contracts by the awarder from payments made to the contractor liable to pay tax under S. 5. Sub-s.(7B) mandates the deduction of the amount specified therein which is a percentage of the contract amount. Sub-s.(7B) clearly provides that the deduction must be made only from persons who are liable to pay tax under S. 5 of the Act. The measure of the tax under the said sub-section is the quantum of the contract amount without any deduction of the turnover of export sales, outside sales or inter-State sales which are outside the purview of the State legislation. The provisions of R.22A(2) also provides for the deduction of the amount specified in sub-s.7B from the payments made by the awarder every time. Here it must be noted that under sub-s.(7B) of S. 7 of the K.G.S.T. Act deduction of tax from payments made to the contractors is required only if they are liable to pay tax under S. 5. R.22A(1) of the K.G.S.T. Rules also provides for payment of tax in accordance with the Rules in the case of works contract only if tax is payable in accordance with the provisions of the Act. Further the proviso to sub-r.(2) of R.22A states that no amount under the said sub-rule shall be deducted if there is no transfer of goods involved in the execution of works contract. Sub-r.4 of R.22A also provides that if the turnover in respect of a contractor for year does not exceed the assessable limit prescribed under S. 5, the amount recovered and remitted by any awarder under sub-r.(2) for the period shall be refunded or adjusted as the case may be by the assessing authority. The most important aspect is that R.22A(6) provides that the amount deducted by the awarder from the payments due to the contractor and remitted under sub-r.(2) shall be adjusted against the amount finally assessed on the contractor under sub-r.(13) of R.21 and shall be dealt with in accordance with sub-r.14 of R.21.

24. Sub rules (13) and (14) of R.21 read as follows: (13) After the close of the year in which the provisional assessments as laid down in sub-r.(8) or sub-r.(9) or sub-r.(10) has been made or in the course of the year to which a return submitted under sub-r.(12) relates, the assessing authority, if after such scrutiny of the accounts and after such enquiry as it considers necessary, is satisfied that the returns filed are correct and complete, shall finally assess under a single

order on the basis of the returns the tax or taxes payable under S. 5, or notified under S. 10 for the year to which the returns relate:

Provided that if the returns filed appear to the assessing authority to be incorrect or incomplete the assessing authority shall, after following the procedure prescribed in R.18 determine the turnover to the best of its judgment and finally assess under a single order the tax or taxes payable under S. 5 or notified under S. 10.

(14) After making the final assessment under sub-r.(13) the assessing authority shall examine, whether any and, if so, what amount is due from the dealer towards it after deducting any tax already paid on the provisional assessment with reference to sub-r.(8) or sub-r.(9) or sub-r.(10). If any amount is found to be due from the dealer towards the final assessment, the assessing authority shall serve upon the dealer a notice in Form No. 13 and the dealer shall pay the sum demanded at the time and in the manner specified in the notice. If the tax due on the final assessment is lower than the tax already paid on the provisional assessment, the assessing authority shall refund the excess tax to the dealer if no other amount is due from him or adjust the excess tax towards the recovery of any amount due on the date of adjustment from the dealer as provided in S. 44 after giving due notice to the dealer. If the tax due on the final assessment is exactly equal to the tax already paid on the provisional assessment, the assessing authority shall inform the dealer that no further amount is due from him".

25. From the above it is clear that the amount deducted under sub-s.(7B) of S. 7 of the Act read with R.22A(2) of the Rules is only provisional and a final assessment in accordance with the provisions of S. 5 is contemplated after the close of the year. It also provides for adjustment of the tax already deducted and also for demanding the tax, if any due from the petitioner or if the amount already deducted is in excess for refund of the same to the assessee or for adjustment of the same towards the dues if any, outstanding.

26. R.22A(3) in this context is very important. It provides that notwithstanding anything contained in sub-r.(2) of R.22A, any contractor who pays tax regularly in according with the rules, on production of a certificate issued to that behalf issued by the assessing authority shall be entitled to payment of the contract amount without deduction of sales tax due on the contract for the period and to the extent or for the works contract specified in the certificate. Sub-s.(7B) introduced with effect from 1.4.1994 provides for deduction only from contractors who are liable to pay tax under S. 5 of the Act. Under S. 5 of the Act, a person is liable to pay tax only on the taxable turnover where his total turnover exceeds assessable limit. S. 2(xxv) of the Act defines taxable turnover which specifically provides for deduction of the turnover of inter State sales, export sales and outside sales. Thus from a cumulative reading of the provisions of sub-s.(7B) of S. 7 of the Act read with the provisions of R.22A(1), (2), (3), (4) and (6) of the Rules it would be clear that the provisions of sub-s.(7B) and R.22A(2)

only provides for collection of an amount equal to 2% in respect of civil contracts and 5% in respect of other contracts as a provisional or advance tax which has to be adjusted after completion of the final assessment in accordance with the normal provisions of the Act. It is also clear from the expression "liability to pay tax under S. 5" in sub-s.(7B) that deduction need be made only from persons who are liable to pay tax under the Act. In other words, if there is no liability to pay tax under S. 5 of the Act then deduction under sub-s.(7B) is not contemplated.

27. Even in the case of persons who are liable to pay tax under S. 5 of the Act if the petitioner obtains a certificate from the assessing authority concerned to the effect that the contractor pays tax regularly in accordance with the rules and produces the same before the awarder no deduction will be made from the bills for the period and for the amount of works contracts specified in the certificate.

28. The Supreme Court in *Steel Authority of India Ltd. case* 118 STC 306 has struck down the provisions of S. 13AA of the Orissa Sales Tax Act only for the reason that there is no specific provisions therein for taking into account the fact that the works contract involves transfer of property in goods consequent upon an inter State sale, an outside sale or sales in the course of import, i.e., there is no provisions in S. 13AA for exclusion of the turnover relating to interstate sales, outside sales and sales in the course of import. The Supreme Court also relied on the decision in *Bhavani Cotton Mills Ltd. v. State of Punjab* (1967) 20 STC 290, which held that if a person is not liable for payment of tax at all, at any time, the collection of tax from him with a possible contingency of refund at a later stage will not make the original levy valid. The Supreme Court also observed that the provisions of sub-s.5(a) of S. 13AA which gives power to the Commissioner to issue certificate in cases where the works contract includes transfer of property in goods and labour or involves only labour and service alone also does not give any power to the Commissioner to deduct the value of inter-State sale, outside sale and import sale.

29. So far as the provisions of the Kerala General Sales Tax Act is concerned sub-s.(7B) specifically provides that the deduction shall be made only from the contractor liable to tax under S. 5. I have already observed that the expression "liable to pay tax under S. 5" means tax is exigible - i.e., only in case where there is "taxable turnover" as defined in S. 2(xxv) of the Act. In this view of the matter, the decision of the Supreme Court in *Bhavani Cotton Mills Ltd. case* mentioned above cannot apply. There are clear provisions in sub-s.(7B) of S. 7 of the Act read with R.22A for exclusion of interstate sales, outside sales and sales in the course of import. So none of the invalidating elements pointed out by the Supreme Court are available in sub-s.(7B) of S. 7 and R.22A. The principles laid down by the Supreme Court in *State of Kerala & Anr. v. Building's Assn. & Anr.* 104 STC 134 will squarely apply. According to me, the provisions of sub-s.(7B) of S. 7 of the Act and R.22A(2) and (5) of the K.G.S.T. Rules do not suffer from the vices pointed out by the Supreme Court in *Steel Authority of India Ltd. case*

rendered in the context of S. 13AA of the Orissa Sales Tax Act.

30. The reasons for amending the provisions of sub-s.(7B) of S. 7 of the Act and R.22A of the Rules as it obtained from 1.4.1994 though not it is stated are also understandable. Sub-s.(7B) as it stood prior to 1.4.1994 provided for deduction of tax due on work contract from the payment made by the awarder to contractor. This casts an obligation on the awarder to determine the tax due from the contractor every time payments are made to the contractor. A Division Bench of the Allahabad High Court in *V.K. Singhal v. State of U.P.* (1995) 97 ST 355 had made the following observation in regard to the deduction of tax by the awarder. "Neither the contractor nor the contractee are the assessing authorities. It would be very difficult for a contractee to examine and for a contractor to specify all these deductions at the stage of intermediate bills. In fact, it is the duty of the assessing authority. It will, therefore, be not possible to take into account all the legal deductions from the total sum received by a contractor from a contractee. It appears to be in the interest of all concerned that the legislature has fixed a percentage for deduction of tax at source".

31. This was the position which the contractors and the contractees were confronted with under the provisions of sub-s.(7B) of S. 7 prior to 1.4.1994. Probably, it may be due to the aforesaid reasons and for obviating such a situation the Government thought of amending sub-s.(7B) of S. 7 and R.22A including introduction of sub-r.(6) or R.22A. In this context it must be relevant to note that rate of tax on the materials involved in the execution of works contract of civil nature is from 6% and above while the rate of tax on the materials involved in the execution of works contract other than civil contracts is 10% and above (see Schedule IV of the Act). It is probably taking into account all the relevant matters legislature thought of making a deduction of 2% in respect of civil contracts and 5% in respect of other contracts from the payments made to contractors by way of advance tax subject to final assessment and adjustment under Rr.-(13) and (14) of R.21 of the Rules. This method, it must be noted, is in the interest of all concerned. Such provisions, as observed by the Supreme Court in *Builders' Association* case 104 STC 134 are designed to ensure due realisation of the tax due. Any person who finds any hardship in adopting the said method can obtain a certificate from the assessing authority concerned to the effect that he is remitting tax regularly in accordance with the rules as contemplated under R.22A(3) and produce the same to the awarder who will make payment of the bill amounts without any deductions.

32. It must be noted that the provisions of sub-s.(7B) and R.22A(2) & (5) are made only to ensure that the transfer of property in goods involved in the execution of works contract, otherwise exigible to tax, does not escape taxation and for the due realisation of the tax due.

33. In these circumstances, I hold that sub-s.(7B) of S. 7 of the K.G.S.T. Act, and R.22A(2) and 22A(5) of the K.G.S.T. Rules are intra vires and within the legislative competence of the State.

34. In view of the aforesaid findings I do not find any merit in the contention of the petitioner that sub-s.(7B) of S. 7 of the Act and R.22A are confiscatory or that it is against the mandate of Art. 265 of the Constitution of India.

35. What remains to be considered is as to whether Exts. P4, P6, P8, P14 proceedings of the respondents are liable to be quashed. Ext. P4 is a communication issued by the 4th respondent to one of the awarder directing it to deduct tax at 8% from the contract amount due to the petitioner and remit the same along with 10% surcharge on it. Petitioner submitted Ext. P5 letter to the 3rd respondent seeking for issuance of a non-liability certificate which was rejected by the 3rd respondent as per Ext. P6 proceedings wherein it is stated that the said turnover is liable to tax under S. 5(i)(iv)(a) of the Act. The claim of the petitioner that the transaction mentioned in Ext. P4 is interstate sales is rejected. Petitioner filed Ext. P7 petition against the said order before the 4th respondent. The same was rejected as per communication dated 30.3.2000 (Ext. P8) stating that there is no prima facie case for any intervention at this stage. The petitioner then filed a revision (Ext. P9) before the Board of Revenue, Thiruvananthapuram. The 3rd respondent has also rejected another request for issuance of a certificate for deduction of tax made in Ext. P13 by Ext. 14 communications.

36. In all the aforesaid proceedings, viz., Exts. P4, P6, P8 and P14 the question involved is as to whether the transactions referred to are interstate sales liable to be exempted under the K.G.S.T. Act or not. This is in realm of disputed questions of fact and law which cannot be resolved in proceedings under Art. 226 of the Constitution of India. It is for the petitioner to pursue the statutory remedies.

For all the reasons stated above, I do not find any merit in this Original Petition. It is accordingly dismissed. In the circumstances of the case, parties will bear their respective costs.