(2012) 07 KL CK 0126

In the High Court Of Kerala

Case No : S.T. Rev. No. 52 of 2012

Snofield Foods Pvt. Ltd. APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 16-07-2012

Acts Referred:
Central Sales Tax Act, 1956 — Section 15
Kerala General Sales Tax Act, 1963 — Section 5, 5(v), 5A

Citation : (2012) 07 KL CK 0126

Hon'ble Judges : Thottathil B. Radhakrishnan, J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : K.I. Mayankutty Mather and Smt. Rukhiyabi Mohd Kunhi, for the Appellant; Bobby John, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.—The assessee, a manufacturer and dealer in ice-creams, is the revision petitioner herein. For the assessment year 2003-04, the assessment was completed by the Fast Track Team u/s 17D of the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the Act"). Having failed before the appellate Tribunal, the assessee is before this Court challenging the levy of 16% tax on the sale of deep freezers, effected by it in the assessment year; which was purchased by it from SSI Units eligible for exemption. On a reading of the order of the Tribunal, what we understand is that the assessee had been purchasing the deep freezers from SSI Units eligible for exemption and after leasing out the same for its business; sells the same. Obviously the sale effected then should be of second-hand freezers. The assessee had been collecting 4% tax on its sale, which the fast track team/assessing authority found to be not in order since, according to it, the product comes under the 5th Schedule of the Act, exigible to multi-point levy. The assessee''s purchase having not suffered tax, the fast track team found that the levy of tax is @ 16%. The Tribunal found the same to be in accordance with law. The assessee''s counsel would urge that once the sale of the SSI Unit, the first sale; was exempted, the levy occurs and there cannot be any shifting of the levy for the reason that there was exemption on the first point of sale.

2. We have heard the learned counsel for the assessee and the learned Government Pleader. The assessee contends for the position that the first point of sale having been exempted, the liability of the assessee would only be for the point of second sale and the second point of levy being the point of last sale is exigible only @ 4% as per the Fifth Schedule to the Act. It is also the submission of the assessee that the assessee purchased goods from exempted dealers and leased out the same to its franchisees; which lease rent is exigible at the rate of 4%. This satisfies both points of levy on the goods as per the Fifth Schedule. As a still another alternative contention the learned counsel for the assessee would invite our attention to the provisos under sub-clause (v) of sub-section (1) of Section 5 of the Act. What is applicable is the 4th proviso, according to the counsel, which has two limbs; the first limb levying tax @ 12% for the subsequent sale and the second limb @ 16% when the sale is to a registered dealer not for sale or any other person. If at all the assessee is held to be coming under the 4th proviso, then the assessee would fall under the first limb of the proviso, wherein tax is leviable @ 12% for the subsequent sale. The learned counsel also relies on the decision of the Supreme Court in Peekay Re-rolling Mills (P) Ltd. Vs. The Assistant Commissioner and Another, to contend that there can be no shifting of levy by reason only of exemption, since the Hon''ble Supreme Court has categorically held that exemption does not negate a levy of tax altogether and the liability to tax remains unaffected, though the payability is extinguished.

3. The learned Government Pleader would, however, rely on a Division Bench decision of this Court in Combined Foods Pvt. Ltd. Vs. State of Kerala [(2011) 19 KTR 238 (Ker)] to contend that the assessee''s purchase; the first sale within the State being not liable to any tax by virtue of the exemption to SSI Units, the assessee is liable to pay tax at the rate provided for under column (8) of the Fifth Schedule, i.e., @ 16%.

4. In the back drop of the contentions, we are of the opinion that the question of law is to be reframed as hereunder :

In the context of the multi-point levy of tax contemplated under Schedule 5 of the KGST Act, when there is no payability of tax on the first sale within the State, by reason of an exemption; at what points and at what rates are the various transactions of sales within the State to be taxed and what is the correct interpretation to be given to the 4th proviso under sub-clause (v) of Section 5 ?

We frame this question quite conscious of the distinction between "liability" and "payability" as held by the Hon''ble Supreme Court in Union of India (UOI) and Another Vs. Azadi Bachao Andolan and Another, .

5. To understand the contentions better, we thought it fit that the provisos under sub-clause (v) of sub-section (1) of Section 5 has to be examined closely. We,

hence, extract sub-clause (v) hereunder along with the provisos:

(v) in the case of goods specified in the Fifth Schedule at the rates and at the two points specified against such goods in the said Schedule:

Provided that where there are no two points of sale in the State for any goods coming under the Fifth Schedule and the first sale is to a person other than a registered dealer, the rate specified in column (8) of that Schedule shall apply to such sales.

Provided further that the registered dealer effecting the last sale within the State to a person other than a registered dealer shall, pay tax at the rates shown in column (6) or in column (8), as the case may be, of the Fifth Schedule irrespective of his turnover:

Provided also that where a registered dealer, after purchasing the goods on payment of the tax mentioned in column (4) of the Fifth Schedule,-

(a) uses or disposes of such goods in any manner other than by way of sale within the State, or

(b) despatches them to any place outside the State except as a direct result of sale in the course of inter-state trade or commerce;

he shall pay tax at the rate shown in column (6) of the said Schedule on the purchase turnover of the goods;

Provided also that where no tax is payable by a dealer effecting the first sale within the State, to a registered dealer for sale then the dealer effecting the subsequent sale within the State shall pay tax at the rates shown in column (4) of the Fifth Schedule and where there are no two points of sale in the State for any goods coming under the Fifth Schedule and the subsequent sale is to a person other than a registered dealer, or to a registered dealer other than for sale the rate specified in column (8) of that Schedule shall apply to such sales.

The Fifth Schedule, with reference to item No.6, is as follows:

FIFTH SCHEDULE

Goods in respect to which tax is leviable on two points under sub-section (1) or sub-section (2) of Section 5.

Sl No.

Description of Goods

1st Point of levy

Rate of 2nd Tax(Percent)

Point of levy

Rate of tax (Percent)

Where there no points Sale in the State

Rate are of tax two (Percent)

(1)

(2)

(3)

(4)

(5)

(6)

(7)

(8)

6

Refrigerators Conditioned Plants, Coolers, room collers, machine components and Parts

At the Water Point of air 1st sale in the state by a dealer who is liable to tax under spare section thereof 5 to a registered dealer

12

At the point of last sale in the state by a dealer who is liable to tax u/s 5.

4

At the point of 1st sale in the state by a dealer is liable to tax u/s 5 to a person other than a registered dealer other than for sale.

8

6. Clause (v) provides for two point levy on goods specified in the Fifth Schedule at the point of first sale and the last sale at the rates shown therein. The assessee does not dispute that deep freezers come under item 6 of the Fifth Schedule. The first point levy is at the "point of first sale in the State by a dealer who is liable to pay tax u/s 5; to a registered dealer for sale", and the rate is 12%. The second point levy is "at the point of last sale in the State by a dealer who is liable to tax u/s 5", and the rate is 4%. The Fifth Schedule also provides that where there are no two points of sale in the State, the levy shall be at the rate of 16%. The respective rates of 12%, 4% and 16% are provided in the Fifth Schedule at column Nos.(4), (6) and (8) respectively and the various points of levy at column Nos.(3), (5) and (7). The second point of levy being the last sale, the legislature visualized more than two points of sales and the multi-point levy as per clause (v), was on the first sale and the last sale. The first three provisos are not applicable to the transaction which is the subject matter of our

consideration in this revision. Admittedly, the 1st sale in the State was exempted, since the first seller was a SSI Unit, entitled to exemption. The 4th proviso deals with instances wherein no tax is payable by a dealer effecting the first sale within the State. We are also of the opinion that the said proviso has two limbs, as contended by the learned counsel for the assessee, however with different ramifications and consequences. The primary condition to fall under the proviso, would be that no tax is payable by the dealer effecting the first sale within the State, as in the present case, where it is exempted.

7. According to us, the interpretation of the 4th proviso would be to the effect that recognizing the fact that the goods in the Fifth schedule would be subjected to more than two points of sale; the proviso intended that when the first sale within the State is exempted, in case of there being two points of subsequent sales, the multi-point levy as per the Fifth Schedule should be made to the subsequent sales. The proviso, in the case of exemption on first sale, shifted the levy to the second point deeming it to be the first point of sale as provided in column (4) and to the last point as provided in column (6). In the event of there being no two subsequent sales, then it was intended that the tax payable under column (8), i.e., 16%, would be applicable. Going by the language of the proviso, we would say that it has two limbs, but in the following manner:

(i) Where no tax is payable by a dealer effecting the first sale within the State to a registered dealer for sale, then that purchasing dealer''s subsequent sale within the State would be taxable at the rates shown in column (4) of the Fifth Schedule. Reading the first limb of the proviso along with the rates and words employed in the Fifth Schedule, it should be understood that such subsequent sale effected by a registered dealer would be taxable @ 12%. The proviso deems the subsequent sale to be the first point of sale in the State by a dealer who is liable to pay tax u/s 5 to a registered dealer for sale; which is the first point levy under column (3) of the Fifth Schedule. Any subsequent sale, which becomes the last sale within the State by a dealer who is liable to tax u/s 5 {column (5)} would be taxable @ 4% {column (6)}.

(ii) The second limb would be that if there are no two points of sale in the State, meaning in the case of no tax being payable on the first sale and there being only one and no two subsequent points of sale, then the one subsequent sale effected by the dealer purchasing the exempted goods, if to a person other than a registered dealer or a registered dealer other than for sale, the same would be the last sale. Then the rate applicable should be that shown in column (8), being 16% as applicable to sale within the State to a person other than a registered dealer or to a registered dealer other than for sale. The deemed first sale then would also be the last sale in the State.

8. The subsequent sale referred to in the first limb and second limb of the proviso are one and the same. The distinction is, in so far as a registered dealer having made a purchase, where no tax was payable, his subsequent sale if made to a registered dealer for sale would be deemed to be the first point of levy

{column (3)}, taxable @ 12% {column (4)} and then the second point of levy @ 4% {column (6)} would be on the last sale {column (5)}. But, if the subsequent sale made by the purchasing dealer is to a person other than a registered dealer or a registered dealer not for sale {column (7)}, then the rate applicable would be 16% {column (8)}, deeming the same to be the first sale, which also would be the last sale within the State.

9. We specifically make this distinction on the proviso because if we accept the interpretation attempted by the learned counsel for the assessee, the proviso would have to be read, divorced from the schedule. When there are no two points of sale in the State it is the first proviso that is applicable whether there is exemption on such sale or not. There would, then, be no subsequent sale. On such reading, we find that the words "subsequent sale" in the second limb of the 4th proviso would be redundant, because if there are no two points of sale and no tax is payable on the first sale then where is the question of subsequent sale arising at all? We can only read the fourth proviso as having shifted the levy, in instances of the first sale within the State being exempted from payment and there are subsequent sales within the State.

10. We feel that a short illustration would serve better the process of interpretation of the proviso.

A, B, C & D are registered dealers. E is a consumer. The transactions and taxability in various situations are illustrated below:

I

1 SSI Unit sells to A for sale

exempted

no payability - 0%

2 A sells to B for sale

deemed 1st sale

A''s liability - 12%

3 B sells to C for sale

no liability - 0%

4 C Sells to D not for sale or E

last sale -

C''s liability - 4%

II

1 SSI Unit sells to A for sale

exempted

no payability - 0%

2 A sells to B for sale

deemed 1st sale

A''s liability - 12%

3 B Sells to C not for sale or E

last sale

B''s liability - 4%

III

1 SSI Unit sells to A for sale

exempted

no payability - 0%

2 A sells to B not for sale or E

deemed first sale; also last sale

11. The reliance placed on Peekay Re-rolling Mills case (supra) on the facts of this case as also the provisions arising for interpretation is misplaced. The controversy in Peekay Re-rolling Mills case was the levy of tax u/s 5A on the same goods that are taxable u/s 5 and the essential question with which the court was concerned was whether this would amount to a tax at a second stage and, therefore, violate Section 15 of the Central Sales Tax Act. To the facts of this case, more apposite would be the decision of the Hon''ble Supreme Court in The State of Tamil Nadu Vs. M.K. Kandaswami and Others, . Though M.K.Kandaswami''s case was referred to in Peekay Re-rolling Mills case (supra); it was distinguished, since Peekay Re-rolling Mills case essentially was on the prohibition u/s 15 of the Central Sales Tax Act and was concerned with whether declared goods could be made liable to tax more than once. In M.K. Kandaswami''s case (supra) the Supreme Court was concerned with Section 7A of the Madras General Sales Tax Act, 1959, which is in pari materia with the provisions of Section 5A of the KGST Act, 1963, and upheld it approving the decision of the Kerala High Court. The third proviso to Section 5(v) also is similar to the said provision. It was categorically found that Section 7A itself is a charging section, which creates a liability against a dealer on his purchase turnover with regard to goods, the sale or purchase of which though generally liable to tax, have not suffered tax. Adopting a purposive interpretation, the Supreme Court held so in M.K. Kandaswami''s case (supra):

It may be remembered that Section 7A is not at once a charging as well as a remedial provision. Its main object is to plug leakage and prevent evasion of tax.

In interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book, should be eschewed. If more than one construction is possible, that which preserves its workability, and efficacy is to be preferred to the one which would render it otiose or sterile. The view taken by the High Court is repugnant to this cardinal canon of interpretation (para 26).

Coming to the 4th proviso of sub-clause (v), it is to be seen that the statute itself provides for a shifting of the levy with respect to goods imposed with multi-point levy; when the first sale, the point of first levy as per the schedule, is exempted from tax, and there is no payability.

12. We have to now examine the facts revealed in the instant case in the light of the above interpretation. The Tribunal, the last fact finding authority, in our opinion, has misconceived the principles underlying the virtue of brevity. In Annexure C order it merely says that since the appellant purchased deep freezer from exempted class of dealers and no tax was paid, the assessment levying 16% tax on its sale is in accordance with law. The Tribunals would do well to examine the facts of the transaction and relate it to the law applicable, being the last fact finding authority, so as to give a clearer picture. In the absence of such examination, we have thoroughly examined the assessment order as such. The entire controversy revolves around the sale of deep freezers and the levy of 16% on turnover of Rs. 5,15,860/-. In the proposal, the assessing authority has noticed the alleged defect in paragraph 3 as extracted herein below:

You have shown fixed asset sales to be taxable at 4%. This claim is not acceptable for the reasons that verification with purchase bills has shown that purchases for Rs.4,53,305/- are not tax suffered purchases and are purchases from exempted class of dealers. Hence this will be assessed at conceded GP 13.8% at tax rate 16% and balance turnover of Rs. 9,82,397/- at 4% as for last point sale. Hence the turnover of Rs. 14,98,257/- freezer sales will be assessed at the following rates:

16% on Rs. 5,15,860.00

4% on Rs. 9,82,397.00

Rs. 14,98,257.00.

13. The assessee only disputes the levy at the rate of 16% and is agreeable to levy at the rate of 4%. As per the proposal, it is seen that the claim of the assessee for 4% was examined against the purchase bills; which were not tax suffered. Such exempted purchase turnover of Rs.4,53,305/- was multiplied with gross profit at the rate of 13.8%, which resulted in a taxable turnover of Rs. 5,15,860/- and levy of tax @ 16%. If, the sale was of second-hand deep freezers which the revision petitioner purchased earlier and let out on lease to others, then the addition of gross profit on the purchase value would be grossly and blatantly erroneous. We have also noticed the reply of the assessee extracted in

page 6 of the assessment order, wherein it is stated that the assessee is an intermediary dealer with respect to the turnover of fixed assets (deep freezers) for Rs. 14,98,258/-.

14. If the assessee is an intermediary dealer and the purchase of the assessee, being the first sale within the State, is exempted, then the assessee''s case would come under the first limb as interpreted by us. The assessee''s sale being the subsequent sale, would be taxable as provided under column (4) of Fifth Schedule at the rate of 12%; if the subsequent sale is also to a registered dealer for sale {column (3)}. Then any subsequent sale which is the last sale {column (5)} would be levied tax @ 4% {column (6)}. If as an intermediary dealer the assessee purchases the goods in the course of first sale where no tax is payable, and then subsequently sells the goods to a registered dealer not for sale or to a person other than a registered dealer, then that sale comes within the second limb as there are no two "subsequent sales" after the exempted first sale within the State. The rate applicable would be 16% {column (8)}, being the deemed first sale which is also the last sale {column (7)}.

15. When the assessee purchases deep freezers as capital goods; that would be a case of no tax being paid on first sale and there is no second point of sale within the State. However, second-hand deep freezers if sold by the assessee, after passage of whatever time; then, necessarily the price for which it was sold would be lesser than the purchase price. That amount would be taxable at the rate of 16% when it is sold to a registered dealer not for sale or any other person. Then there would be no question of addition of gross profit.

16. Admittedly on first sale of deep freezers no tax was payable since the sale was by SSI units, eligible for exemption. The discussion above would show that if the assessee purchased it for sale, then the subsequent sale if to another registered dealer for sale, then the liability to tax on such sale would be 12% and any subsequent sale which is the last sale would be leviable at 4%. However, if the assessee''s sale is to a registered dealer not for sale or to an unregistered dealer, then necessarily the assessee''s liability would be 16%. If the assessee has purchased it as capital goods and effecting sale of used freezers, whatever be the period of use, then tax would be payable only on the amount of such sale as indicated above. The contention that the assessee leases out the deep freezers and since the definition of "sale" includes a lease cannot hold good. The transfer of right to use resulting from a transaction of lease is taxable at the rate of 8% under sub-clause (iii) of sub-section (1) of Section 5 of the Act.

17. Fundamentally, what is discernible from the clear words of the fourth proviso is that the goods under the Fifth Schedule being levied tax at multi-point, any first sale being exempted; such exemption from payability shall not deprive the Revenue of the multi-point levy in instances of such multi-points of sale arising within the State. Distinguishing ''liability'' and ''payability'', the Hon''ble Supreme Court in Azad Bachao Andolan case (supra) held that "liability to taxation is a legal situation; payment of tax is a fiscal fact" (sic). We notice that the

legislature has specifically used "if no tax is payable" in the subject proviso. This is the intention that can be gathered from the clear and unambiguous language employed.

18. As noticed by us, the assessment order also does not give us a complete picture. The action of the assessing officer in adding gross profit and the submission of the assessee that they are intermediary dealers within the State would make the transactions fall either under the first limb of the proviso or the second limb of the proviso; depending upon "to whom" the sale is effected. However, we also find from the reconciliation statement of the assessee extracted in page 5 of the assessment order that depreciation has been claimed on deep freezers and loss of sales on fixed assets had been deducted to the profit and loss account. This reveals an improper marshalling of facts by all the authorities concerned. Whether the assessee is an intermediary seller and if so whether the sale is to a registered dealer for sale or otherwise has essentially to be determined before the rate of tax leviable is decided. In such circumstances, the sale price of the assessee would be relevant for determination of the turnover on which the rate of tax is to be applied. There is no room for deducting depreciation or loss because then it is a sale of goods and not sale of fixed assets. However, if the assessee is making second hand sales of deep freezers, then again what is taxable is the consideration for such sale and there can be no addition of gross profit to the purchase turnover. We are afraid that the authorities below have not examined the facts in the proper perspective. In view of what has been stated above, the revision petition is allowed. The question of law regarding the interpretation of the 4th proviso under sub-section (v) of section 5 of the KGST Act is answered as above. In the circumstance of the case, the orders of the authorities below are set aside and the matter is remanded to the assessing authority / fast track team for de novo consideration, in accordance with law and also in accordance with the observations made above.

