
(2012) 06 KL CK 0013
In the High Court Of Kerala
Case No : S.T. Rev. No. 69 of 2008

Southern Refineries Limited

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 13-06-2012

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 10

Citation : (2013) 62 VST 353

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

Bench : Division Bench

Advocate : E.K. Nandakumar and A.K. Jayasankar Nambiar, s, K. John Mathai, P. Benny Thomas and Anil D. Nair, for the Appellant; Bobby John, Government Pleader, for the Respondent

Judgement

K. Vinod Chandran, J.—The petitioner is an assessee under the Kerala General Sales Tax Act, 1963 (for short, "the KGST Act") and is aggrieved by the reduction of the period of exemption, by the assessing officer, as confirmed by the first appellate authority and the Tribunal. The petitioner/assessee is a medium scale industrial unit, which commenced commercial production on September 1, 1993. The petitioner claims to have been granted exemption under SRO. No. 1729/1993 for an amount of Rs. 3,66,44,000 for a period of seven years from September 1, 1993 to August 31, 2000. The petitioner has produced annexure A order of exemption dated November 24, 1995 which, along with annexure B, shows the eligibility to exemption, the period, quantum and the goods in respect of which exemption is granted. The bone of contention is only with respect to the period of exemption granted as per annexure A order. The petitioner claims that annexure A exemption order under SRO. No. 1729/1993 prescribes exemption for a period of seven years with respect to the petitioner's liability under the KGST Act, subject however, to the quantum of tax exemption which is also specified in annexure A. The present revision is with respect to the CST assessment of the petitioner completed for the year 1998-99. The petitioner claimed on the strength of annexure A order that in continuation of SRO. No.

1729/1993 issued u/s 10 of the KGST Act, the Government has issued SRO. No. 1730/1993 under the CST Act granting reduced rate of two per cent for inter-State transaction, again for a period of seven years. Admittedly no separate exemption order is required to be passed under the Central Sales Tax Act or the notification issued thereunder.

2. The assessing officer rejected the claim of the petitioner for grant of exemption under the Central Sales Tax Act for the assessment year 1998-99 on the ground that exemption available to the petitioner as an industrial unit is not under SRO. No. 1730/1993, but is under SRO. No. 1731/1993. SRO. No. 1731/1993 grants the reduction in the rate of tax for industrial units only for a period of five years.

3. Annexure E order of assessment, finding the petitioner covered under SRO. No. 1731/1993, was challenged unsuccessfully by the petitioner before the first appellate authority as well as the Tribunal. The petitioner has produced SRO. Nos. 1729/1993, 1730/1993 and 1731/1993, respectively as annexures C, D and F. The counsel for the petitioner would contend that the definition of a "new industrial unit" under medium and large scale industries in SRO. No. 1730/1993 has adopted the definition in SRO. No. 1729/1993. Hence, the exemption granted to the petitioner, annexure A, under SRO. No. 1729/1993 for the liability under the KGST Act necessarily has to govern the petitioner's liability under the Central Sales Tax Act too; which is intended by the Government under SRO. No. 1730/1993. On the above premise, the petitioner has raised three questions of law, all boiling down to the eligibility of the petitioner under SRO. No. 1730/1993 for concessional rate of two per cent on the inter-State transactions for a period of seven years as against the prescription of five years under SRO. No. 1731/1993.

4. The learned Government Pleader would support the impugned orders and urge before us that the petitioner is only entitled to exemption for a period of five years, being covered under SRO. No. 1731/1993.

5. Exemption notifications, as is trite, have to be construed strictly. The claim of the petitioner has to be considered with reference to the specific words and concessions/exemptions provided by the notifications. SRO. No. 1729/1993 defines "new industrial unit" under clause 11(i) as small-scale, medium or large scale industrial unit set up on or after April 1, 1993 and certified as such by the appropriate authority. It is to be noticed that the specific case of the petitioner in the revision as well as before the lower authorities was that the petitioner's unit had commenced production after April 1, 1993, i.e., on September 1, 1993. The petitioner does not raise a claim as an industry set up on or after April 1, 1993. This distinction would necessarily raise a question as to the eligibility of the petitioner under SRO. No. 1729/1993 and would definitely invite a scrutiny of annexure A, exemption order. Annexure A cites the subject as:--

New medium and large scale industrial units--Set up on or after April 1, 1989--

Sales tax exemption orders issued--Regarding.

6. Hence, the petitioner's claim was not considered as a unit set up on or after April 1, 1993, since the petitioner's unit is obviously one set up on or after April 1, 1989, i.e., prior to April 1, 1993, but commenced commercial production on September 1, 1993. Though SRO. No. 1729/1993 is read as item 6 in annexure A order, we read as item No-1 SRO. No. 654/1989, which is an earlier notification in 1989 issued to grant exemption in respect of tax payable under the KGST Act on the turnover of the sale of goods produced and sold by new industrial units for a period of five years from the date of commencement of sale of such goods. The said notification, though not produced, was perused by us and "new industrial unit" as per the said notification was explained as meaning "large and medium undertakings set up on or after April 1, 1989 and registered with the Department of Industries as an industrial unit". The question which perturbed is, as to how a unit which was deemed to have been set up on or after April 1, 1989, i.e., prior to April 1, 1993, was granted exemption under SRO. No. 1729/1993 which specifically granted exemption to industries set up on or after April 1, 1993.

7. A careful reading of annexure C revealed the note under clause 11(i) of SRO. No. 1729/1993, which is extracted below:

Medium or large scale industrial units set up prior to the 1st day of April 1993 and governed by Notification G.O. (P). 94/89/TD dated April 27, 1989 published as SRO No. 654/89 in the Kerala Gazette Extraordinary No. 396 dated April 27, 1989 and those set up after the 1st day of April, 1993 and governed by Notification G.O. (P) No. 155/93/TD dated November 3, 1993 published as SRO No. 1729/93 in the Kerala Gazette Extraordinary No. 1122 dated November 4, 1993 which were not able to avail of a concession contemplated therein for the reason that they were not registered with the Director of Industries and Commerce, the exemption shall be available for a period of five or seven years as the case may be, with reference to the notification under which concession was/is to be granted, from the date of actual availment of the exemption, subject to the monetary limit applicable. The revised certificate in such cases shall be issued by the Secretary, Board of Revenue (Taxes), Thiruvananthapuram, on application by the units. N. B. : Note added by SRO 178/96 dated February 12, 1996 with effect from January 1, 1994.

8. The note indicates that new industrial units set up prior to April 1, 1993 and governed by SRO. No. 654/1989 and those set up after April 1, 1993 governed by SRO. No. 1729/1993, which were not able to avail of concession/exemption for the reason of their not being registered with the Director of Industries and Commerce, the exemption was specifically made applicable; however, only with reference to the period for which the exemption was granted as contained in the respective notifications. Hence, an industry governed by SRO. No. 654/1989 set up prior to April 1, 1993, having not been able to avail of the exemption provided therein (SRO. No. 654/1989) would be entitled to avail of the exemption after

the publication of SRO. No. 1729/1993, but, however, only for the period stipulated in SRO. No. 654/1989. Annexure A, as noticed above, would specifically show that SRO. No. 1729/1993 was not as such applicable to the petitioner. It was by virtue of the note extracted above contained in SRO No. 1729/1993 that the petitioner was entitled to seek the exemption under SRO. No. 654/1989. However, the exemption could be only for a period of five years as provided under SRO. No. 654/1989.

9. This interpretation is in consonance with the concession granted under the Central Sales Tax Act by SRO. No. 1730/1993 and SRO. No. 1731/1993. SRO. No. 1730/1993, as rightly contended by the petitioner, defines "new industrial unit" as those defined under SRO. No. 1729/1993. That is to say, those units set up on or after April 1, 1993. It is to the units which are set up on or after April 1, 1993 and entitled to exemption under the KGST Act as per SRO. No. 1729/1993 that SRO. No. 1730/1993 was issued granting concessional rates under the Central Sales Tax Act for a period of seven years. Obviously as found above, the petitioner is not a unit set up on or after April 1, 1993 and is thus not covered by the terms contained in SRO. No. 1729/1993 or by SRO. No. 1730/1993. This brings us to the issue of the entitlement of the petitioner under SRO. No. 1731/1993. At the risk of repetition, we notice that SRO. No. 654/1989 was intended to grant exemption to units set up on or after April 1, 1989, i.e., prior to April 1, 1993. By virtue of SRO. No. 1729/1993, the benefit conferred under SRO. No. 654/1989 was resurrected by virtue of the note in SRO. No. 1729/1993 for those who failed to avail of the concessions earlier for want of registration. Hence, necessarily the Government thought it fit that the benefit under the KGST Act should be extended to the Central Sales Tax Act also by way of concessional rate. While SRO. No. 1730/1993 extended such concessional rate under the CST for those "units set up on or after April 1, 1993", SRO. No. 1731/1993 extended benefit available under SRO. No. 654/1989 and resurrected by the note referred to above by issuance of SRO. No. 1731/1993. This interpretation is amply supported by item 6 in Schedule IV of SRO. No. 1731/1993, which specifically refers to the concessional rate being applicable for a period of five years for "new large and medium scale industrial units which started commercial production on or after April 1, 1993". The distinction, hence, is with respect to "the units that were set up on or after April 1, 1993", and those "which started commercial production on or after April 1, 1993". The petitioner's unit having been set up prior to April 1, 1993 as is evident from annexure A, the benefit of exemption can be conferred only for the period specified under SRO. No. 654/1989 under the KGST Act and the notification which governs the petitioner's claim for concessional rate under the Central Sales Tax Act is SRO. No. 1731/1993. Hence, all the questions of law raised by the petitioner have to be answered against the petitioner and in favour of the Revenue.

10. Though the petitioner has not raised such a question of law, what troubles us is the fact that annexure A has granted exemption for a period of seven years under the KGST Act. No separate exemption order has been contemplated under

the Central Sales Tax Act. Could the assessing officer go behind the exemption order and take away the exemption/concession granted or rather reduce the period of exemption/concession granted in annexure A and disentitle the petitioner to avail of concessional rates for two years? The position that an assessing officer cannot sit in judgment over the proceeding of an authority granting exemption has been laid down in *Deputy Commissioner of Sales Tax, Ernakulam v. Surya Refineries (P) Ltd.* [1991] KLJ (Tax Cases) 513. Necessarily when a competent authority passes an order by virtue of the jurisdiction conferred on it by the statute, the same is valid and applicable, unless set aside, varied or modified in accordance with law. The only caveat would be when the order passed is without jurisdiction. The concept of jurisdiction has two aspects-- (i) going to the root; in so much as the competence of the authority itself is questioned and (ii) when an authority competent to consider the issue exceeds the jurisdiction in the course of the enquiry.

11. On the question of judicial review with reference to jurisdiction or lack of it a significant break-through in English law was achieved with *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147(HL). The House of Lords for the first time rejected the idea that jurisdiction of a Tribunal or authority could only be questioned in the first instance as to the competence to embark upon an enquiry. It was held that the jurisdictional aspect could be questioned on the competence to conduct an enquiry and also with respect to excesses of jurisdiction committed in the course of such enquiry. The position that an authority conferred with a jurisdiction could make a right determination or a wrong determination was accepted. But that was not to depart from the position that an order in excess of jurisdiction could be deemed to be a nullity. Lord Reid in leading the majority held:

It has sometimes been said that it is only where a Tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the Tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the Tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand

that some confusion has been caused by my having said in *Reg. v. Governor of Brixton Prison, Ex parte Armah* [1968] A.C. 192, 234 that if a Tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law...

12. in the said decision the ouster of jurisdiction of courts provided in a statute was considered by the appellate court which reiterated the established principle that a provision ousting the ordinary jurisdiction of the court though must be construed strictly; it should be understood that nevertheless it reserves the ordinary jurisdiction of the court to exercise judicial review where the order passed under the statute was a "nullity". A fine distinction was drawn in the errors of law that was committed within the jurisdiction and those errors of law which were beyond or in excess of the jurisdiction. While the former would necessarily have to be corrected by a superior authority or court *Anisminic Ltd.* [1969] 2 AC 147, clearly laid down that any error of law committed, which touches upon the very jurisdiction of the authority/Tribunal could be considered a nullity.

13. We keep in mind the fine line distinguishing the jurisdictional and non-jurisdictional error. We are also conscious of the contours of our jurisdiction in the above revision. We remind ourselves that we are not sitting in appeal of annexure A. We are also not called upon to examine the validity of annexure A. The above revision is from the assessment order as confirmed by two appellate authorities and we are examining the question of law whether the assessing officer was right in going behind or ignoring annexure A and holding that the exemption is valid for only a period of five years.

14. Annexure A order has been passed by the Board of Revenue (Taxes), Thiruvananthapuram, which is the authority conferred with the power to pass an exemption order under SRO. No. 1729/1993. There cannot be any dispute with respect to the competence of the authority and the jurisdiction has been so conferred by the notification. However, looking at the aspect of the authority having exceeded the jurisdiction, it is pertinent that by the specific words employed in SRO. No. 1729/1993 read with SRO. No. 654/1989, the power of the authority to grant exemption under the KGST Act for a new industrial unit which was set up prior to April 1, 1993, but after April 1, 1989 was only for a period of five years. Would that make the order a nullity in so far as the grant for an additional two years? Has not the authority in granting two additional years exceeded its jurisdiction as conferred by the relevant notifications?

15. A Division Bench of this court had considered a similar issue arising out of the very same notification, but however, with factual variations in *K. Premerajan Vs. State of Kerala*, . The facts relevant to the said decision in brief is that the

assessee was granted an exemption order under SRO. No. 1729/1993 by the District Level Committee, effective for the period from July 5, 1997 to July 4, 2002. The assessing officer having alertly detected that the goods dealt with by the assessee falls in the negative list, however, after the period was over, took up the matter with the District Level Committee and also completed the assessment rejecting the claim of exemption. The District Level Committee having reviewed the matter, amended its earlier order and refused exemption to the assessee on the ground that the goods dealt with come within the negative list. The assessee was before the court challenging the assessment on grounds that the assessing officer was not competent to go behind the order of exemption and that the review of the exemption order by the District Level Committee was incompetent, inter alia, for the reason that the same was passed after the period of exemption was over, thus disentitling the assessee from passing on the liability to its consumers. On the strength of precedents, the Division Bench first rejected the contention of the assessee about being disabled to pass on the tax liability and held that the disability of the assessee to pass on the tax burden to its customers cannot be of any consequence. (vide J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another, , American Remedies Pvt. Ltd. Vs. Govt. of Andhra Pradesh and Another, and State of Rajasthan and Another Vs. J.K. Udaipur Udyog Ltd. and Another,).

16. The next contention dealt with by the Division Bench was with respect to the assessing officer going behind the orders of exemption granted by the competent authorities. The Division Bench examined the concepts of "jurisdiction" and "nullity" and found that the instant case was one in which there was a want of jurisdiction and not one of irregular assumption of jurisdiction. Under the notification, in the said case, the District Level committee was authorised to determine whether a particular assessee is eligible or not for the grant of exemption under the notification. However, the goods being dealt with by the assessee, falling specifically under the negative list, it was held, the District Level Committee did not have jurisdiction to entertain such an application. The jurisdiction conferred on the District Level Committee did not extend to the goods in the negative list and excluded the same and an order granting it would be in excess of the jurisdiction conferred. The Division Bench judgment in K. Premerajan Vs. State of Kerala, is clearly distinguishable from Surya Refineries case [1991] KLJ (Tax Cases) 513 in so far as the finding in the exemption certificate in the latter case was one within the jurisdiction of the authority.

17. We are of the opinion that the same reasoning in K. Premerajan Vs. State of Kerala, , however in a different context can be adopted for the present revision. In the matter of industries set up on or after April 1, 1989 and prior to April 1, 1993, the competent authority was conferred jurisdiction as per the notifications on a combined reading of SRO. No. 1729/1993 and SRO. No. 654/1989. But the said jurisdiction extended to grant of exemption only for a period of five years. The grant of exemption for seven years; to the extent of the additional two years, is definitely in excess of the jurisdiction and again cannot be considered as

one of irregular assumption of jurisdiction or an error of law committed within the jurisdictional competence. To the extent of the exemption granted beyond the specific period of five years prescribed under the relevant notification, the same was definitely vitiated by lack of jurisdiction or want of jurisdiction. The authority clearly exceeded the jurisdictional mandate of SRO. No. 1729/1993 read with SRO. No. 654/1989. In the circumstances, the assessing officer was perfectly right in confining the exemption to five years; since annexure A to the extent it granted exemption for the additional two years was a nullity. Therefore, the assessing authority was justified in passing the assessment order under the Central Sales Tax Act rejecting the claim of exemption beyond five years and finding the assessee's claim for concessional rate under the Central Sales Tax Act to be governed under SRO. No. 1731/1993. The question of law suo motu raised by us is also answered in favour of the Revenue and against the assessee. All the questions of law, hence, are answered against the assessee and in favour of the Revenue and the sales tax revision is dismissed.