

(1998) 03 KL CK 0017

In the High Court Of Kerala

Case No : T.R.C. 53, 54, 83, 130 and 131/96

Sovereign Spices

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 18-03-1998

Acts Referred:

Central Sales Tax Act, 1956 — Section 5, 5(1), 5(3)
Constitution of India, 1950 — Article 286, 286(1)
Kerala General Sales Tax Act, 1963 — Section 41

Citation : (1998) 03 KL CK 0017

Hon'ble Judges : Om Prakash, C.J.;J.B. Koshy, J

Bench : Division Bench

Advocate : Raja Ram Agarwal and S. Abdul Salam, for the Appellant; V.V. Asokan, Government Pleader for Tax, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Koshy, J.—Questions of law raised in all these tax revision cases are the same on similar set of facts. Therefore, as agreed by the Counsel appearing for the parties, all these cases are disposed of together.

2. Petitioners in these tax revision cases are doing business in spices like pepper and ginger, etc. in Kerala State and they are registered dealers under the provisions of the Kerala General Sales Tax Act and Central Sales Tax Act. Petitioners purchased pepper, dry ginger etc. which is liable to tax at last purchase point in the Kerala State and after effecting purchase of pepper etc. the same was sold to exporters outside the State who, in turn, exported the goods to outside the country. Petitioners contended that they are entitled to exemption under Section 5(3) of the Central Sales Tax Act as the purchase by them is the purchase preceding the export. They also submitted that purchase effected by the Petitioners is inextricably connected with the export sales and it is exempt under Article 286(1)(b) of the Constitution of India. The case before the assessing authority was that they are entitled to exemption u/s 5(3) of the C.S.T.

Act. That was not accepted by the assessing authority, Deputy Commissioner (Appeals) as well as the Kerala Sales Tax Appellate Tribunal. The order in Appeal No. 265/95 passed by the Kerala Sales Tax Appellate Tribunal is produced in T.R.C. No. 83/96. Findings of the Tribunal are recorded in paragraph 4 of the order which is as follows:

Admittedly, the purchase effected by the Appellant is the purchase of pepper, dry ginger etc., within the State of Kerala which are taxable at the last purchase point. After the above purchase is complete, the Appellant sold the same to exporters outside the State of Kerala. Exporters outside the State of Kerala exported the same. So, three transactions are involved in this case. One, a sale by a dealer in the Kerala to the Appellant, i.e. the Appellant's purchase in Kerala, secondly sale by the Appellant to the exporters at Bombay (2nd transaction), third sale by exporter to foreign buyer (3rd transaction). Sale by exporter to foreign buyer which directly occasions the export is covered by Section 5(1) of the C.S.T. Act. Therefore, the second transaction, i.e. sale by the Appellant or the purchase by the exporter which alone is covered by Section 5(3) of the C.S.T. Act, as the words used in Section 5(3) of the C.S.T. Act is that "the purchase or sale preceding the purchase or sales occasioning the export". The purchase by the Bombay exporter is not a purchase occasioning the export, but, the purchase preceding the purchase occasioning export. Therefore, it is clear that (third transaction i.e.) purchase by the Appellant (sale by a third party to the Appellant) is not a purchase preceding the purchase occasioning export mentioned in Section 5(3) of the C.S.T. Act, but sales by the Appellant to Bombay exporters is the sale preceding the sales occasions the export (Bombay exporter's purchase is the purchase preceding the purchase occasioning the export). The Hon'ble High Court of Andhra Pradesh reported in *Bismillah and Co. Vs. State of Andhra Pradesh*, and Hon'ble High Court of Kerala in *Deputy Commissioner (Law) v. Kepee Sons* reported in 1991 KLT 271, have held in identical set of facts that the purchase effected by the Appellant is not the purchase u/s 5(3) of the C.S.T. Act.

According to the Petitioner, decision of the Tribunal is in contravention of the provisions contained in Article 286(1)(b) of the Constitution of India as their purchases were inextricably connected with the export. It is also contended by the Petitioners that the Tribunal is not justified in holding that purchases of pepper and ginger effected by the Assessee are not the last purchases preceding the purchase occasioning the export contemplated u/s 5(3) of the C.S.T. Act.

3. It is contended that since the purchase of goods in question were inextricably connected with the export, the State has no jurisdiction to tax the same under Article 286(1)(b) of the Constitution of India. It was argued that during the assessment year 1990-91, different export houses outside the State placed orders on the Petitioners for supply of pepper and ginger for export. On receipt of the said orders, Petitioners supplied the goods for export and, therefore, these purchases were inextricably connected with the export. These pepper and ginger

were despatched to export companies outside the State and they have exported the same outside the Territory of India. The Bill of Lading issued by the Shippers, Certificate of Export issued by the Exporters etc. show that the goods were actually exported.

4. Petitioners relied on the decision of the Supreme Court of India in *State of Travancore-Cochin and Ors. v. Bombay Co. Ltd., Alleppey* AIR 1952 S.C. 366 wherein it was held by the Supreme Court that a sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. In the above case, Assessee received export orders and in executing the sale for export, they made local purchases and according to the sales tax authorities the sales were completed before the goods were shipped and, therefore, cannot be considered to have taken place in the course of export so as to attract exemption under Article 286(1)(b) of the Constitution of India. It was held by the Court that local purchases "made for the purpose of export" were integral parts of the process of export. The court held as follows:

...A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other.

5. In *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, after considering the decision in *Bombay Company's* case AIR 1952 S.C. 366 referred to earlier, the Supreme Court held that the phrase "integrated activities" used in *Bombay Company's* case AIR 1952 S.C. 366 is only to denote that "such a sale" (i.e. sale which occasions the export) "cannot be dissociated from the export without which it cannot be effectuated, and the sale and the resultant export form parts of a single transaction". It was also held that a purchase for export is not an activity so integrated with the export so as to be regarded as done "in the course of" export. The Supreme Court clearly distinguished purchase in the course of export and purchase for export.

6. Again, the Supreme Court considered the matter in *Serajuddin and Others Vs. The State of Orissa*, There, the Supreme Court, by a majority of judgment, held as follows:

...Where the sale is effected by the seller and the seller is not connected with the export which actually takes place, it is a sale for export. Where the export is the

result of sale, the export being inextricably linked up with sale so that the bond cannot be dissociated without a breach of the obligations arising by statute" contract, or mutual understanding between the parties arising from the nature of the transaction the sale is in the course of export.

In *Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others*, the Appellants were sellers of tea and their purchasers were local agents of foreign buyers. The sales were by public auction. Apex Court held that a transaction of sale which is a preliminary to export of the commodity sold may be regarded as a sale for, export, but is not necessarily to be regarded as one in the course of export unless the sale occasions export. It was said that to occasion export there must exist such a bond between the contract of sale and the actual exportation that each link is inextricably connected with the one immediately preceding it.

7. In *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, the Supreme Court held that there must be a single sale which itself causes the export and that there is no room for two or more sales in the course of export. In *Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others*, similar view was taken by the Supreme Court. In *Murarilal Sarawagi and Others Vs. The State of Andhra Pradesh*, it was held by the Supreme Court that if the contract of the purchaser with the exporter is not an integrated one, then the exporter would be the last purchaser within the State. In *Member Board of Revenue, West Bengal Vs. Swaika Oil Mills, , the Netherlands Selling Organisation Ltd. in India* bought from the Respondents certain quantity of linseed oil "F.O.B. Calcutta price". The commodity was to be exported by the purchaser to its foreign buyer, the export to be made under the export licence of the Respondents. The Supreme Court held that there was a direct, distinct and independent contract of sale between the Swaika Oil Mills on one hand and their buyers in India, the Netherlands Selling Organisation and the sale effected in pursuance of that contract is wholly unconnected with the sale by the Netherlands Organisation to their foreign buyers. So long as there is no privity of contract between the purchaser and the foreign buyer, it cannot be stated that they are inextricably connected or goods were purchased in the course of export. Here, in this case, the Petitioners purchased pepper and ginger from the State locally. The sale was concluded. Thereafter, they forwarded them to their buyers and their buyers outside the State exported the same. Even if the purchases may be for export, it cannot be stated that the purchases were done by the Petitioners in the course of export. Therefore, Petitioners are not entitled to the benefits of exemption under Article 286 of the Constitution of India.

8. Considering the fact that only sale in the case of export will get the benefit of Article 286 of the Constitution of India, in view of the decision of the Supreme Court in *Serajuddin and Others Vs. The State of Orissa*, referred to earlier, Section 5(3) of the Central Sales Tax Act was enacted, as can be seen from the Statement of Objects and Reasons when Bill was introduced. Relevant portion of

the Statement of Objects is extracted below:

The Supreme Court has held (vide *Serajuddin and Others Vs. The State of Orissa*,) that the sale by an Indian exporter from India to the foreign importer alone qualifies as a sale which has occasioned the export of the goods. According to the Export Control Orders, exports of certain goods can be made only by specified agencies such as the State Trading Corporation. In other cases also manufacturers of goods, particularly in the small scale and medium Sectors, have to depend upon some experienced export house for exporting the goods because special expertise is needed for carrying on export trade...It is, therefore, proposed to amend, with effect from the beginning of the current financial year, Section 5 of the Central Sales Tax Act to provide that the last sale or purchase of any goods preceding the sale or purchase occasioning export of those goods out of the Territory of India shall also be deemed to be in the course of such export if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for, or in relation to, such export.

In the Notes on clauses published in the Gazette along with the Bill and Statement of Objects and Reasons, reasons, for enacting Section 5(3) and notes and reasons on Clause 5(3) is as follows:

This clause seeks to insert with retrospective effect from 1st April 1976 a new Sub-section (3) in Section 5. The new Sub-section provides that the last sale or purchase of any goods preceding the sale or purchase occasioning export of those goods out of the territory of India shall also be deemed to be in the course of such export if such last sale or purchase took place after, and was for the purpose of complying with the agreement or order for, or in relation to such export.

9. The first important decision on the subject by the Supreme Court after Section 5(3) was enacted was a decision reported in *Consolidated Coffee Ltd. and Another Vs. Coffee Board, Bangalore*, . Supreme Court clearly held that Section 5(3) of the Central Sales Tax Act has obviously been enacted to extend the exemption from tax liability under the Act not to any kind of penultimate sale but only to penultimate sale as satisfies the two conditions specified therein, namely, (a) that such penultimate sale must take place (i.e. become complete) after the agreement or order under which the goods are to be exported and (b) it must be for the purpose of complying with such agreement or order and it is only then that such penultimate sale is deemed to be a sale in the course of export. It is also held that agreement referred to in Clause 5(3) refers to the agreement with the foreign buyer and not an agreement with a local dealer containing the covenant of export. Therefore, it is clear that Sub-section (3) of Section 5 only exempted last stage of purchase of any goods preceding the sale or purchase occasioning the export of those goods.

10. The learned Senior Counsel appearing for the Petitioner cited the decision of the Supreme court of India in *State of Orissa Vs. Minerals and Metals Trading*

Corporation of India Limited, . In the above case, Minerals and Metals Trading Corporation of India was registered as a dealer under the Orissa Sales Tax Act. On getting orders from foreign buyers it purchased mineral ores from the mine owners who were registered dealers under the Act. The Minerals and Metals Trading Corporation under the preexisting contract with a Japanese buyers sold the goods to them by delivering the goods to them at Pradeep Port for transportation out of India. The Supreme Court held that the sale effected by the Assessee in favour of the Japanese buyers is sale in the course of export of the goods out of the territory of India and as such is not exigible to sales tax. But the Supreme Court differentiated sale "in the course of export of the goods" and sale "within the State". This dictum is not at all helpful to the Petitioners. In the case considered by the Supreme Court, the Assessee entered into a contract with the Japanese buyers for export sale of mineral ores and the Supreme Court held that the export sale has an entirely different legal concept and "sale" and "export" are so intertwined and intermixed that both begin and end together. After analysing the contract the Supreme Court held as follows:

A sale "in the course of the export of the goods" and a sale "within the State of Orissa" are two distinct events. A sale "in the course of the export of the goods" cannot be a sale within the State of Orissa. The Assessee entered into contracts with the Japanese buyers for "export sale" of the mineral ores. An "export sale" has an entirely different legal concept. In the "export sale", the "sale" and the "export" are so intertwined and intermixed that both begin and end together. The various clauses of the contract entered into by the Assessee and the Japanese buyers are wholly irrelevant and are of no consequence. Even if on the construction of the contract of "export sale" the sale part of it is completed within the State it would still not be considered as legally complete because still the time the "sale" and the "export" both are completed none can be taken to be complete. It is, therefore, inherent in the concept of "export sale" that both the "sale" and the "export" are completed when the goods are appropriated by the foreign buyer.

In this case before us, purchase of pepper and ginger by the Petitioners was complete in the State itself. Thereafter, it was sold to the parties outside the State and they, on their contract of export, exported the goods to outside the country and there is nothing to indicate that the purchase by the Petitioners of the goods from Kerala is in the "course of export".

11. In Vijayalaxmi Cashew Company and Others Vs. Dy. Commercial Tax Officer and Another, it was held by the Supreme Court that onus to prove that the last sale or purchase preceding the sale or purchase occasioning the export comes within the exemption lies on the person claiming protection u/s 5(3) of the C.S.T. Act. On going through the documents and facts as found by the Tribunal, it can be seen that the Assessee has not discharged the onus to prove that their purchase the last sale or purchase preceding the sale or purchase occasioning the export.

12. The next case cited by the Petitioners was C.T. Ltd. and Another Vs. Commercial Tax Officer and Others, wherein pursuant to a contract between State Trading Corporation and Appellants, Appellants purchased tea from tea auctions to be supplied under the former contract. Deliveries of tea were made to the Iranian buyers under the contracts. In that case, the State Trading Corporation entered into a contract with the Government Trading Corporation of Iran for supply of a particular quantity of a particular type of tea. In turn, S.T.C. entered into a contract with the Assessee pursuant to which Appellant purchased tea from tea auctions for being supplied under the former contract directly to Iran. Appellant's invoice showed that it is sold to the Iranian buyer. Drawback benefit was also accrued to the Appellant. In such circumstances, there was no transfer of the property in tea by the Appellants to S.T.C., but it was transfer to the Iranian buyer and the purchase of tea by the Appellants was held to be in fulfilment of the export obligation to the Iranian buyer as penultimate sale in the course of export. The Supreme Court before coming to such a decision, considered the following facts:

The manner in which the contract between the Appellants and S.T.C. was executed reinforces our view. The Tea. Export Licence for the tea was that of the Appellants. The invoice of the Appellants showed the Iranian buyer against the column "Sold To", and no objection in this regard was raised by S.T.C. The duty drawback benefit accrued entirely to the Appellants. The Bill of Lading issued by the Irano-Hind Shipping Co. Ltd. showed the Iranian buyer's Tehran bank as consignee of the tea shipped by the Appellants.

On these facts, the Supreme Court held as follows:

There is, therefore, nothing in the contract between the Appellants and S.T.C. or in the manner of its execution that establishes that there was a transfer of the property in tea by the Appellants to S.T.C. before it was transferred to the Iranian buyer. Hence, the purchase of the tea by the Appellants at the auctions in fulfilment of the export obligation to the Iranian buyer was the penultimate sale in the course of export and covered by the terms of Section 5(3). It was accordingly exempt from the payment of sales tax.

The facts under consideration before us is entirely different, and the purchases in the State were done by the Assesseees themselves.

13. On similar set of facts as in this case, under consideration a Division Bench of this Court in Kepee Sons v. State of Kerala 1991 (1) KLT 270 held that Assesseees are not entitled to the benefit of Section 5(3) of the C.S.T. Act. In that case also, Petitioners purchased pepper and ginger and sold interstate to exporters in Bombay and who, in turn, exported the goods outside the territory of India. The Court held as follows:

The sale which occasioned to export is the sale by the Bombay dealer (Exporter) to the foreign buyer. The sale or purchase which preceeded such export (the penultimate purchase) which comes within Section 5(3) of the C.S.T. Act, is the

purchase made by the Bombay Exporter who purchases goods from the revision Petitioner and effects exports. What is taxed in this case is the purchases made by the Petitioner in this State. Such purchase is not the preceding purchase occasioning the export but purchase removed by one more step. So, the purchase made by the Petitioner within the State is not just the immediate transaction before the export sale. Such a purchase made by the Petitioner will not come u/s 5(3) of the C.S.T. Act.

Identical facts are available in this case also. The Division Bench also followed the decision of the Andhra Pradesh High Court in *Bismillah and Co. v. State of Andhra Pradesh* (1989) 73 S.T.C. 135. The Assessee Bismillah and Company purchased raw hides and skins and sold them to Bharat Skins Corporation, Madras. Bharat Skins Corporation exported them to foreign country. Andhra Pradesh High Court held that since Petitioner is the last purchaser in the State is liable to pay tax and benefit of Sub-section (3) of Section 5 of C.S.T. Act cannot be extended to the purchase of the said goods by the Petitioner since the purchase by the Petitioner is not a purchase preceding the export purchase.

14. In *K.V. Moosakoya and Co. v. State of Kerala* (1998) 6 K.T.R. 61 (Ker.) Anr. Division Bench of this Court followed the decision in *Kepee Sons v. State of Kerala* 1991 (1) KLT 270 referred to earlier. There also, revision Petitioner sold dried ginger and pepper taxable at the last purchase point to the Bombay buyer who, in turn, exported the goods outside the territory of India. The claim of exemption by the revision Petitioner under the cover of Section 5(3) of the C.S.T. Act was ruled out. It was held that the sale occasioned the export is the sale by the Bombay dealer to the foreign buyer. Therefore, the purchase which preceded the export is the purchase made by the Bombay exporter. Hence the purchase made by the Assessee was not the immediate preceding purchase which occasioned the export eligible for exemption under Sub-section (3) of Section 5 of the C.S.T. Act. This decision was also rendered on almost identical facts in this case. SLP filed before the Supreme Court against the above judgment was dismissed in SLP (Civil) No. 3656 of 1997.

15. The learned Senior Advocate Shri Rajaram Agarwal appearing for the Petitioners finally submitted that the Petitioners were only commission agents or buying agents and they were only acting under the instructions of the exporters situated outside the Kerala State and, therefore, purchases effected in the sales is penultimate sales entitling exemption under Section 5(3) of the Central Sales Tax Act. Petitioners relied on the decision of the Kerala High Court in *Liptons Ltd. v. Municipal Sales Tax Officer, Ernakulam* and Anr. (1959) 10 S.T.C. 459. On the facts of that case, Kerala High Court found that under the agreement the Assessee was only a buying agent of the foreign companies and there could not be a sale by an agent to the principal. On the facts of the case, the Court held that no sale took place in the State and the Assesseees were only buying agents for the principals.

16. In *M/s Pannalal Babu Lal v. Commissioner of Sales Tax* the Allahabad High

Court held that a commission agent, when he agrees to work for his principal as the latter's agent and to obtain for him to goods which the latter wants, undertakes a duty which he has to discharge by purchasing the goods required and supplying them to his principal and such a transaction cannot be assessed to the sale. In *Mysore Chemical Supplies v. State of Tamilnadu* (1992) 84 S.T.C. 544 it was held that whether the true relationship between parties is a contract of sale or contract of agency has to be gathered from the nature of the contract. It is also held that its terms and conditions and the terminology used by the parties are not decisive of the legal relationship. Whether the transactions in a particular case are sales or contracts of agency is a mixed question of fact and law must be investigated with reference to the material which the Assessee might be able to place before the appropriate authority. If an agent, after taking delivery of the property sells the same as his own property at his choice and for a price different from that which he ultimately passes on to his principal, it implies only an outright purchase of the goods of the principal to himself and subsequent sale by him to the ultimate purchaser.

17. The Petitioners also relied on the decision of the Supreme Court in *Commissioner of Sales Tax v. Bakhtawar Lal Kailash Chand Arhti and Ors.* (1992) 87 S.T.C. 196. In that case, the Assessee purchased goods from cartmen and agriculturists as commission agents on behalf of ex-U.P. principals and the goods purchased were duly despatched to such principals to places outside the U.P. State. Despatches also took place immediately from the date of purchase as soon as railway wagons were available. It was held that movement of the goods from U.P. to Anr. State was found to have been agreed upon between the parties and that the purchase of the goods and their despatch were parts of the same transaction and the movement of the goods from one State to Anr. was occasioned by and was the result or the incident of the purchases. Therefore, the purchases were in the course of interstate trade and the Respondents were not liable to purchase tax under the Section 3-D of the U.P. Sales Tax Act, 1948. The Court also held that if the commission agents had purchased the goods on behalf of the ex-U.P. principals in the first instance and thereafter in pursuance of subsequent instructions despatched the goods, the instructions to despatch the goods would be independent of the instructions to purchase. There would be a break between the purchase and the despatch of the goods and the purchase would not be an interstate purchase. This will invariably depend upon finding of fact in each case.

18. Whether the Petitioner acted only as a commission agent or not and whether Petitioner purchased the goods after getting export orders from the exporters for the exact quantity, nature of transaction etc. are questions of fact to be decided from the entire facts of the case and materials available in the case. Here, there was not even a pleading to that effect before the assessing authority, appellate authority or the Tribunal. Even in this revision petition, there is no pleading that the Petitioners were only commission agents and Bombay exporters were the principals and they were buying the goods on behalf of the Bombay exporters

merely on commission basis and their purchases from Kerala were not independent transactions and they were not having the rights over the property and there was no sale by the Kerala persons to them or there was no sale from them to their exporters.

19. It is submitted by the learned senior counsel that where the court is inherently lacking in jurisdiction, the plea as to jurisdiction can be raised at any stage as held by the Supreme Court in *Chandrika Misir and Another Vs. Bhaiya Lal*, . Even such plea can be taken at the execution stage as held by the Supreme Court in *Sunder Dass Vs. Ram Prakash*, It was further argued that question of law can be raised at any stage of the proceedings. We agree with the contention of the learned Senior Counsel that if it is a pure question of law that can be considered by the court even in revision application. It is also true that by a provision of law there is inherent lack of jurisdiction, the Court can consider the same at any stage. But, in this case, fresh plea now raised is that the Petitioner is a commission agent of the Bombay exporter and, therefore, Petitioner's purchase of pepper and ginger should be considered as the penultimate purchase. So, the questions whether the Petitioner is only a commission agent and whether the exporters situated outside are principals of the Petitioners. Such questions of fact have to be specifically pleaded before the assessing authority and the assessing authority has to enter findings on the same from the evidence produced before it. But, there was no such plea of agency raised before the assessing authority, first appellate authority or before the second authority, the Tribunal. Even in the tax revision case filed before this Court there was no such plea. This is raised for the first time during the hearing of the petition. The case of the Assessee throughout was that the Assessee purchased the goods and thereafter it was sold to the Bombay exporter and Bombay exporter sold the goods to the foreign buyer, even though Bill of Lading etc. were produced to show that goods were exported.

20. Supreme Court in *Commissioner of Sales Tax v. Bishamber Singh Lavag Ram* (1981) 47 S.T.C. 80 while considering the question whether the Respondent in the case is a dealer or only a commission agent observed as follows:

The crucial test is whether the agent has any personal interest of his own when he enters into the transaction or whether that interest is limited to his commission agency charges and certain out of pocket expenses, and in the event of any loss his right to be indemnified by the principal. This principle was applied in the case of *Pakki Arhat* by Sir Lawrence Jenkins, C.J., in *Bhagwandas Narotamdas v. Kanji Deoji* ILR (1906) 30 Bom. 205 and approved of by the Judicial Committee in *Bhagwandas Parasaram v. Burjorji Ruttonji Bomanji* (1919 18) L.R. 45 IndAp 29 and by this Court in *Shivnarayan Kabra Vs. The State of Madras*,

The Supreme Court also quoted with approval observations of Vivian Bose, J. in *Kalyanji Kuwarji v. Tirharam Sheolal* AIR 1938 Nag. 254 as:

The test to my mind is this: does the commission agent when he sells have authority to sell in his own name? Has he authority in his own right to pass a valid title? If he has then he is acting as a principal vis-a-vis the purchasers and not merely as an agent and therefore from that point on he is a debtor of his erstwhile principal and not merely an agent. Whether this is so or not must of course depend upon the facts in each particular case.

Whether an Assessee is only a commission agent or not or whether he is independently dealing, whether he makes privity of contract with his sellers and his purchaser making the principal liable to the third party, whether exporter placed order after getting the orders for export, whether the exact quantity is ordered to be purchased to show co-relation, whether he purchased the goods as if it is for his own, whether he has power to sell the goods to Ors. if he gets a better order, all will depend upon the facts of the case and it is not a pure question of law or inherent lack of jurisdiction to be raised at the time of hearing of the revision petition. Whether the Petitioners are commission agents or not is not a question arising out of the order of the Tribunal. Such a question was not raised or pleaded before any of the authorities below including the Tribunal or even in the revision application. There is also no prima facie factual basis for such a plea. Therefore, we are not inclined to accept this contention.

21. A party can approach this Court u/s 41 of K.G.S.T. Act in revision only if "Appellate Tribunal has either decided erroneously or failed to decide any question of law". On the basis of the pleadings and facts found concurrently by the authorities, we are unable to say that the Appellate Tribunal has decided erroneously or failed to decide any question of law. There is no ground to differ from the earlier Division Bench decisions of this Court decided on almost identical set of facts in *Kepee Sons v. State of Kerala* 1991 (1) KLT 270 and *K.V. Moosakoya and Co. v. State of Kerala* (1998) 6 K.T.R. 61 (Ker.). Tribunal has correctly held that the Petitioners are not entitled to the benefit of Section 5(5) of the Central Sales Tax Act. Facts of all these tax revision cases are similar.

For the reasons stated above, we see no merit in the tax revision cases. Hence all these tax revision cases are dismissed.