

(2009) 02 KL CK 0023

In the High Court Of Kerala

Case No : Writ Appeal No's. 941, 942, 978, 979, 980, 993, 998, 1004, 1008, 1039, 1049, 1066, 1080, 1083, 1108, 1131, 1132, 1315, 1583, 1666, 1667, 1704, 1716, 1814, 1874, 1923, 2222, 2651 of 2007 and 113 of 2008 and W.P. (C) . No's. 23593 and 25376 of 2007

S.P.L. Limited

APPELLANT

Vs

Commercial Tax Inspector, Kasaragod and Others

RESPONDENT

Date of Decision : 26-02-2009

Acts Referred:

Constitution of India, 1950 — Article 19(1)
Kerala Value Added Tax Act, 2003 — Section 47(16A)
Kerala Value Added Tax Rules, 2005 — Rule 22

Citation : (2009) 25 VST 220

Hon'ble Judges : K. Surendra Mohan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : K.B. Muhamed Ruttu and K.M. Firoz, for the Appellant; Vinod Chandran, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The appellants are traders in Kerala engaged in sale of marble, granite, ceramic tiles, glass sheets, etc. These items are mainly brought from other States or are imported from abroad. In exercise of powers conferred u/s 47(16A) of the Kerala Value Added Tax Act, 2003 (hereinafter called, "the Act"), the Commissioner issued circular No. 50 of 2006 declaring 12 items as tax-evasion prone goods and authorising recovery of sales tax in advance on the said commodities on arrival of the same in the State. In other words, the notification authorises recovery of tax at the Boarder Check-post or at the port area through which goods are brought to the business places of the dealers for sale. By a later circular No. 53 of 2006, the Commissioner of Commercial Taxes directed collection of advance tax on purchase value of the notified goods increased by freight and five per cent towards gross profit. Appellants challenged constitutional validity of Section 47(16A) and the two

circulars issued by the Commissioner on the ground that the same are unconstitutional, illegal and arbitrary. However, the learned single judge upheld the constitutional validity of the statutory provision and the validity of the circulars issued thereunder, against which these appeals are filed. We have heard Senior Counsel Dr. K.B. Mohammed Kutty and other counsel appearing for the appellants and the Special Government Pleader appearing for the respondents.

2. During hearing of appeals, counsel for both sides informed the court that by virtue of subsequent amendment to the circulars, the Commissioner has excluded lifts, elevators and escalators and petroleum products other than LPG from payment of advance tax. Similarly, circular No. 53 of 2006 was also amended excluding five per cent addition towards gross profit for the determination of value for payment of advance tax. Subsequent to the amendment, there are ten items on which advance tax is payable. The said items and rate of tax provided for payment of advance tax are given hereunder:

Sl. No. Commodities Rate of tax

1 Marble slabs and tiles 20% 2 Granite slabs and tiles 20% 3 Ceramic floor and wall tiles including vitrified tiles 20% 4 Glass sheets 12.5% 5 Cuddapah stones, kotta stones, any other similar stones and slabs 12.5% 6 Readymix concrete 12.5% 7 Generator whether assembled or not 12.5% 8 Timber 12.5% 9 Live chicken and chicken meat 12.5% 10 Bitumen 4% 3. The first contention raised by the counsel for the appellants is that Section 47(16A) under which circular Nos. 50 and 53 of 2006 are issued, does not authorise collection of advance tax before sale, but only authorises collection of tax payable under the Act on any commodity prior to the due date on which it is payable. According to counsel for the appellants, Rule 22 of the Kerala Value Added Tax Rules, 2005, provides for payment of tax for the sales made every month on or before the 10th of the succeeding month. The contention of the appellants, therefore, is that what is authorised under the section is recovery of tax for the notified commodities on any date prior to 10th of the month in which tax is payable under Rule 22 of the KVAT Rules. The relevant section is extracted hereunder for easy reference:

47. Procedure for inspection of goods in transit:-(1) ...

(16A) Notwithstanding anything contained in this Act or the Rules made thereunder, the Commissioner may, where he deems it necessary to prevent any evasion of tax, direct that the tax in respect of the sale of any evasion-prone commodities, as may be specified by him, shall be paid before the date prescribed for its payment under this Act.

4. The contention of the appellants that the section does not authorise recovery of tax in advance is overruled by the learned single judge holding that such an interpretation will lead to absurdity and would defeat the purpose of the Act. We are in complete agreement with this finding of the learned single judge because collection of tax after sale of goods on any anterior date could be achieved by the State through amendment to Rule 22 of the KVAT Rules which provides for filing

of monthly return and payment of tax along with the same on the 10th of the succeeding month. What the Legislature intends is to identify evasion-prone goods and to recover the tax for the same in advance. In fact, it is pertinent to note that Sub-Clause (16A) is provided to Section 47 which provides for inspection of goods in transit. Most of the commodities covered by notification have their source outside Kerala and they reach the State through border check-posts and through ports in Kerala. Unless tax is collected on arrival, the traders may evade tax for the goods and that is why the goods are declared "tax-evasion prone". If the appellants' contention that collection of tax on evasion-prone goods contemplated u/s 47(16A) is only recovery of tax after sale of goods, then the same does not amount to collection of tax in advance at all because tax collected on sale ceases to be advance tax. We are of the view that what is contemplated in the section is collection of tax for the commodities covered by the notification which are declared evasion-prone, at the earliest opportunity possible, which is on arrival of goods in the State itself, thereby making evasion of tax for the goods impossible. Therefore, we reject the contention of the appellants that Section 47(16A) does not authorise collection of tax before sale. Consequently we hold that the impugned circulars authorising collection of tax in advance prior to sale of the commodities referred to therein are in accordance with the statutory provisions.

5. The next contention raised by the appellants is that if Section 47(16A) authorises declaration of evasion-prone goods and collection of tax in advance, i.e., prior to sale of goods, then such provision is unconstitutional. The Special Government Pleader appearing for the respondents contended that tax paid in advance is allowed to be taken credit by the dealer along with the next monthly return and so much so that, according to him, tax though recovered in advance from the dealer, is not treated as tax payable for the commodity brought from outside the State. We completely agree with this contention because the recovery of tax in advance acts as a security towards payment of tax for the commodity later. In fact, in effect the collection of tax on arrival of goods ensures accounting of goods by the dealer. The dealer paying tax in advance for the commodity takes it into stock and sells it later. Even if he does not sell the goods in the month of arrival, he can take credit for the advance tax paid against tax payable for other goods sold in the month. In other words, the advance tax recovery is only in the form of a security as the dealer is adjusting it towards his other tax liability for the month. Therefore, the grievance highlighted by the appellants that tax is recovered in advance prior to the sale of goods is factually incorrect because dealers are allowed to take credit of advance tax paid along with monthly return filed in the succeeding month, irrespective of whether goods for which advance tax paid are sold or not. In other words, tax collected for the sales of the month is allowed to be retained by the dealer to the extent of advance tax paid by him, which he adjusts while making payment along with the monthly return. Recovery of tax in advance is not a new concept and it was there under the Sales Tax Act which was in force for sale of all commodities until the

VAT regime came in its place. Further, the Income Tax Act provides for recovery of tax in advance including deduction at source. VAT has its source under entry 54 of List II to the Seventh Schedule to the Constitution of India which authorises the State to levy tax on sale or purchase of goods other than newspaper subject to the provisions of entry 92A of List I. It is the settled position that State's authority to levy tax includes all incidental powers to achieve the object. Admittedly, the appellants are engaged in trading and the goods in respect of which advance tax is collected are goods brought for sale on which tax will be eventually payable by them. We have already noticed that the collection of tax on arrival of goods in the State serves only as a security and for accounting purposes and the State does not in fact collect the tax for the commodity before its sale. The Special Government Pleader submitted that the goods covered by notification are generally sold in bulk and there are several instances where goods are seen brought to the State in bogus names and some unscrupulous dealers bring goods with the name and registration numbers of other dealers. According to him, if tax is not collected in advance on arrival of goods, the importer may later disown the goods leading to evasion of tax. We have ourselves seen in large number of penalty cases reaching this Court that apparent dealers in whose names goods reach the State, have denied their involvement with the goods. In other words, goods reaching the State in bogus names is the common feature and unless State takes effective steps, evasion of tax will be the consequence. Collection of tax in advance at the check-post is one way of preventing transport in bogus names. When the amounts recovered as advance tax are allowed to be adjusted against monthly tax liability of the dealer in the monthly return filed in the next month, we do not think the appellants can have any grievance in the matter. We are not impressed with the argument of the appellants that their rights under Article 19(1)(g) are violated inasmuch as before the incidence of tax falls, they are made to pay the tax because for sale of commodity from the beginning to the end of a month, the dealers are allowed to keep the tax until the 10th of the succeeding month when they are required to remit the monthly tax. Since the statute authorises dealers to retain collected tax for up to 40 days, we see no reason why dealers cannot be called upon to pay tax in advance for the commodity brought for sale in the State. It is common knowledge that goods are replenished by traders depending on sales and therefore, they will have no difficulty to adjust the advance tax paid along with monthly tax payable on the 10th of the succeeding month. We, therefore, feel all the hardships expressed by the appellants are imaginary. Further, the system of payment of advance tax is working very smoothly for the last three years which only shows that the traders have accepted the same. We are in agreement with the finding of the learned single judge on all other contentions raised by the appellants. We, therefore, dismiss all the writ appeals and the writ petitions.