

(2002) 12 KL CK 0063
In the High Court Of Kerala
Case No : T.R.C. No. 184 of 1999

State of Kerala

APPELLANT

Vs

Gopalakrishnan

RESPONDENT

Date of Decision : 20-12-2002

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 5, 5(1), 7, 7(1)

Citation : (2003) 1 ILR (Ker) 513 : (2003) 2 KLT 276 : (2004) 138 STC 536

Hon'ble Judges : G. Sivarajan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : V.V. Asokan, Government Pleader, for the Appellant;

Final Decision : Dismissed

Judgement

G. Sivarajan, J.—The matter arises under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as the Act). The assessment year concerned is 1996-97. The question that arises for consideration is as to whether the surcharge paid under the Kerala Surcharge on Taxes Act can be reckoned for the purpose of computation of tax at the compounded rate u/s 7 of the Act.

2. The State is the revision petitioner. The respondent is a jeweller and an assessee to sales tax under the Act. He opted for the benefit of paying tax at the compounded rate u/s 7(1) of the Act. The final assessment of the respondent-assessee for the assessment year 1996-97 was completed as under:

Rs.

Sales tax for the previous year 33,950

Surcharge due for the year 1,698

Total 35,648

Sales tax due for 1996-97 at 150 per cent of 1995-96 53,472

Surcharge due at 10 per cent 5,348

According to the respondent, for the year 1996-97 the surcharge paid on the amount of sales tax in the previous year cannot be reckoned in the computation of tax u/s 7 of the Act. The respondent, therefore, took the matter in appeal before the Appellate Assistant Commissioner of Commercial Taxes, Idukki. The appeal was allowed by accepting the contention of the assessee and directed exclusion of the surcharge paid in the previous year from the computation of tax u/s 7 of the Act. On appeal by the State, the Sales Tax Appellate Tribunal confirmed the order of the Appellate Assistant Commissioner.

3. The learned Special Government Pleader appearing for the petitioner contends that the surcharge paid by the assessee in the assessment for the previous year will have to be reckoned while determining the compounded rate of tax and the two appellate authorities had misread the provisions of Section 7(1)(a) of the Act in directing exclusion of the surcharge from the computation. The Government Pleader in support of this contention has relied on the decisions of the Supreme Court reported in *Cardamom Planters' Association v. Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam* (1989) 75 STC 1185. *Ramanatha Shenoy and Co. v. Sales Tax Officer, Tellicherry and Anr.* (1963) 14 STC 231 and *Ernakulam Radio Company v. State of Kerala* 1966) 18 STC 445. Though notice was served on the respondent-assessee, nobody appears for the assessee.

4. In order to appreciate the contention of the revenue, it is necessary to refer to the provisions of Section 7 of the Act as it is stood at the relevant time. Section 7(i)(a) with the first two provisos of the Act reads as follows:

"7. Payment of tax at compounded rates.- (1) Notwithstanding anything contained in Sub-section (1) of Section 5,

(a) any dealer in gold or silver ornaments, may, at his option, instead of paying tax in accordance with the provisions of that sub-section, pay tax at one hundred and fifty per cent of the maximum amount of tax payable by him for a period of twelve months in a financial year, as conceded in the return or accounts, in any of the three financial years immediately preceding the assessment year:

Provided that where during any such preceding year, the dealer has not transacted business for any period in a financial year, the tax payable for the twelve months shall be calculated proportionately on the basis of the tax payable for the period during which such dealer had transacted business:

Provided further that where a dealer has paid tax under this clause for the preceding year, the compounded rate of tax to be paid by him, for the succeeding year shall be at one hundred and fifty per cent of such tax paid or the tax calculated under this clause, whichever is higher; and;"

Section 7(1)(a) provides that any dealer in gold or silver ornaments may at his option instead of paying tax in accordance with the provisions of Sub-section (1) of Section 5 of the Act pay tax at 150 per cent of the maximum amount of tax

payable by him for a period of 12 months in a financial year, as conceded in the return or accounts, in any of the three financial years immediately preceding the assessment year. Under the second proviso, where a dealer has paid tax under this clause for the preceding year, the compounded rate of tax to be paid by him, for the succeeding year shall be at 150 per cent of such tax paid or the tax calculated under this clause, whichever is higher. Thus, it is clear from the provisions of Section 7(1)(a) that the tax to be paid by an assessee who opts for the compounding facility is in lieu of the tax which is payable under Sub-section (1) of Section 5 of the Act. No doubt, the tax payable u/s 5(1) of the Act is the tax due on his taxable turnover for that year in the case of goods specified in the first or second schedule at the rate and at the points specified against such goods in the said schedules. Surcharge is a tax payable not under the provisions of the Act but is a tax payable under the provisions of the Kerala Surcharge on Taxes Act, 1957. Of course the tax payable u/s 7(1)(a) of the Act is 150 per cent of the maximum amount of tax payable by him for a period of 12 months as conceded in the return in any of the three financial years immediately preceding the assessment year. The tax payable in this context can be understood only as the tax payable under the provisions of Section 5(1) or at any rate under the provisions of the Act.

5. In this context, it is relevant to note the provisions of the Kerala Surcharge on Taxes Act, 1957. Section 3 of the said Act reads as follows:

"3. Levy of surcharge on sale's and purchase taxes.-(1) The tax payable under the Kerala General Sales Tax Act, 1963, shall, in the case of a dealer whose turnover-

(a) is not less than one lakh rupees but does not exceed ten lakhs rupees in a year, be increased by a surcharge at the rate of five per centum, and

(b) exceeds ten lakhs rupees in a year, be increased by a surcharge at the rate of ten per centum, of the tax payable for that year, and the provisions of the Kerala General Sales Tax Act, 1963, shall apply in relation to the said surcharge as they apply in relation to the tax payable under the said Act:

Provided that where in respect of declared goods as defined in Clause (c) of Section 2 of the Central Sales Tax Act, 1956, the tax payable by such dealer under the Kerala General Sales Tax Act, 1963 together with the surcharge payable under this sub-Section exceeds four per centum of the sale or purchase price, the rate of surcharge in respect of such goods shall be reduced to such an extent that the tax and the surcharge together shall not exceed four per centum of the sale or purchase price.

(2) Notwithstanding anything contained in Sub-section (i) of Section 22 of the Kerala General Sales Tax Act, 1963 no dealer referred to in Sub-section (1) shall be entitled to collect the surcharge payable under the said sub-section.

(3) Any dealer who collects the surcharge payable under Sub-section (1) in

contravention of the provisions of Sub-section (2) shall be punishable with fine which may extend to one thousand rupees and no court below the rank of a Magistrate of the first class shall try any such offence."

As per this section in the case of a dealer who is liable to pay tax under the Kerala General Sales Tax Act and whose turnover is not less than Rs. 1 lakh, but does not exceed Rs. 10 lakhs in a year the tax payable under the said Act shall be increased by a surcharge at the rate of 5 per cent and where the turnover exceeds Rs. 10 lakhs in a year the tax shall be increased by a surcharge at the rate of 10 per cent of the tax payable for that year and the provisions of the Act shall apply in relation to the said surcharge as they apply in relation to the tax payable under the Act. This would show that the levy of surcharge is an independent levy and the measure of such levy is geared to a percentage of the tax payable under the Act. Thus, it is clear that the tax payable under the provisions of Section 7(1)(a) of the Act cannot take in any surcharge payable u/s 3 of the Kerala Surcharge on Taxes Act in the absence of a specific mention in the said section including the surcharge paid under the Kerala Surcharge on Taxes Act.

6. In the circumstances we are of the view that surcharge paid in the previous year under the Kerala Surcharge on Taxes Act cannot be reckoned or included in computing the tax payable u/s 7(1)(a) of the Act.

7. In fact, the very same question arose for consideration before a Single Bench of this Court in O.P. No. 11716 of 2002 and one of us (Justice C.N. Ramachandran Nair) in the Judgment, dated 4th July 2002 held that surcharge paid during the previous year cannot be reckoned for the purpose of computation of compounded tax u/s 7(1) of the Act. The assessment year concerned in that case was 2000-01 where the assessee had excluded the surcharge paid in the previous year in the computation of compounded rate of tax payable u/s 7(1) of the Act. The assessing authority, however, included the surcharge amount also for the purpose of reckoning the compounded rate of tax. The assessee challenged the same in the Writ Petition mentioned above. The contention was that what is paid towards tax at compounded rate is the tax payable u/s 5 of the Act and since surcharge is a separate levy under a separate statute the same should not be reckoned for the purpose of demanding tax at the compounded rate for the relevant year, i.e., 2000-01. The learned Single Judge with reference to the relevant provisions of Section 7(1)(a) considered the matter as follows:

"Section 7(1)(a) provides that a dealer in gold or silver ornaments may, at his option, instead of paying tax in accordance with the provisions of Section 5(1), pay tax at 120 per cent (later increased to 150 per cent) of the tax payable by him as conceded in the return or accounts for the immediate preceding year. The explanation to the above section defines "tax payable as conceded in the return or account for the immediate preceding year" as tax payable on the sales turnover under Sub-section (1) of Section 5 and the tax payable on the purchase turnover u/s 5A of the Act. It is clear from the above provisions that what the

petitioner is to pay u/s 7(1)(a) is the liability which would have been payable by the petitioner u/s 5(1) of the K.G.S .T. Act read with petitioner's liability u/s 5A of the Act. While Section 5(1) provides for payment of tax on the sale of goods at the point of sale and at the rate provided in the Schedule to the Act, Section 5 A of the Act provides for a scheme of purchase tax to be levied in respect of purchase of articles where sales tax is not payable by the sellers at sale point. In the scheme of payment of tax at compounded rate, a progressive increase on a percentage basis of the previous year's tax is provided. During the year 2000-01, the petitioner was called upon to pay 120 per cent of the tax payable for the immediately preceding year. The details of the tax payable for the immediately preceding year given in the assessment order are extracted above. The explanation to Section 7(1)(a) makes it clear that the tax paid for the previous year based on which compounding fee is payable for the subsequent year is the sales tax u/s 5(1) and the purchase tax under S .5 A. Surcharge though in substance is sales tax, is not a tax payable under the K.G.S.T. Act. Section 2(xxiv) of the K.G.S.T. Act defining "tax" also does not include surcharge which was being levied by a separate statute; until its repeal. So long as tax based on which compounding fee is payable u/s 7(1) is the sales tax due u/s 5(1) or purchase tax due u/s 5A, it does not include surcharge which is a levy under separate statute. It is not as if Surcharge Act is not applicable to dealers paying tax at compounded rate u/s 7. Surcharge under that Act was a levy on the sales tax payable under the K.G.S.T. Act and dealers paying tax at compounded rate also would have been liable to pay surcharge on the compounding fee but for its repeal. However, surcharge cannot be reckoned for the purpose of computation of tax at compounded rate u/s 7(1) of the K.G.S.T. Act."

Of course, during the assessment year 2000-2001 Section 7(1)(a) of the Act had an explanation thus:

"Explanation.- For the purpose of this clause "tax payable as conceded in the return or account for the immediate preceding year" means tax payable on the sales turnover under Sub-section (1) of Section 5 and the tax payable on the purchase turnover u/s 5A."

It is with reference to Section 7(I)(a) with this explanation the aforesaid view was taken by the Single Bench. True, such an explanation was not there in Section 7(1)(a) during the assessment year 1996-1997. Even de hors the explanation "tax payable as conceded in the return or account for the immediate preceding year" can only mean the tax payable under the Act. The definition of "tax" in Section 2(xxiv) of the Act means "the tax payable under this Act". Even otherwise an explanation at times is appended to a section to explain the meaning of words contained in the section. The explanation to Section 7(1)(a) as it stood during the assessment year 2000-2001 has to be read in harmony with and to clear up any possible ambiguity in the main section and if so read it is clear that what is implicit in the main part of Section 7(1)(a) is made explicit by

the explanation. Thus the Judgment in O.P. No. 11716 of 2002 also accords with the view which we have already taken.

8. Notwithstanding the above legal position, the Government Pleader has relied on the Judgment of the Supreme Court in *Cardamom Planters' Association v. Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam* (1989) 75 STC 118. In that case the appellant, a society registered under the Societies Registration Act, 1860, sold the produce of its members who were cardamom growers, under a statutory licence under which it could not charge more than one per cent of the sale price as commission. Though the appellant had not made any claim for purposes of the primary sales tax liability, that the turnover of the goods dealt with by it on behalf of the principals should be dissected and tax imposed on the basis of the liability of the principal, for the purpose of the surcharge under the Kerala Surcharge on Taxes Act, 1957, as amended in 1976, it made such a claim. The Tribunal allowed the claim but the High Court, on revision, restored the orders of the Deputy Commissioner who had held that the appellant was liable to pay surcharge on its aggregate turnover. Affirming the decision of the High Court, Supreme Court held that the appellant was clearly a dealer within the meaning of Section 3 of the statute, particularly in view of Clause (c) of Section 2(viii) and the appellant's taxable turnover had to be determined by taking the aggregate price of all the goods sold by it. The fact that it was prohibited from reimbursing itself either from the vendors or from the principals or that it had to pay the surcharge from the meagre earnings permitted by statute, it was held, did not justify a different interpretation. The Supreme Court also held that provisions of the Act and the Kerala Surcharge on Taxes Act, 1957 clearly treat a commission agent as a dealer and make him liable to sales tax as well as surcharge in respect of his entire turnover. In that context the Supreme Court in the said Judgment has observed thus:

"We may note here two important features of the latter Act. The first is that, unlike sales tax which the dealer is entitled to get reimbursed from the purchaser of the goods sold by him, the surcharge has to be borne by the dealer himself, for Sub-section (2) of Section 3 of the Surcharge Act prohibits the dealer from collecting the surcharge payable by him under Sub-section (1) on pain of prosecution under Sub-section (3). The second is that while a dealer might be liable to sales tax at different rates on the turnover of the different goods dealt in by him, he has to pay a surcharge calculated on the amount of the sales tax payable by him in respect of his total dealings throughout the year."

It is not clear as to how this decision would be of any assistance in deciding the scope of Section 7(1)(a) of the Act. The decision in *Ernakulam Radio Company v. State of Kerala* (1966) 18 STC 445 also is not of any assistance to the revision petitioner. The said decision was concerned with the legislative competence of the State in enacting the Kerala Surcharge on Taxes Act, 1957. While upholding the validity of the said Act this Court observed that "a tax can be a tax on the sale of goods though the primary liability for the same is placed upon the dealer

without giving him an opportunity to recoup the same from the consumer and that sales tax charged by a dealer is really a part of the price of the articles sold by him". It was also observed that "the object of the Act, as is clear from the preamble, is only to increase the tax on the sale or purchase of goods and the fact that its quantum is determined with reference to the sales tax imposed would not alter its character". It was also observed that "it is a tax on the aggregate of sales effected by the dealer during the year in question and that the surcharge therefore is really an enhancement of the sales tax when the turnover of the dealer exceeds Rs. 30,000 a year, and is a tax on the aggregate of sales effected by the dealer during the year".

9. We are unable to understand as to how this decision also will help the revenue. Yet another decision relied on by the revenue is *S. Rarnanatha Shenoy and Co. v. Sales Tax Officer, Tellicherry and Anr.* (1963) 14 STC 231. In that case also provisions of Section 3(2) of the Kerala Surcharge on Taxes Act, 1957 was challenged and this Court upheld the said provision. The said decision also has no relevance in so far as the question involved in this case.

We are of the view that the Appellate Assistant Commissioner and the Tribunal have rightly held that the surcharge paid by the assessee on the sales tax determined under the provisions of Section 5(1) of the Act in the previous year cannot be reckoned for the purpose of determining the tax at the compounded rate payable under the provisions of Section 7(1)(a) of the Act and in directing exclusion of the surcharge paid. We do not find any merit in this Tax Revision Case. It is accordingly dismissed.