(2009) 02 KL CK 0072

In the High Court Of Kerala

Case No : S.T. Rev. No''s. 163 and 164 of 2006

State of Kerala APPELLANT

Vs

Kunhikannan Jewellery RESPONDENT

Date of Decision : 12-02-2009

Acts Referred:

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

Citation : (2010) 28 VST 179

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

Bench : Division Bench

Advocate : Vinod Chandran, Government Pleader, for the Appellant; T.M. Sreedharan, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—Connected revision cases are filed by the State against the order of the Sales Tax Appellate Tribunal holding that respondent has no liability to pay purchase tax u/s 5A on the turnover of bullion purchased from non-resident Indians. We have heard Government Pleader appearing for the petitioner and counsel appearing for the respondent.

2. Non-residents are granted exemption on sales turnover of bullion under entry 10 of Schedule II of S.R.O. No. 1727 of 1993. However, in order to prove exemption the purchaser has to issue declaration in annexure I of the said notification. The respondent admittedly has not issued any declaration in annexure I in terms of the notification. However since the respondent did not produce any sale bills issued by non-resident Indians, the assessing officer levied tax u/s 5A treating the purchases as made in circumstances in which no tax is payable by the sellers. The Tribunal however held that since the respondent has not issued any declaration, liability u/s 5A cannot be fastened on the purchaser merely because the sellers are not assessed to tax. The Government Pleader submitted that since bullion purchased by the respondent was consumed in the manufacture of ornaments, which were sold by the respondent, the purchases will attract tax u/s 5A because the purchases were in circumstances in which no

tax is payable by the seller. However, the respondent''s counsel contended that bullion is an item taxable at sale point and the turnover is assessable at the sale point at the hands of the sellers. According to counsel for the respondent, the respondent has furnished the names and addresses of the sellers from whom bullion was purchased.

3. After hearing both sides and after going through the order of the Tribunal, we do not think the view taken by the Tribunal can be sustained. Purchase tax is payable u/s 5A if the commodity purchased is taxable and the purchase is in circumstance in which no tax is payable by the seller at the point of sale of goods in the State. This position is made clear by the decision of the Supreme Court in State of Tamil Nadu v. M.K. Kandaswami [1975] 36 STC 191, and that of this Court in Deputy Commissioner (Law) Vs. Alappat Exports (P) Ltd., .

4. The contention of the Government Pleader that since the sellers are entitled to exemption by virtue of the notification above referred to, liability u/s 5A is automatic on the purchaser because the purchaser is engaged in manufacture of gold ornaments from bullion, is not acceptable as such. Similarly, the contention of the respondent that since declaration in annexure I is not issued by them to the sellers, they cannot be assessed u/s 5A is equally unacceptable. If any non-resident Indian who has sold bullion to the respondent is engaged in the business of importing and selling of bullion and if the turnover of such non-resident Indian exceeds the taxable limit, then sales tax should be assessed and recovered from such non-resident Indian as bullion is an item taxable at the sale point u/s 5(1) read with relevant entry of the First Schedule to the Kerala General Sales Tax Act, 1963. If a non-resident liable to pay tax on sales of bullion wants to claim exemption under the notification above referred to then he ought to have obtained declaration from the respondent in annexure I and claimed exemption. However, if the non-resident who made sales to the respondent escaped liability on account of lapses on the part of the Department, the same will not justify assessment of turnover u/s 5A on the respondent. It is for the respondent to produce sale bills or purchase vouchers to prove that non-resident seller was engaged in the "business" of importing and selling of bullion and his turnover was above the limit that attracts liability u/s 5(1) for the purpose of escaping liability u/s 5A of the Act. In the normal course a non-resident Indian occasionally visits his home and he cannot be expected to be doing business in the import and sale of bullion. However, if any such non-resident Indian who sold bullion to the respondent was engaged in the business attracting liability then the turnover representing purchases from such non-resident cannot be assessed at the hands of the purchaser. The respondent has no case that the sellers have charged sales tax from them which obviously means that sellers claim exemption on such sales. Since the item purchased is admittedly consumed in the manufacture of gold ornaments, the respondent will be liable to pay tax u/s 5A if the purchase is in circumstances in which no tax is payable by the seller which is either by virtue of exemption available under notification S.R.O. No. 1727 of 1993 or on account of the fact that the seller is not a dealer engaged in the

business of sale of bullion. The Tribunal''s order cannot be sustained because the Tribunal declared exemption in favour of the respondent merely because they have not issued declaration in annexure I. We have already held that even if declaration prescribed under the notification is not issued, a non-resident seller cannot be assessed unless it is proved that such non-resident who made sales to the respondent is engaged in the business which is to be proved with reference to periodicity, frequency and volume of sales.

5. We therefore allow the tax revision cases by setting aside the order of the Tribunal and remand the matter to the assessing officer for giving opportunity to the respondent to produce purchase vouchers or sale bills pertaining to purchase of bullion from non-residents containing the names and addresses and proof of sellers'' identity for the assessing officer to conduct enquiry and to exclude so much of the purchases from nonresidents who were liable to pay tax u/s 5(1) of the Act. We make it clear that merely because sellers who are liable u/s 5(1) are not assessed or cannot be assessed on account of limitation is not a ground for fastening liability on the respondent u/s 5A. The respondent is given two months'' time from the date of receipt of a copy of this judgment for furnishing particulars, and records before the assessing officer. However, if no proof is produced within the period granted above, towards proof of purchase with names and addresses of the non-residents then the assessment made u/s 5A will stand confirmed.