
(2008) 08 KL CK 0017
In the High Court Of Kerala
Case No : S.T. Rev. No. 363 of 2006

State of Kerala

APPELLANT

Vs

Malabar Cements Ltd.

RESPONDENT

Date of Decision : 26-08-2008

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 22, 41, 45A, 45A(1), 46
Kerala General Sales Tax Rules, 1963 — Rule 21(13)

Citation : (2009) 21 VST 291

Hon'ble Judges : H.L. Dattu, C.J.; A.K. Basheer, J

Bench : Division Bench

Advocate : Vinod Chandran, Special Government Pleader, for the Appellant; T.M. Sreedharan and V.P. Narayanan, for the Respondent

Final Decision : Allowed

Judgement

H.L. Dattu, C.J.—The Revenue is before us in this revision petition filed u/s 41 of the Kerala General Sales Tax Act, 1963 being aggrieved by the orders passed by the Sales Tax Appellate Tribunal, Additional Bench, Palakkad in T.A. No. 10 of 2006 dated March 30, 2006. By the impugned order, the Tribunal has cancelled the orders passed by the first appellate authority in Section T.A. No. 6469 of 2005 dated November 24, 2005.

2. The respondent in this revision petition is a Government company and is engaged in the manufacture and sale of cement. The assessee-company has several cement manufacturing units including one at Cherthala. It is only in their unit cement is manufactured using "fly ash" as basic raw material. The unit had started its commercial production with effect from May 7, 2003 and marketed the cement so produced under the label "Portland Pozzoloria" cement. The unit had charged sales tax in the invoices raised and had collected the same from its consumers and remitted the tax so collected along with the monthly returns submitted till the end of July 2004.

3. The assessee-company, in so far as its Cherthala unit is concerned, had

applied for grant of exemption from payment of sales tax under the Kerala General Sales Tax Act, 1963 ("the Act", for short). The competent authority had issued the exemption certificate on August 9, 2004, granting exemption from payment of sales tax with effect from August 7, 2003. Till then and thereafter the assessee for a further period of 21 days had collected sales tax on its sales of cement from its Cherthala unit.

4. The respondent-company was filing its monthly returns and annual returns before the assessing authority and was including the turnover of its Cherthala unit in the said returns filed.

5. The assessee-company had filed its monthly returns for the month of August, 2004 on September 9, 2004, along with a covering letter dated September 10, 2004, inter alia, stating that its Cherthala unit is exempted from payment of sales tax in view of the exemption certificate issued by the competent authority. In spite of this letter, it is relevant to notice that the respondent-company, in so far as its sales made by the Cherthala unit is concerned, has continued to collect tax for the month of August, 2004.

6. The assessing authority had issued notice dated September 15, 2004 to the assessee, inter alia, directing them to deposit the tax collected on the sales turnover of cement by its Cherthala unit and it was also brought to their notice, that, failing to comply with the directions contained in the notice, the authority would proceed to pass appropriate orders u/s 46 of the Act.

7. The notice issued by the assessing authority dated September 15, 2004 is relevant for the purpose of the case and, therefore, it is extracted:

No. 3101 0400/2004-05.

Office of the Assistant Commissioner (Assessment), Commercial Taxes, Special Circle, Palakkad. Dated September 15, 2004

NOTICE

Please take notice that you have also got a registered branch grinding unit of grey cement at Cherthala and its sales turnover and collected tax been conceded along with the sales turnover of your headquarters at Walayar up to the month of July, 2004. But to my surprise the sales turnover of cement and its collected tax due from your grinding unit at Cherthala is not seen furnished along with your sales turnover of your headquarters at Walayar in the month of August, 2004. Thus you have intentionally concealed a portion of your sales turnover and its collected tax due in the return filed for the month of August, 2004. This is a clear violation punishable u/s 45A(1)(d) of the KGST Act, 1963.

In the above circumstances you are requested to file a revised return including the sales turnover of your branch unit at Cherthala and the collected tax due on the above sales turnover with proof of payment of tax, failing which you will be proceeded u/s 46 of the KGST Act to recover the collected tax kept by you with

interest and the tax already paid will be appropriated first towards interest accrued on such tax due and the balance available shall be appropriated towards principal outstanding u/s 55 C and also provisional assessment will be initiated under Rule 21(13) of the KGST Rules.

You are also given an opportunity to be heard in person or through authorised representative in the office during the office hours of the undersigned within three days of the receipt of this notice.

Sd./- ASSISTANT COMMISSIONER (ASSESSMENT)-II.

8. After receipt of the notice, a reply came to be filed by the assessee and in that, it had only stated that the assessee was exempted from payment of sales tax in view of the exemption certificate issued by the competent authority dated August 9, 2004 with effect from August 7, 2003, and it was further stated that it intends to make use of the tax collected by it for expansion of its industrial unit. The explanation offered by the assessee to the notice dated September 15, 2004 is as under:

In reply to your notice cited (4) above we may submit the following. We have furnished the turnover and tax collected for Walayar unit. As regards CGU (Cherthala Grinding Unit), we have been exempted from payment of sales tax for nine years from the date of commencement of production vide Kerala Gazette Notification S.R.O. No. 859/2004 and G.O. (P) No. 129/2004/TD dated August 9, 2004. This was informed to you vide our letter cited fourth above enclosing a copy of the gazette notification (for ready reference, the above letter with gazette notification is once again forwarded). It was in this context the particulars pertaining to CGU were not furnished and there was no intention of concealing the facts. However, we furnish below the details of turnover and tax collected at our Cherthala Grinding Unit (CGU) during the month of August 2004 for reference.

Rate Turnover KGST AST

Sales to stockist 15% 1,07,77,129.32 16,16,585.87 2,42,486.32 Sales depot 15% 8,36,723.41 1,25,508.57 18,826.34 Sales to Government 4% 7,21,808.32 28,873.00 4,331.64 Total 1,23,35,661.05 17,70,967.44 2,65,644.30 The very purpose of granting the exemption is for putting up another 600 TPD Grinding unit at Panakkad in Malappuram District and Government have granted administrative sanction for the project vide GO(MS) No. 83/2004/ID dated July 20, 2004. Also as per the notification dated August 9, 2004 cited above, the tax exemption is applicable from the date of commencement of commercial production, i.e., August 7, 2003 and as such an amount of Rs. 4,40,59,643, i.e., sales tax remittance from August 7, 2003 to July 31, 2004 is to be refunded to us. As we require funds to purchase land and for other preliminary activities of the project we have retained the collected tax for the month of August, 2004 with us. Viewing the situation in totality and considering the intention of the Government in allowing the relief to this PSU, kindly allow us to retain the

amount of tax with us and to continue the project activities and no penal action may kindly be initiated. We are moving separately for the refund of the amount already remitted for the period from August 7, 2003 to July 31, 2004.

9. Not being satisfied with the reply so filed, the assessing authority had issued yet another demand notice dated September 30, 2004 which is produced along with the revision petition papers. In the said notice, the assessing authority had directed the assessee to deposit a sum of Rs. 20,36,612 towards the tax collected by its Cherthala unit for the month of August, 2004 and also had levied a penal interest in a sum of Rs. 20,366. After the receipt of the demand notice, the assessee had filed its reply dated October 13, 2004. In the said reply, for the first time the assessee had stated that after the receipt of the exemption certificate issued by the competent authority, they have issued credit notes to its purchasers/ customers. The reply filed by the assessee dated October 13, 2004 is as under:

Kindly refer our letter No. Fin/Sales Tax/2004-05/8570 dated September 10, 2004 and No. Fin/Sales Tax/2004-05/9050 dated September 22, 2004 (copy enclosed for ready reference). The reason for retaining the above amount was explained to you in the above cited letters. Credit notes have been raised towards tax collected during the month of August 2004.

We may once again explain the background of our action. The sales tax exemption has been granted to Malabar Cements Ltd., for utilising it as a source of fund for implementing another 600 TPD cement grinding unit at Panakkad, Malappuram District. It would be seen that the Cherthala Grinding Unit (CGU) is the only industrial unit at the moment owned by public sector undertaking and MCL is the only public sector undertaking manufacturing grey cement using fly ash as a raw material. CGU has been in operation since August 7, 2003. So the intention of the Government order is explicitly clear and we are to get the exemption benefit from August 7, 2003. The modality of claiming refund of the sales tax already remitted is being finalised. It was in this context the above referred amount of tax, i.e., Rs. 20,36,612 was retained by us.

However since the intention of the Government in issuing order has already been explained to you, as already requested no penal action may kindly be initiated against MCL for the time being on this issue and also no penal interest may be recovered.

10. After all this correspondence, a revised return came to be filed by the assessee of all its cement manufacturing units including Cherthala unit on December 3, 2004. In the said return, the assessee had only shown the sales turnover of its Cherthala unit and not even whispered anything with regard to the tax collected by them for the month of August, 2004.

11. Once again, a demand notice came to be issued by the assessing authority dated January 17, 2005, directing the assessee to deposit the tax collected for the month of August, 2004 and also to pay penal interest for the belated

payment of the tax collected. After receipt of the said notice, a reply dated January 20, 2005 came to be filed by the assessee. In that except stating that they have issued credit notes to its purchasers of cement, they had not whispered anything with regard to the debit notes that was issued by the assessee to its customers. The reply filed by the petitioner dated January 20, 2005 is as under:

Kindly refer your notice cited above directing to remit the collected sales tax with interest due on cement sales made by our CGU during the month of August 2004. As you are please aware, the Cherthala CGU has been exempted from payment of sales tax for nine years from the date of commencement of commercial production vide Government Gazette Notification S.R.O. No. 859/2004 and G.O.(P) No. 129/2004/TD dated August 9, 2004. We furnish the following facts for your kind perusal.

The exemption was effective from the date of commencement of commercial production which is August 7, 2003. However, the above referred exemption order was received by the company by the middle of August and the company have implemented the order with effect from September 1, 2004.

Sales tax collected during the month of August as mentioned in your notice was subsequently refunded by the company by issuing credit notes numbering from 612 to 678 dated September 1, 2004. This was duly informed to you vide our letter No. FIN/ST/2004-05/10010 dated October 13, 2004.

MCL is one of the PSUs under the Industries Department, Government of Kerala. Therefore the company cannot conceal the facts as mentioned in your notice.

In this connection, it may be mentioned that the Assistant Commissioner (Intelligence), Commercial Taxes, Trivandrum had issued the notice u/s 45(a) and 46 of the KGST Act, 1963 and we have furnished the facts on the notice. Subsequently there was a personal hearing also by the Assistant Commissioner.

Considering the above facts and the collected tax has been refunded by issuing credit notes, we request you to drop the proposed penalty proceedings by the Department vide notice No. 3101 0400/04-05 dated January 17, 2005 against the company. We confirm that we would be attending the personal hearing as proposed without fail.

12. Since the Revenue was taking steps to recover the amounts due to them from the assessee, the assessee had preferred an appeal in No. 6469 of 2005 against the demand notice issued by the assessing authority. For the first time, in the memorandum of appeal, the assessee had stated, that apart from issuing credit notes to its purchasers of cement, had also issued debit notes and thereby the sales price of the cement that was sold by the Cherthala unit includes the tax that was collected for the month of August, 2004. The ground raised by the assessee in its memorandum of appeal requires to be noticed. Therefore, it is extracted:

Though the exemption notification was issued in the middle of August 2004, the appellant continued to charge sales tax up to the end of the month as any change in the price structure in the middle of the month will adversely affect sales. It was decided by the appellant to retain the customer price at the same amount as fixed earlier. Therefore the appellant issued credit notes for the sales tax collected and merged the same into the basic price by issue of debit notes.

13. The first appellate authority, in our opinion, rightly understanding the colourable device that was adopted by the assessee to deprive the Revenue from payment of the sales tax due to it, in its well considered order has stated as under:

The appellant-company ought to have remitted the tax collected up to August 12, 2004 to Government invariably and thereafter the company would either return the tax collected to persons from whom the amount was collected or to pay over the same to Government. If the amount is not returned to the persons from whom it is collected, the amount so collected is liable to be forfeited to Government. In any event, the company is not entitled to retain the amount collected by way of tax.

In view of Section 22 and Section 46A and the scheme of tax exemption granted in S.R.O. No. 854 of 2004 the appellant cannot retain the amount collected by way of tax. Any later arrangement by the company does not alter the very nature of tax collected from customers on its sales during August 2004.

The appellant did not give effect to the Government Notification in S.R.O. No. 859/04 till August 31, 2004 in respect of transaction made during August 2004 despite it received copy on August 12, 2004. The company collected an amount calculated at 15 per cent of basic price purporting to be by way of tax and further levied AST on tax and the customers paid the amount so calculated as tax under the KGST Act, 1963 till August 31, 2004. Both the seller and buyer treated the amount as tax due under the KGST Act, 1963. Buyers, in turn claimed exemption on their subsequent resale on the strength of these tax suffered bills. On this context, the company had to pay over the collected tax to Government on the due date as it had done previously or return the tax to the persons from whom it was collected. As on September 20, 2004 the company had no intention to return the tax to its customers as is evident from the letter dated September 22, 2004 wherein it is stated that the company had retained the tax with them. On a later date the company decided to increase the basic price for the completed past sales in such a way that the composite price remains to be the same. The company has no authority to convert an amount collected purporting to be by way of tax to its basic price to its own benefit. So the action of the company to convert tax amount as its basic price is a fraudulent act. This action of the company results in excessive enrichment which is not the intention of the Government while issuing Notification in S.R.O. No. 859 of 2004. The company had not only paid over the amount collected by way of tax during the month of August 2004 to Government but had appropriated it for their own benefit. Non-

inclusion of sales turnover relating to Cher-thala unit and failure to report the details of tax collection in the return of August 2004 is not a mere technical or venial defect.

14. The assessee had questioned the correctness or otherwise of the orders passed by the first appellate authority in second appeal before the Sales Tax Appellate Tribunal in T.A. No. 10 of 2006. The Tribunal while disposing of the appeal has granted relief to the assessee, primarily being of the opinion that the assessee had not only issued credit notes but also issued debit notes to the customers and, secondly, that the assessee is entitled to fix its sales price for the sale of the commodity in question.

15. Being aggrieved by the orders passed by the Appellate Tribunal, the Revenue has approached this Court by filing this revision petition.

16. The Revenue has framed three questions of law for our consideration and decision. They are as under:

(A) Whether the Appellate Tribunal is right in law in annulling the well considered order of the appellate authority which has sustained the demand of the Assessing Authority to collect and forfeit the admitted tax collections of the assessee for the month of August 2004, especially when the assessee has admittedly not reimbursed the amount to the buyers from whom they have collected tax?

(B) Is not the Tribunal in error in its understanding on Section 22 and Section 46A of the KGST Act while disposing of the TA?

(C) Whether under the facts and circumstances of this case the very appeal filed by the assessee before the first appellate authority maintainable?

17. We have heard Sri Vinod Chandran, learned Special Government Pleader (Taxes) appearing for the Revenue and Sri V.P. Narayanan, learned Counsel appearing for the assessee.

18. Sri Vinod Chandran, learned Special Government Advocate, would submit that it was expected of the assessee-company to have remitted the tax collected by them for the month of August, 2004 within the due date, to the Sales Tax Department and since that has not been done the notices were issued by the assessing authority to the assessee. It is further contended that it was the case of the assessee before the assessing authority that the assessee had issued credit notes to the purchasers, but there was not even a whisper to the debit notes that was issued to its customers. He would further submit that by way of the so-called tax planning, the assessee has tried to defeat the lawful claim of the Revenue. In support of his contention, learned Government Advocate has brought to our notice the comments made by the apex court on the observations made by Justice Chinnapa Reddy, J. in McDowell and Co. Ltd. Vs. Commercial Tax Officer, , in Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706. Lastly the learned Counsel would submit that the principles for levy of penalty u/s 45A of the Act are totally different and those principles cannot be applied when it

comes to the question of demanding the tax due under the Act.

19. In *Azadi Bachao Andolan's* case [2003] 263 ITR 706 the apex court has observed : (at page 762)

If the court finds that notwithstanding a series of legal steps taken by an assessee, the intended legal result has not been achieved, the court might be justified in overlooking the intermediate steps, but it would not be permissible for the court to treat the intervening legal steps as non-est based upon some hypothetical assessment of the "real motive" of the assessee. In our view, the court must deal with what is tangible in an objective manner and cannot afford to chase a will-o'-the-wisp.

20. Further, the court has also noticed the majority view of the learned Judges in *McDowell and Co. Ltd. Vs. Commercial Tax Officer*, wherein it is stated : (page 754 of 263 ITR)

Tax planning may be legitimate provided it is within the framework of the law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.

21. Sri V.P. Narayanan, learned Counsel appearing for the assessee, would submit that on the very same set of facts the Commissioner of Commercial Taxes has set aside the orders passed by the assessing authority in levying penalty, in exercise of his powers u/s 45A of the Act and, therefore, the first appellate authority was not justified in sustaining the demand notices issued by the assessing authority, wherein he had directed the assessee to deposit the tax collected by them for the month of August, 2004 in so far as its Cherthala unit is concerned. The learned Counsel would further submit that the assessee is a Government Company and it did not have any intention to defeat the lawful claim of the Revenue. Lastly, the learned Counsel would submit that since the assessee had issued credit and debit notes to its customers, it cannot be said that a colourable device is adopted by the assessee to retain the tax collected from its customers.

22. One and the only question that arises for our consideration and decision is, whether the assessing authority was justified in issuing demand notices to the assessee to remit the tax collected by its Cherthala unit for the month of August, 2004.

23. The assessee is a Government company. It has several manufacturing units at different places, for manufacture of cement. It has a unit at Cherthala also. At Cherthala unit, it manufactures cement using "fly ash" as basic raw material. The assessee-company had filed an application for grant of exemption from payment of sales tax on August 7, 2003. The application was considered by the competent authority and a certificate of exemption was issued on August 9, 2004, granting

exemption to the assessee's Cherthala unit from payment of sales tax with effect from August 7, 2003. The order so passed by the competent authority was communicated to the assessee on August 12, 2004.

24. The assessee had filed its monthly returns for all its units before the assessing authority on September 9, 2004. In the monthly return so filed, the assessee had not included the turnover of its Cherthala unit solely on the ground that it has obtained an exemption certificate from the competent authority. Even after receipt of the exemption from payment of sales tax, the assessee had collected sales tax on the sales of cement made by its Cherthala unit.

25. The assessing authority coming to know that in spite of the grant of exemption from payment of sales tax, the assessee-company had collected tax on sale of cement from its Cherthala unit, had issued a demand notice asking the assessee to remit the tax due to the State. The assessee in the reply filed had only stated that it is exempted from payment of sales tax and secondly that whatever amount it has collected by way of tax from its customers, they intend to make use of the same for the purpose of expansion of its industrial unit. That only means when it filed the first reply to the demand notice issued by the assessing authority, it did not have any intention to return the amount collected by way of tax to its customers.

26. Since the assessing authority was not satisfied with the reply so filed by the assessee, it had issued yet another demand notice dated September 30, 2004. For the first time, in its reply, the assessee had stated that it had issued credit notes to its customers, but unfortunately it had not stated the date of issuance of such credit notes to its customers.

27. In view of the demand notices so issued, the assessee had filed its revised returns for the assessment year 2003-04 on December 3, 2004. In the revised return filed, the assessee had included only the sales turnover of its Cherthala unit, but had not even whispered about the tax collected by its Cherthala unit on the sales of cement effected for the month of August, 2004.

28. For the first time, in the memorandum of appeal filed before the first appellate authority, the assessee had stated that it had not only issued credit notes to its customers but also issued debit notes and in the debit notes the tax collected has been merged with the sale price of cement and, therefore, the assessee need not have to remit any tax collected from its customers for the month of August, 2004.

29. The apex court in McDowell and Co. Ltd. Vs. Commercial Tax Officer, (majority view) has observed that tax planning may be legitimate provided it is within in the framework of law and colourable devices cannot be part of tax planning. The apex court in the aforesaid decision has observed that : (page 286 of STC and 161 of ITR)

...It is up to the court to take stock to determine the nature of the new and

sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of "emerging" techniques of interpretation as was done in Ramsay [1982] AC 300, Burma Oil [1982] Simon's TC 30 and Dawson [1984] 1 ALL ER 530, to expose the devices for what they really are and refuse to give judicial benediction.

30. In that case, the court had occasion to refer to the following observations of Lord Brightman in Furniss v. Dawson [1984] 1 ALL ER 530:

The fact that the court accepted that each step in a transaction was a genuine step producing its intended legal result did not confine the court to considering each step in isolation for the purpose of assessing the fiscal results.

31. In the present case, it was not the case of the assessee that it had not collected tax from its customers for the month of August, 2004 though exemption certificate was issued to the assessee on August 9, 2004 which was received by the assessee on August 12, 2004. In fact, in the reply filed to the first demand notice they would only say that they intend to make use of the tax collected from its customers for expansion of its activities.

32. After realising that the same would not be permissible in law, by way of further reply to the second demand notice, they would speak of the issuance of credit notes. Again, the dates of the credit notes are not even mentioned in the reply filed.

33. For the first time before the first appellate authority, they speak of not only the issuance of credit notes but also the issuance of debit notes. The facts which we have noticed in extenso would speak for itself the modus operandi adopted by the assessee-company. The credit notes issued earlier and debit notes issued within a short span of time were only to avoid remittances of tax collected for the month of August, 2004. The purpose that is served, which stares on the face of it, is to overcome the demand notice issued by the assessing authority, though the court is entitled to lift the mask of the assessee to see the device adopted for tax evasion and to circumvent the obligation. Here is a case where the assessee in order to cover up its illegal and unauthorised collection of tax has adopted a dubious method and has come out with an unbelievable theory of issuing credit notes as well as debit notes to its customers.

34. In the background of the facts we have noticed, we need not get ourselves bogged down with the controversy as to judicial approach to tax avoidance devices as was pointed out in McDowell and Co. Ltd. Vs. Commercial Tax Officer, and further explained in Azadi Bachao Andolan's case [2003] 263 ITR 706. It is true that the tax planning may be legitimate, provided it is within the framework of law. The tax planning in the instant case, was done only when they were asked to remit the tax collected. As observed by the courts, colourable devices cannot be part of the tax planning and it is wrong to encourage such devices.

35. In our considered view, the assessee cannot retain the tax collected by it

from its customers, and the same requires to be remitted to the State Government within the time prescribed under the Act, along with its monthly returns. In the instant case, as we have already stated in detail, the assessee, in fact, had collected tax for the month of August, 2004, but failed to remit the same with the Sales Tax Department and it is only as an afterthought it has issued the so-called credit notes and debit notes to its customers. This colourable device adopted by the assessee, in our view, is only a sham transaction and the same cannot be sustained. In that view of the matter, in our opinion, the Tribunal was wholly unjustified in merely relying on the so-called credit notes and debit notes to grant relief to the assessee. In that view of the matter the revision petition requires to be allowed and the orders passed by the Tribunal requires to be set aside.

36. Accordingly, we pass the following:

ORDER

(i) Revision petition is allowed.

(ii) The questions of law framed by the Revenue are answered in the affirmative and against the assessee.

(iii) We set aside the orders passed by the Tribunal in T.A. No. 10 of 2006 dated March 30, 2006 and confirm the orders passed by the first appellate authority in Section T.A. No. 6469 of 2005 dated November 24, 2005.. No order as to costs.

37. Ordered accordingly.