

(2011) 12 KL CK 0023

In the High Court Of Kerala

Case No : Writ Petition (C) No. 11661 of 2006

Supersonic Industrial Complex

APPELLANT

Vs

The Assistant Commissioner of (Assessment)

RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 265

Kerala General Sales Tax Act, 1963 — Section 10, 22, 22(2), 44, 5

Citation : (2012) 1 KLJ 392

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : K.B. Muhamed Kutty, for the Appellant; S. Sudhish Kumar (GP), for the Respondent

Judgement

P.R. Ramachandra Menon, J.—Denial of the claim for refund, in respect of exemption from the liability to pay purchase tax with retrospective effect is the point involved. The petitioner, an assessee on the rolls of the first respondent, is a dealer engaged in the business connected with the commodity "rubber". By virtue of the relevant provisions of law, tax was payable on purchase turnover of rubber and the petitioner was remitting the same accordingly, in connection with the manufacture of centrifuged latex and crumb rubber.

2. While so, the Government, in exercise of the power conferred u/s 10 of the Kerala General Sales Tax Act, 1963 (KGST Act in short) issued Ext. P2 notification bearing SRO No. 695/2003, finding it necessary in the public interest so to do and exempted the manufacturers of centrifuged latex and crumb rubber from payment of tax under the KGST Act, 1963 on the purchase turnover of rubber in any form used for the manufacture of centrifuged latex and crumb rubber. It was also stated that the said notification shall be deemed to have been in force during the period from 01.04.1988 to 09.10.2001. It was further stipulated that, "tax, if any, already paid shall not be refunded". The exemption granted as per the said notification was further extended from 10.10.2001 to 31.03.2004, as

per Ext. P3 notification bearing SRO No. 316 of 2005 dated 31.03.2005. In the said notification, it was stipulated that, "tax collected shall be paid over to Government immediately and tax if any, already paid shall not be refunded".

3. As a matter of fact, in respect of the assessment year 2001-02, the petitioner had already remitted purchase tax amounting to a total sum of Rs. 1,09,495/-. But in view of the subsequent notifications as aforesaid, providing exemption retrospectively w.e.f. 01.04.1988 to 31.03.2004, the petitioner claimed refund at the time of assessment. The request was declined and the assessment was completed as per Ext. P1 assessment order dated 17.11.2005, which is under challenge in this writ petition.

4. The case of the petitioner is that, the petitioner had not collected any tax, though he had effected the payment. As such, the petitioner claims to have refund, more so, in view of the clarification issued by the Government in the subsequent notification i.e. Ext. P3, to the effect that uncollected tax was given exemption. As such, the stipulation that the tax if any already paid, shall not be refunded will be attracted, only if such tax is already collected, resulting in any unlawful enrichment. It is also stated that, the State, having no right to collect the tax for the period in question, by virtue of the exemption granted as per Exts. P2 and P3 notifications, is not authorised to have the amount retained at their hands; more so, in view of the mandate under Article 265 of the Constitution of India, which stipulates that, no tax shall be collected without the authority of law. So also, it is contended that Section 10 of the KGST Act, confers the power under the Government, only to provide exemption or to reduce tax liability and as such, the notifications issued in exercise of the said power cannot be made as a tool indirectly, to levy/collect any tax. It is pointed out that, alternate remedy by way of appeal is not effective, as the departmental authorities are always bound by the contents of the notifications, which hence necessitates interference of this Court, as sought for in this Writ Petition.

5. The first respondent has filed a counter affidavit, pointing out that, the liability to pay tax is very much there under the Statute and it was only by virtue of the exemption given as per Exts. P2 and P3 notifications, that the petitioner could put forth the claim. When the petitioner claims for the benefit of the notifications, it has to be taken as it is, which in turn contains a specific clause, that the tax, if any already paid, will not be refunded. The petitioner having satisfied the tax, they are bound by the notification stipulating that the notification will not enable the assessee to have refund, once the tax is already paid. Reliance is also sought to be placed on the decision rendered by the Division Bench of this Court in *Kokkala Arecanut Commission Agents' Association v. The Commissioner of Commercial Taxes*, (2003) (11) KTR 316 (Ker.).

6. Dr. K.B. Muhammedkutty, the learned senior counsel appearing for the petitioner submits that, unlike sales tax (where the levy is at the point of sale), the liability to pay "purchase tax" arises at the point of purchase from the customers and as such, there is no chance for any unlawful enrichment of the

petitioner. By virtue of the mandate u/s 22 (2) (b) of the KGST Act, there is a prohibition in collecting the purchase tax and if any such attempt is made, the petitioner is liable to pay penalty, under the relevant provisions of law. This being the position, the rider placed in Exts. P2 and P3 notifications can only be regarded as a "drafting error" and such stipulation may be warranted/justified in the case of sales tax, where there is a chance for unlawful enrichment of the dealer, if the tax collected from the customers on behalf of the State is not paid to the State. The learned senior counsel submits that the clause contained in Exts. P2 and P3 notifications," that "the tax, if paid, shall not be refunded, has necessarily to be read and understood as: "the tax, if collected and paid, will not be refunded". The petitioner having not collected the tax, they are very much entitled to have refund; is the crux of submission. Reliance is sought to be placed on the decision rendered by the Supreme Court in *Corporation Bank v. Saraswati Abharanasala and another*, (2009) 19 VST 84 and that of a Division Bench of this Court in *Apar Ltd. v. Asst. Commissioner and Ann*, (2000) 8 KTR 363 (Ker.) The learned Senior counsel also submits that the reliance placed by the respondents on Kokkala's case (cited supra) is quite out of place, in so far as the said decision was rendered originally by the learned Single Judge, observing that, the appellant had not questioned the validity of the notification (paragraph 15)

7. Sri. S. Sudhish Kumar, the learned senior Government Pleader appearing for the respondents submits that, the issue is squarely covered by the decision rendered by the Division Bench of this Court in Kokkala's case cited supra, wherein the scope of interpretation of similar provision with reference to the notification bearing SRO No. 127/2000 was examined by the Court. The learned Government Pleader submits that the decision rendered by the Division Bench of this Court in 2000 (3) KTR 363 (Ker.) (cited supra) and that of the Supreme Court in 2009 (19) VST 84 (cited supra) are quite distinguishable and are not applicable to the case in hand. He also submits that the tax paid by the petitioner has already been passed on to the customers by including the same while fixing the sale price, which is inclusive of such other amounts/expenses and the element of profit as well.

8. The learned senior counsel for the petitioner submits that, if the rider in Exts. P2 and P3 notifications is let to stand as it is, without reading, understanding and applying the same as: "tax, if collected and paid shall not be refunded", it will lead to quite an anomalous situation, whereby persons like the petitioner, who are law-abiding citizens, who satisfied the liability without demur would stand discriminated from the rest of the lot, who chose to flout the law and evaded the payment. The law is not liable to be interpreted in favour of a wrong doer, submits the learned senior counsel.

9. In *Apar Ltd's* case - (2000) 8 KTR 363 (Ker.) (cited supra), the Division Bench of this Court was considering the question, whether the petitioner/assessee was entitled to have refund of the turnover tax paid after the date of exemption as per the notification dated 29.10.1992. The State of Kerala granted exemption in

respect of turnover tax payable on the turnover at the first point of sale in the State by dealers coming under sub-clause (g) of Clause I of Sub Section (2A) of Section 5 of the KGST Act, except on the turn over relating to goods received on consignment and/or branch transfer. Later, by virtue of the subsequent notification dated 09.03.1993, it was made clear that, the earlier notification dated 29.10.1992 shall be deemed to have come into force on 01.04.1992, however adding a "proviso" that the turn over tax, if any paid, shall not be refunded. The learned Single Judge declined to grant refund of turn over tax paid, on the ground that the notification dated 09.03.1993 applied to all dealers without discrimination, which was subjected to challenge in the appeal. After considering the facts and figures and the relevant provisions of law, it was held by the Bench, that the persons like the petitioner were compelled to pay turnover tax, because they were excluded from exemption; that it was only after approaching the Court, that they got the benefit of exemption; that from 29.10.1992 they were compelled to pay turnover tax illegally and further that, the turnover tax up to 29.10.1992 was collected legally, while the collection thereafter was illegal and hence the petitioner/assessee was entitled to get refund of the turnover tax paid after 29.10.1992. In the said case, as observed by the Division Bench, the tax was remitted by the petitioner/assessee after the notification. Further, they effected payment under compulsion and were pursuing steps by challenging the notification itself and only by virtue of the interference of this Court, that the proceedings were intercepted. As such, it cannot be said that, the case of the petitioner herein is covered by the above decision, though some analogy, on some counts, is possible.

10. Coming to the decision of the Division Bench in Kokkala's case, a similar clause as involved herein, stipulating that, "tax, if any paid will not be refunded", was there as well, as incorporated in the concerned notification SRO No. 127/2000 dated 05.02.2000. The appellant therein represented the dealers in arecanut, who purchased the same locally and used to dispatch outside the State. Since, arecanut is a commodity taxable at the last purchase point, when it is purchased locally, the dealers are liable to pay tax on their purchase turnover. True, as per the provisions of the KG ST Act 1963, the dealer can collect the tax from the customer when the tax liability is on his purchase turnover. The rate of tax of arecanut up to 31.12.1999 was 5% and from 01.01.2000 it was enhanced to 8 %. Later, the Government in public interest, issued SRO No. 127 of 2000 dated 05.02.2000 reducing the rate of tax on arecanut from 8% to 4%, giving retrospective effect from 01.01.2000, however, incorporating a stipulation that the "tax, if any paid, will not be refunded". It was contended by the appellant that there was absolutely no rationale in the above stipulation. When an honest dealer remits the tax due on his purchase turnover in time and a dishonest dealer or a dealer for some other reasons does not file the return and evades payment of tax, if the clause in the notifications is read and understood as done by the first respondent, it would only give premium to the wrong-doer, resulting in patent arbitrariness and violation of Article 14 of the Constitution of India. The

Bench observed that, the liability to pay tax is irrespective of the fact whether tax is collected by the dealer or not. In respect of the goods which are taxable at the first point of sale in the State by a dealer, he is liable to pay tax u/s 5, though by virtue of Section 22 of the Act, such dealer can collect tax on his sale. Whether the dealer collects the tax or not, he has to pay tax on his taxable turnover. But in the case of a dealer, whose transaction is liable to pay tax only at the last point of purchase, the Bench observed that, there was no question of collection of tax by that dealer from anybody on that point and he has to pay tax on his taxable turnover; thus making the position clear that, collection of tax is not relevant, so far as the liability to pay is concerned. A similar contention as now put forth by the learned senior counsel for the petitioner to the effect that the clause "tax, if. paid, shall not be refunded" should be read and understood as: "tax, if collected and paid, shall not be refunded" was mooted in the above case as well. The Bench observed that the intention of the notification, as clarified by the Commissioner of Commercial Taxes was to see that the retrospective operation providing reduction of the rate shall not result in outflow of money from the Government exchequer. If the interpretation as put forth by the appellant ("if collected and paid to the Government, will not be refunded") is accepted, it will lead to a position discriminating the dealers paying tax at the point of sale, against the dealers who are paying tax at the point of purchase, attracting violation of Article 14 of the Constitution of India. It was held by the Bench, that there was no justification for reading the last two paragraphs of the notification in conjunction, as they contemplate two different situations; one regarding the "tax collected" and the other regarding the "tax paid" and as such, the Bench was not in a position to read into the latter clause, the word "collected" occurring in the first clause, when that clause did not warrant such an interpretation. Thus interference was declined in the appeal and the contention of the assessee was turned down, answering the position in favour of the revenue.

11. With regard to the law laid by the Supreme Court in *Saraswathi Abharanasala's* case (cited supra), it was a case, where the first respondent dealer in bullion gold purchased gold from the appellant bank during the period from 06.04.1999 to 10.12.1999 and paid the sales tax at the prevailing rate of 1% and the amount collected by the bank/seller as sales tax was duly remitted with the sales tax department. Subsequently, the State of Kerala, as per notification SRO 1075/99 dated 27.12.1999, reduced the rate of sales tax from 1 % to h %, which was given retrospective effect from 01.04.1999. In view of the said notification, the first respondent before the Supreme Court (*Saraswati Abharanasala*) put forth a claim before the appellant bank to refund the excess collection amounting to Rs. 20,97,763.50/- with interest, which made the appellant bank to place a claim for refund before the sales tax authority. The Assistant Commissioner, Sales Tax rejected the request, referring to the relevant clause under the concerned notification that, the tax, if any, paid over to the Government shall not be refunded and the Bank was instructed to inform the customer (first respondent) accordingly. On getting the communication from the

Bank as to the rejection of the claim, the first respondent approached the High Court of Kerala by filing the Writ Petition, wherein interference was declined and the party was relegated to approach the Commissioner, Commercial Taxes for appropriate reliefs. This was challenged by the first respondent by filing appeal before the Division Bench, wherein the Bench observed that, when the Legislature of the Government had given relief with retrospective effect, it should reach the concerned eligible citizens, observing further that, the Bank had opportunity to file the return, showing the sales tax liability and claim refund in terms of Section 44. The liability was mulcted upon the Bank to effect refund with interest @ 10 % and to claim it later from the department. This made the Bank to approach the Apex Court, which led to the decision in *Corporation Bank v. Saraswati Abharanasala and another* (cited supra).

12. Referring to the factual position, the Apex Court observed that, the rate of tax which was applicable on 01.04.1999 by reason of the legal fiction created by the notification was therefore h %. The effect- of a legal fiction was held as to be given full effect and to be taken to its logical conclusion, more so, when the sale tax was leviable on sale of goods and it must be collected by the dealers as an "agent" of the State, at such rate as may be specified. Neither the State nor the agent was entitled to collect the tax at a higher rate than the rate specified, in view of the mandate under Article 265 of the Constitution of India, that no tax shall be levied or collected except by authority of law. If tax was paid in excess of the tax specified, except" the cases involving the principle of "unjust enrichment", excess tax paid was held as liable to be refunded. It was also observed that, it was not a case where the "do trine of unjust enrichment" had any application, as the respondent State had no case that the buyer had passed on the excess amount of tax collected by it to the purchasers.

13. True, the Apex Court observed that, the Statute should not be construed in such a manner, so as to encourage the defaulter and discourage those who abide by law. But, the said observation has to be read and understand with reference to the context. The law that was being considered was with reference to levy at the point of sale and the benefit of the reduction of the rate of tax for the period in question, was being claimed/agitated by both the sides, the seller Bank as well as the purchaser Abharanasala, to whom the liability was passed over. Unlike this, in the instant case, the liability is in respect of "purchase tax" levied, being at the last point of purchase in the State, which does not contemplate any passing over of such liability to the customers, in view of the mandate u/s 22 (2) (b). The dealer was liable to satisfy the tax irrespective of any chance to have it passed over to the customer, which in turn was satisfied by the petitioner herein. The notification issued much later by the Government, considering the public interest so to do, providing exemption and more as a matter of "policy", was only to put a finality to the ongoing litigations, if any, or to provide other remedial measures in the market conditions in connection with the augmentation/ procurement of revenue, however taking care to see that the public exchequer, was not let to be dried up. It was exactly a similar situation that was considered

by the Division Bench of this Court in Kokkala's case as well and as such, it stands on a different footing than the position of the appellant in Saraswathi Abharanasala's case. this Court finds that the case in hand is covered by the decision rendered by the Division Bench of this Court in Kokkala's, case. Further, the purchase tax paid by the petitioner has already been passed on to the customers, not as purchase tax, collection of which is prohibited u/s 22 (2) (b), but by including the same in the cost price and then fixing the appropriate "sale price". This is not a case where the liability to pay purchase tax is disputed by the petitioner. The purpose of granting retrospective exemption is stated as in tune with public interest. However, on comparison with the other limb of the "public interest" i.e., the State exchequer who had already obtained the tax paid and had provided necessary budget allocation shall not be let to be dried up, this Court has necessarily to adopt a purposive interpretation. In the above, circumstances, this Court finds that the claim for refund put forth by the petitioner, challenging the correctness and sustainability of Ext.P1 assessment order, is quite wrong and misconceived. The Writ Petition is devoid of any merit and the same is dismissed accordingly.