
(2003) 06 KL CK 0048

In the High Court Of Kerala

Case No : T.R.C. No"s. 439 and 440 of 2001

Thadikkadavu Service Co-operative Bank Limited

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 30-06-2003

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 2, 23(3), 5(2A)

Citation : (2004) 138 STC 353

Hon'ble Judges : Kurian Joseph, J;G. Sivarajan, J

Bench : Division Bench

Advocate : N. Muraleedharan Nair, R. Muralidharan and V.K. Shamusudheen, for the Appellant; Georgekutty Mathew, Government Pleader, for the Respondent

Judgement

1. The matter arises under the Kerala General Sales Tax Act, 1963, for short, "the Act". The assessee is the revision petitioner in both these cases. State is the respondent. The assessment years concerned are 1990-91 and 1991-92 respectively. The assessee is Co-operative Bank mainly engaged in the business in chemicals, manure, agricultural implements, etc., for the welfare of its members and agriculturists. During the assessment years in question, the assessee was also acting as procuring agent of rubber and raw cashew nuts on behalf of CAPEX (Cashew Workers Apex Industrial Co-operative Society Limited) and CCR and AR (Cannanore District Co-operative Rubber and Agricultural Marketing Society Limited). During the said two assessment years, the assessee had procured rubber and raw cashew nuts by raising purchase bills of the CAPEX and CCR and AR. The assessee had entered the said transactions in its books and had also included the same in the returns filed for the said two years. However, in the assessment, the assessee had claimed that the said turnover is not liable to be included in the total turnover of the assessee for the purpose of levy of turnover tax u/s 5(2A) of the Act. If the said turnover is excluded the petitioner's turnover will be less than Rs. 50 lakhs in which case petitioner will not be liable to turnover tax. The assessing authority however included the turnover of the agency transaction in the total turnover for the purpose of levy of

turnover tax. Though the assessee had filed appeals before the Appellate Assistant Commissioner (Commercial Taxes), Kannur and before the Tribunal, they were without success.

2. We have heard the learned counsel for the assessee and the learned Government Pleader appearing for the respondent. The only question that arises for consideration is whether the turnover of rubber and raw cashew nuts procured by the assessee for and on behalf of CAPEX and CCR and AR under the Monopoly Procurement Programmer of the State Government forms part of the turnover of the assessee and consequently part of the total turnover for the purpose of levy of turnover tax u/s 5(2A) of the Act. According to the assessee, since it had procured rubber and raw cashew nuts on behalf of CAPEX and CCR and AR by issuing the purchase bills of the said two concerns, the purchase turnover of rubber and raw cashew nut does not form part of the turnover the assessee. It is also their case that the CAPEX and CCR and AR had included the said turnover in their assessment and had paid turnover tax on the said transactions. On the other hand, the contention of the State is that even a procurement agent is a dealer as defined u/s 2(viii) of the Act and the agency transaction forms part of the turnover as defined u/s 2(xxvii) and consequently forms part of the total turnover u/s 2(xxvi). It is also the contention of the department that the assessee in its books had treated the transaction as part of their turnover and had also included the turnover covered by those transactions in the returns filed by them and further the assessee had obtained form 25 declarations from CAPEX and CCR and AR for getting the benefit of exemption from the levy of turnover tax. The Government pleader had also relied on the decisions of the Supreme Court in *State of Madras Vs. The Cement Allocation Co-ordinating Organisation, , Cardamom Planters" Association, Bodinayakannur Vs. Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam, , and State of West Bengal v. O.P. Lodha [1997] 105 STC 561* ker and submitted that even the procurement agent is a dealer and that the agency transactions of the petitioner will form part of the total turnover for the purpose of levy of turnover tax.

3. We find that a Division Bench of this Court in the judgment dated September 17, 2001 in T.R.C. 401 of 2001 (Reported as *Brothers Trading Company Vs. State of Kerala*, ker considered the question whether commission agents are liable to pay turnover tax. The Division Bench after due consideration of the definitions of "dealer", "total taxable turnover", "total turnover" and "turnover" in Section 2(viii), (xxv), (xxvi) and (xxvii) as also the provisions of Rules 8 and 9 of the KGST Rules, 1963 and the decisions of the Supreme Court *State of Madras v. Cement Allocation and Co-ordinating-Organisation (supra) Cardamom Planters" Association, Bodinayakannur Vs. Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam, and State of West Bengal v. O.P. Lodha [1997] 105 STC 561* ker held that commission agents are liable to be assessed for turnover tax. The Division Bench has also relied on another decision of this Court in *Kerala Produce and Export Company Vs. State of Kerala*, and observed that

the principles laid down in the said decision does not in any way differ from the reasoning and conclusion which they have taken.

4. The only distinction which is sought to be drawn by the counsel for the petitioner is that in the instant case, the petitioner had only acted as procurement agent under the Monopoly Procurement Scheme of the State Government and such transaction cannot be treated as the turnover of the petitioner.

5. In the present case, as already noted, the assessee itself had treated the purchase turnover of rubber and raw cashewnuts effected on behalf of CAPEX and CCR and AR as its turnover and accounted the same in its books. Further, the assessee had included the said turnover in their return and had claimed exemption by producing form 25 declaration. We find that the assessing authority had deducted the purchase turnover of cashew as per S.R.O. No. 326 of 1992 from the levy of turnover tax u/s 5(2-A). Similarly the purchase turnover of local sales of rubber was also deducted from September 1, 1991 as per S.R.O. No. 1004 of 1991. The Notification S.R.O. No. 326 of 1992 grants exemption in respect of turnover tax payable under Sub-section (2-A) of Section 5 of the Act on the purchase turnover of cashewnuts by co-operative societies and co-operative banks under the Monopoly Procurement Scheme other than CAPEX. This notification also implies that the purchase turnover of cashewnuts effected by co-operative societies and co-operative banks under the Monopoly procurement Scheme forms part of the turnover liable to be assessed under the Act. Otherwise, there is no question of grant of exemption under the notification. Considering the facts and circumstances of the case, we are of the view that the authorities and the Tribunal were perfectly justified in including the turnover of the agency transaction of the petitioner in the total turnover for the purpose of levy of turnover tax under the Act. Of course by virtue of the notification mentioned above they are not liable to pay turnover tax on the said transactions.

6. One more question is raised in these two revisions. It is with regard to the levy of interest u/s 23(3) of the Act. Learned Counsel for the assessee submitted that the assessee had not admitted any liability in respect of the agency transaction in the returns filed by it. The counsel also submitted that no demand was also raised by the assessing authority for penal interest prior to the passing of the assessment orders. Counsel on that base submitted that in view of the decision of the Supreme Court in Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others, penal interest u/s 23(3) cannot be levied for the period prior to the demand made pursuant to the assessment orders under challenge. We find that the Tribunal did not consider this claim on the ground that no appeal will lie against an order levying penal interest. We do not agree with the said view of the Tribunal. In the instant case as already noted, the assessee had filed appeal against the assessment order relating to other matters also. Further, penal interest is levied in the assessment order itself. In view of the above, the assessee is entitled to challenge the levy of penal interest when an

appeal is filed against the assessment order on other matters also. However, we are not in a position to decide this issue on merits in this case for the reason that we do not have all the required materials before us to find out as to whether the decision of the Supreme Court mentioned above applies to the facts of the present case. In these circumstances, we direct the assessing authority to consider this question and pass an independent order determining the liability to penal interest for the period prior to the demand made pursuant to the assessment orders for the aforesaid two years. The assessee is free to produce all the required materials and the assessing authority will consider the question in the light of the decision of the Supreme Court in Maruti Wire Industries case (supra) mentioned above.

These two revisions are disposed of as above.