
(1977) 06 KL CK 0017
In the High Court Of Kerala
Case No : W.A. No. 175 of 1974

The Sales Tax Officer and Another

APPELLANT

Vs

C.E. George

RESPONDENT

Date of Decision : 29-06-1977

Acts Referred:

Constitution of India, 1950 — Article 265

Citation : (1977) 40 STC 323

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.; K.K. Narendran, J

Bench : Division Bench

Advocate : Government Pleader, for the Appellant; M.M. Cherian and K.R. Rajasekharan Pillai, for the Respondent

Final Decision : Allowed

Judgement

V.P. Gopalan Nambiyar, C.J.—Exhibit P1 is the order of the Sales Tax Officer, Nedumangad, assessing the petitioner to sales tax due under the Central Sales Tax (Amendment) Act, 1969 (Act 28 of 1969). The order records that on verification of accounts it was found that the petitioner had effected inter-State sales to the tune of Rs. 1,27,752.09; that on verification a turnover of Rs. 50,536.02 alone was covered by valid C forms, Rs. 5,185.32 was supported by defective C forms and Rs. 72,030.75 was not covered by any C forms at all. On this basis, the assessment proceedings were completed. On appeal, the appellate authority stated as follows:-

3. ...Central sales tax paid by outside dealers and received by the appellant has been remitted and the amount of Central sales tax demanded in the sales bill but not received has not been remitted. Only with regard to the payment of the latter amount, objection has been raised at the time of hearing, namely, that the appellant was not liable to pay tax in view of the Central Sales Tax (Amendment) Act, 1969, in cases where tax was demanded but not received by him. The Sales Tax Officer, Nedumangad, has issued a preassessment notice wherein he had proposed to assess the turnover covered by C forms at 3 per cent and those

covered by defective C forms and not covered by C forms at the higher rate of 10 per cent. It is seen that no objection was filed to the said notice. Section 10(1) of the Central Sales Tax (Amendment) Act, 1969 (Act 28 of 1969), reads thus:

Where any sale of goods in the course of inter-State trade or commerce has been effected during the period between the 10th day of November, 1964 and the 9th day of June, 1969 and the dealer effecting such sale has not collected any tax under the principal Act on the ground that no such tax could have been levied or collected in respect of such sale or any portion of the turnover relating to such sale and no such tax could have been levied or collected if the amendments made in the principal Act by this Act had not been made, then, notwithstanding anything contained in Section 9 or the said amendments, the dealer shall not be liable to pay any tax under the principal Act, as amended by this Act, in respect of such sale or such part of the turnover relating to such sale.

In this case, the dealer had charged Central sales tax on all inter-State sales on the ground that he would be liable to pay tax on all such sales. Therefore, it would appear to me that the exemption referred to above will not apply to the appellant's case. I am therefore of the view that the Sales Tax Officer was right in having assessed to tax at 3 per cent on the turnover covered by C forms and at higher rate on the turnover covered by defective C forms and not covered by C forms. In the result, the assessment is confirmed and the appeal is dismissed.

In respect of the amount due from the writ petitioner recovery proceedings under the Kerala Revenue Recovery Act were started. Exhibit P6 is the demand notice issued for attachment. The writ petitioner filed O. P. No. 5371 of 1972 in this court to quash exhibits P1, P2 and P6. The learned Judge took the view that the requirements of Section 10 of the Central Sales Tax (Amendment) Act of 1969 stood satisfied in favour of the writ petitioner. The learned Judge was of the view that the writ petitioner had not collected the sales tax from the customers and that this would be sufficient for him in the circumstances to escape liability and to resist the recovery proceedings. Section 10 of the Central Sales Tax (Amendment) Act, 1969 (Act 28 of 1969), reads as follows :

10. Exemption from liability to pay tax in certain cases.-(1) Where any sale of goods in the course of inter-State trade or commerce has been effected during the period between the 10th day of November, 1964 and the 9th day of June, 1969 and the dealer effecting such sale has not collected any tax under the principal Act on the ground that no such tax could have been levied or collected in respect of such sale or any portion of the turnover relating to such sale and no such tax could have been levied or collected if the amendments made in the principal Act by this Act had not been made, then, notwithstanding anything contained in Section 9 or the said amendments, the dealer shall not be liable to pay any tax under the principal Act, as amended by this Act, in respect of such sale or such part of the turnover relating to such sale.

(2) For the purposes of Sub-section (1), the burden of proving that no tax was

collected under the principal Act in respect of any sale referred to in Sub-section (1) or in respect of any portion of the turnover relating to such sale shall be on the dealer effecting such sale.

The learned Judge noticed the decisions, viz., *V. S. Narayanan Nair and Co. v. Union of India* 1971 KLT 526 and *Abdul Khader Rawther v. Union of India* 1972 KLT 432. In the earlier of these decisions, a learned Judge of this court had observed that there was no rational basis for differentiating a person who did not make a wrong collection from one who made a wrong collection and returned the same. In the second of the decisions the collection of the tax was made with an undertaking to return it if it is found that there is no liability for the tax. The Division Bench held that the case was not one where it could be said that there is no collection on the ground that no tax could be levied or collected. In that case, it was ruled that the assessee was not entitled to exemption u/s 10. After noticing the two decisions, the learned Judge observed :

5. ...Here the petitioner did not collect any amount and, therefore, cannot be said to be outside the exemption u/s 10 simply because he had levied tax in the invoices. The section, if interpreted, consistent with the object of its enactment, would extend its benefit to the petitioner in this case and I hold that the assessment in question is bad in law as it is in violation of Section 10 of the Central Sales Tax (Amendment) Act, 1969. Exhibits P1 and P2 are therefore quashed to the extent of the liability regarding the tax not collected by the petitioner.

2. We are of the opinion that the reasoning and the conclusion of the learned Judge cannot be supported. Before exemption can be claimed u/s 10 of the Amendment Act noticed above, two conditions should stand made out: (1) that no tax should have been levied or collected in respect of the sales in question and (2) that the non-collection should have been on the ground that no such tax could have been levied or collected in respect of the sales. On the facts disclosed, the learned Government Pleader for the appellants argued with force that neither of the conditions would stand satisfied. The assessee had billed the customer for the amount due by way of tax. That, according to the learned Government Pleader, would be sufficient to constitute collection. Even assuming it did not amount to collection, it was argued that there is nothing to show that the non-collection was on the ground that the amount was not collectible at all. On the other hand, the learned Government Pleader contended that the very fact that the amount was included in the bills showed the assessee's firm belief and opinion that the amounts were collectible as sales tax. We are clearly of the view that the second ground of the learned Government Pleader is well-founded and is entitled to acceptance. We do not express any final or concluded opinion on the first of the grounds. There can be little doubt that, in the instant case, it cannot be said that the assessee had failed to collect the amounts on the ground that the amount was not collectible by way of sales tax. Such a ground of conclusion stands belied by the inclusion of the amount in the bills prepared by the

assessee. That would be sufficient to deny exemption. Therefore, the view taken by the learned Judge was not correct.

3. On the question whether it could be said that the sales tax was not collected, the learned Government Pleader invited our attention to the decision in *Gannon Dunkerley and Co., Madras (P.) Ltd. v. Sales Tax Officer, Mattancherry* 1957 KLT 380 where a Division Bench judgment of this Court had referred to the judicial exposition of the meaning of the words "assessment", "levy" and "collection". The learned Government Pleader pointed out that the view thus expounded had been approved by the Supreme Court in *A.N. Lakshmana Shenoy Vs. The Income Tax Officer, Ernakulam and Another*, . He also drew our attention to the decision of the Supreme Court in *Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd.*, , paragraphs 20 and 21 of which contained the relevant discussion. These read as follows :

20. The term "levy" appears to us to be wider in its import than the term "assessment". It may include both "imposition" of a tax as well as "assessment". The term "imposition" is generally used for the levy of a tax or duty by legislative provisions indicating the subject-matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate "levy" with an "assessment" as well as with the collection of a tax when it held that "when the payment of tax is enforced, there is a levy". We think that although the connotation of the term "levy" seems wider than that of "assessment", which it includes, yet it does not seem to us to extend to "collection". Article 265 of the Constitution makes a distinction between "levy" and "collection". We also find that in *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, at 2045, this court made a distinction between "levy" and "collection" as used in the Act and the Rules before us. It said there with reference to Rule 10:

We are not inclined to accept the contention of Dr. Syed Mohammed that the expression "levy" in Rule 10 means actual collection of some amount. The charging provision Section 3(1) specifically says: "There shall be levied and collected in such a manner as may be prescribed the duty of excise...." It is to be noted that Sub-section (1) uses both the expressions "levied" and "collected" and that clearly shows that the expression "levy" has not been used in the Act or the Rules as meaning actual collection.

Having regard to the view that we have taken, we do not wish to express an opinion in this case as to whether the inclusion of the amount in the bills of the assessee would amount to a collection within the meaning of the section. For the reason earlier indicated, we allow this appeal, set aside the order of the learned Judge and direct that O.P. No. 5371 of 1972 would stand dismissed. There will be

no order as to costs.

Counsel for the writ petitioner (respondent in the appeal) submitted that recovery proceedings can only be taken against the assets of the deceased in the hands of the writ petitioner. We think it quite unnecessary for us to clarify this obvious principle.