
(1978) 08 KL CK 0007

In the High Court Of Kerala

Case No : T.R.C. No"s. 14 and 15 of 1978

T.S. Govindarajulu Naidu

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 16-08-1978

Acts Referred:

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

Citation : (1979) 43 STC 233

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

Bench : Division Bench

Advocate : T.L. Viswanatha Iyer, for the Appellant; The Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Gopalan Nambiyar, C.J.—These tax revision cases are concerned with the assessment to sales tax passed on the revision petitioner for the years 1972-73 and 1973-74. The assessee is a dealer in synthetic gems. The assessee purchases the gems locally and sells them in Tiruchi and other places outside the State. For purchases and sales thus made by the assessee he was made liable u/s 5A of the Act. The provisions of the said section may be read :

5 A. Levy of purchase tax.—(I) Every dealer who in the course of his business purchases from a registered dealer or from any other person any goods, the sale or purchase of which is liable to tax under this Act, in circumstances in which no tax is payable u/s 5, and either-

(a) consumes such goods in the manufacture of other goods for sale or otherwise; or

(b) disposes of such goods in any manner other than by way of sale in the State; or

(c) despatches them to any place outside the State except as a direct result of

sale or purchase in the course of inter-State trade or commerce,

shall, whatever be the quantum of the turnover relating to such purchase for a year, pay tax on the taxable turnover relating to such purchase for that year at the rates mentioned in Section 5.

(2) Notwithstanding anything contained in Sub-section (1), a dealer (other than a casual trader or agent of a non-resident dealer) purchasing goods, the sale of which is liable to tax u/s 5, shall not be liable to pay tax under Sub-section (1) if his total turnover for a year is less than twenty-five thousand rupees :

Provided that where the total turnover of such dealer for the year in respect of the goods mentioned in Clause (i) of Sub-section (1) of Section 5 is not less than two thousand five hundred rupees, he shall be liable to pay tax on the taxable turnover in respect of those goods.

(3) Notwithstanding anything contained in the foregoing provisions of this section, a dealer referred to in Sub-section (1), who purchases goods the sale of which is liable to tax under Clause (ii) of Sub-section (1) of Section 5, and whose total turnover for a year is not less than twenty-five thousand rupees but not more than thirty thousand rupees may, at his option, instead of paying the tax in accordance with the provisions of Sub-section (1), pay tax at the rate mentioned in Sub-section (1) of Section 7 in accordance with the provisions of that section.

Stated broadly and briefly, the ingredients necessary to attract liability are: (1) that the assessee must be a purchaser from a registered dealer or from any other person of goods, the sale or purchase of which is liable to tax under the Act; and (2) the purchase must have been in circumstances in which no tax is payable u/s 5; and (3) the goods purchased must have been consumed in the manufacture of other goods for sale or otherwise. The rest of the section is not material and need not be noticed. In other words, for the purpose of this case, it is only Sub-clause (a) of Sub-section (1) of Section 5A that has application and no other sub-clause. We may now turn to Section 5(1) of the Act, which is the charging section. The said section, in so far as it is material, reads :

5. Levy of tax on sale or purchase of goods.-(1) Every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than twenty-five thousand rupees and every casual trader or agent of a non-resident dealer, whatever be his total turnover for the year, shall pay tax on his taxable turnover for that year,-

(i) in the case of goods specified in the First or Second Schedule, at the rates and only at the points specified against such goods in the said schedules ; and

(ii) in the case of other goods, at the rate of four per cent at all points of sale.

Synthetic gems, which are the goods with which we are concerned in this case, are goods not specified in the First or Second Schedule and, therefore, governed by Sub-clause (ii) of Section 5(1) and liable to be assessed to tax only at all

points of sale (and not at the point of purchase) u/s 5(1)(ii). Section 9 of the Act grants exemption from tax to a dealer in respect of goods specified in the Third Schedule to the Act; and Section 10 confers a power on the Government to grant exemption or reduction in the rate of tax on the sale or purchase of any goods specified or class of goods at all points or specific point or points, etc. In pursuance of Section 10, Notification G. O. (Ms.) No. 95/72/TD dated 30th November, 1972 (S.R.O. No. 658/72), has been issued, which is as follows:

In exercise of the powers conferred by Section 10 of the Kerala General Sales Tax Act, 1963 (15 of 1963), the Government of Kerala, having considered it necessary in the public interest so to do, hereby make an exemption in respect of the tax payable under the said Act by any dealer on the sale of polished synthetic gems, whether they are sold loose or as part of any article in which they are set.

In pursuance of these provisions, counsel for the assessee contended that the effect of Section 5A read with the exemption granted u/s 10 would be to make the sale or purchase one which is not liable to tax under the Act. Alternatively, it was contended that even if the operation of the exemption does not have the effect of nullifying the liability under the Act, the sale or purchase must be regarded as "in circumstances in which no tax was payable" under the latter part of Section 5A(1) of the Act. Either way, it was claimed, that the provisions of Section 5A would operate in favour of the assessee to relieve him from liability to tax. Counsel for the assessee relied upon the decision of a learned Judge of this Court in *Malabar Fruit Products Company v. Sales Tax Officer, Palai* 1972 K..L.T. 246, where the learned Judge dealt with the effect of an exemption from tax liability, and held after noting the ingredients u/s 5A of the Act and the definition of "goods" that the goods must be understood as "taxable goods". It was observed :

The term "goods" is exhaustive enough to include all kinds of movable property and growing crops, grass or things attached to or forming part of the land. Therefore, what is the purpose of the further qualification to the term "goods", namely, the sale or purchase of which is liable to tax ? The qualification can possibly refer only to the provisions for exemption such as that in Section 10 of the Act. Section 10 provides that Government may, if they consider it necessary in the public interest, by notification in the Gazette make an exemption or reduction in rate, in respect of any tax payable under the Act on the sale or purchase of any goods, at all points or at a specified point or points in the series of sales or purchases by successive dealers. Several goods have been exempted at all points of sale or purchase in the State by any person, as, for example, vegetables. They are no doubt goods as the term is defined, but are not goods liable to tax under the Act because of the exemption u/s 10. If this clause "the sale or purchase of which is liable to payment of tax" is not read in this manner, the entire clause becomes redundant as otherwise all goods are brought within the scheme of taxation u/s 5 of the Act. All movable properties included in the definition of the goods are automatically within the scheme of taxation at some

point or other u/s 5(1) of the Act. If that be the case, the qualification of the term "goods" by the words "sale or purchase of which is liable to tax under this Act" if intended as a qualification can only refer to such provisions of Section 10 of the Act. Such a construction is evidently reasonable because in regard to such goods which are exempted at all points there is no reason to think that tax should be levied u/s 5A as there could not be any idea of checking of evasion in regard to sales tax on such goods.

In *The State of Tamil Nadu Vs. M.K. Kandaswami and Others*, construing the provisions of Section 7-A read with Section 17(1) of the Tamil Nadu General Sales Tax Act, almost similarly, if not identically, worded, the Supreme Court also came to the conclusion that the effect of a provision for exemption coupled with the provision making the tax exigible would be to nullify liability and to lead to the conclusion that the goods in question are not liable to tax. Section 7-A of the Act there construed was practically the same as Section 5A of our Act. The Court observed :

We are unable to accept this interpretation which would render Section 7-A(1) wholly nugatory. With due respect, it seems to us that in arriving at this erroneous interpretation, the learned Judge mixed up the concept of goods liable to tax with the transactions liable to tax under the Act. The scheme of the Act involves three inter-related but distinct concepts which may conveniently be described as "taxable person", "taxable goods" and "taxable event". All the three must be satisfied before a person can be saddled with liability under the Act. Nevertheless, the distinction between them, if overlooked, may lead to serious error in the construction and application of the Act. "Goods" is defined in Section 2(j) as:

All kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes all materials, commodities, and articles (including those to be used in the fitting out, improvement or repair of movable property); and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Taxable person" is a "dealer" as defined in Section 2(g). "Taxable event" is the "sale or purchase of "goods"" effected during the accounting period although the tax liability is enforced only after quantification is effected by assessment proceedings. "Sale" is defined in Section 2(n) as :

"Every transfer of the property in goods by one person to another in the course of business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge."

Section 3(2), which is the main charging provision, enjoins that in the case of goods mentioned in the First Schedule, the tax under this Act shall be payable by a dealer at the rate and only at the point specified therein on the turnover in each year relating to such goods whatever be the quantum of turnover in that year.

The focal point in the expression "goods, the sale or purchase of which is liable to tax under the Act," is the character and class of goods in relation to their exigibility. In a way this expression contains a definition of "taxable goods", that is, goods mentioned in the First Schedule of the Act, the sale or purchase of which is liable to tax at the rate and at the point specified in the schedule. The words "the sale or purchase of which is liable to tax under the Act" qualify the term "goods" and exclude by necessary implication goods, the sale or purchase of which is totally exempted from tax at all points u/s 8 or Section 17(1) of the Act. The goods so exempted-not being "taxable goods"-cannot be brought to charge u/s 7-A.

The words "under the Act" will evidently include a charge created by Section 7-A also. It is to be noted that Section 7-A is not subject to Section 3; it is by itself a charging provision. Section 7-A brings to tax goods the sale of which would normally have been taxed at some point in the State, subsequent to their purchase by the dealer if those goods are not available for taxation, owing to the act of the dealer in (a) consuming them in the manufacture of other goods for sale or otherwise, or (b) despatching them in any manner other than by way of sale in the State, or (c) despatching them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce.

The decision seems to be directly in favour of the assessee. But the learned Government Pleader contended that on the language of the section, there is a difference between non-liability to tax under the Act and an exemption from liability in pursuance of its provision. This may well be so. But the combined effect of a provision imposing liability to tax and of one granting exemption from the said liability is, for all practical purposes, to hold that there is no liability to tax under the Act. This view is what prevailed with the learned Judge of this Court in *Malabar Fruit Products Company v. Sales Tax Officer, Palai* 1972 KLT 246 and with the Supreme Court in *The State of Tamil Nadu Vs. M.K. Kandaswami and Others*, .

2. The learned Government Pleader stressed the distinction between non-liability and an exemption from tax with respect to the decision of the Supreme Court in *A.V. Fernandez Vs. The State of Kerala*, . But in view of the later decision of the Supreme Court in *State of Tamil Nadu v. M.K. Kandaswami* on the scope of the provisions of an Act almost similarly worded, we think the contention of the counsel for the assessee must prevail. We accept the same.

3. We are also of the view that whatever be the combined effect of an imposition of tax u/s 5A and the grant of an exemption in pursuance of a notification u/s 10, the latter part of Section 5A(1) is wide enough to make out a case in favour of the assessee. By reason of the exemption granted, we think it could well be contended by the assessee that the sale or purchase of the synthetic gems was "in the circumstances in which no tax is payable u/s 5".

4. The learned Government Pleader had a contention that the range of the

exemption is not co-extensive with the range of liability to tax u/s 5A. It was pointed out that Section 5A imposes liability on goods the "sale or purchase of which" is liable to tax under certain conditions and circumstances dealt with in the section; whereas the exemption from tax granted by the notification in question is only in respect of the sale of polished synthetic gems and not in respect of the purchase of such gems. It was, therefore, said that it cannot be said that there is a total exemption from the sphere of tax liability. Counsel for the assessee replied that while both a sale and a purchase are covered by Section 5A, and a sale alone is referred in the exemption notification, there is a good justifying reason for the same ; viz., that synthetic gems are liable u/s 5(1) (ii) of the Act only at the point of sale and not at the point of purchase. In view of this, we agree with the counsel for the assessee that as far as the synthetic gems are concerned the exemption is total and the combined effect of the exemption together with the provision in Section 5A, for all practical purposes, is to hold that the sale of the synthetic gems is not liable to tax under the Act or is under circumstances under which no tax is payable.

Being of this view, the contrary conclusion taken by the Sales Tax Appellate Tribunal cannot be sustained. We allow these tax revision cases and set aside the orders of the Tribunal. There will be no order as to costs.