

(2002) 10 KL CK 0066
In the High Court Of Kerala
Case No : O.P. No. 5084 of 1995

United Enterprises

APPELLANT

Vs

Sales Tax Officer

RESPONDENT

Date of Decision : 18-10-2002

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 19, 35

Citation : (2003) 1 ILR (Ker) 268 : (2003) 1 KLT 725 : (2004) 138 STC 500

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Advocate : N.N. Divakaran Pillai, for the Appellant; Georgekutty Mathew, Government Pleader, for the Respondent

Judgement

G. Sivarajan, J.—The matter arises under the K.G.S.T. Act, 1963 (hereinafter referred to as "the Act"). The petitioner is a partnership-firm doing business of running a bar attached hotel by name "Hotel Rachana" at Chalakkudy. It is an assessee on the files of the Sales tax Officer, Chalakkudy. For the assessment year 1989-90 the petitioner filed a return showing a total and taxable turnover of Rs. 12,70,323 and Rs.2,34,369 respectively. The assessing authority completed the assessment by its order dated 21st March, 1992 fixing the total and taxable turnover at Rs. 13,25,156.94 and Rs. 2,81,060 respectively. The taxable turnover under restaurant Section declared was Rs. 2,34,369. The turnover u/s 5A fixed included purchase turnover of cooking gas worth Rs. 7,267 without bills.

2. The assessing authority later issued a notice dated 12th January, 1995 (Ext.P-2) u/s 19 of the Act in respect of three assessment years 1989-90, 1990-91 and 1991-92, inter alia, stating that during the assessment year 1989-90 the petitioner had purchased goods for Rs. 3,35,125.80, that the petitioner had conceded only a sales turnover of Rs. 2,34,200, that generally in bar attached hotels the sales turnover under restaurant Section must be atleast 1 1/2 times of the purchase value of goods used for the preparation of cooked food which is an acceptable norm in the line of business and the turnover

disclosed is nearly 70 per cent of the cost of goods only which is not acceptable. It is therefore stated in the notice that the turnover should have been fixed at Rs. 5,02,689 as against the conceded turnover of Rs. 2,34,200 and therefore it is clear that there is an escapement of turnover to the extent of Rs. 2,68,220 which has resulted in a short levy of sales tax, additional sales tax and surcharge Rs. 35,688. The petitioner filed his reply dated 21st March 1985 (Ext. P-3). The petitioner had also raised an additional objection in respect of the assessment year 1989-90 that the reassessment is barred by limitation. According to the petitioner, the proposal for reassessment u/s 19 of the Act in respect of the assessment year 1989-90 was dropped being barred by limitation. The second respondent, the Deputy Commissioner of Agricultural Income Tax and Sales Tax, Thrissur thereafter issued a notice dated 7th March, 1993, (Ext. P-5) u/s 35 of the Act in respect of the assessment year 1989-90 pointing out the fact that as against the purchase turnover of Rs. 3,35,125.80 used for preparation of cooked food for sale the turnover conceded is only Rs.2,34,369, i.e. only about 70 per cent of the cost of goods consumed and that generally the sales turnover under food items will be at least 11/2 items of purchase value of goods used for preparation of food and there is escape in the taxable turnover of food items under restaurant Section and short levy of tax. It is also stated that the turnover u/s 5A of the Act fixed includes purchase turnover of cooking gas worth Rs.7,269 without bills which is taxable at 15 per cent as against 5 per cent levied in the order, which also resulted in short levy of tax. It was further stated that the second respondent proposed to set aside the assessment in exercise of its powers conferred u/s 35 of the Act and to remand the case to the assessing authority to dispose of according to law. The petitioner was directed to file objections, if any, to the said proposal. The petitioner has challenged this notice in this Original Petition.

3. No counter-affidavit is filed by the respondents.

4. Sri. N.N. Divakaran Pillai, learned Counsel appearing for the petitioner submits that the assessing authority had completed the assessment of the petitioner for the year 1989-90 after due consideration of all the aspects and that the assessing authority sought to reopen the assessment for the year u/s 19 of the Act and dropped further proceedings in view of the bar of limitation. The counsel on the basis of the aforesaid factual situation submitted that the second respondent Deputy Commissioner has no power to invoke Section 35 of the Act for the purpose of getting at escaped turnover for which the only remedy provided is Section 19 of the Act. He also submits that in exercising the power u/s 35 it would not be permissible to the Deputy Commissioner to trench upon the power of the assessing authority u/s 19 of the Act. He also submits that even if such a power is to be invoked, it can only be subject to the other provisions of the Act, in this case within the time provided for making re-assessment u/s 19 of the Act. The Counsel in support of the said contention has relied on the decision of the Supreme Court in *State of Kerala v. Cheria Abdulla and Co.* (1965) 16 STC 875 and the decision of the Karnataka High Court in *Bidar Sahakar Sakkare*

Karkhane Ltd. v. State of Karnataka (1985) 58 STC 65 besides other decisions.

5. The learned Government Pleader appearing for the respondents submitted that the power of the assessing authority u/s 19 of the Act and of the Deputy Commissioner u/s 35 of the Act are totally different powers, which are mutually exclusive also. He also submits that the Deputy Commissioner is entitled to invoke the supervisory power conferred u/s 35 of the Act even to rope in escaped turnover provided the conditions specified in Section 35 viz., that the order is vitiated by illegality, irregularity or impropriety are made out. He further submitted that the bar of limitation provided u/s 19 of the Act cannot have any application for invocation of the provisions of Section 35 of the Act and that for the application of the said Section a specific time limit, is provided in Section 35 itself. The Government Pleader in support of his contentions has relied on the decision of the Full Bench of this Court in Madras Rubber Factory Ltd. v. State of Kerala (1979) 44 STC 208 : 1979 KLT 572 and the decision of a Division Bench of this Court in T.R.C. No. 282 of 2001.

6. In order to appreciate the rival contentions it is necessary to refer to the provisions of Section 35 of the Act as it stood at the relevant time. Section 35 reads as follows:

"35. Powers of revision of the Deputy Commissioner suo motu.- (1) The Deputy Commissioner may of his own motion, call for and examine any order passed or proceedings recorded under this Act by any officer or authority subordinate to him other than an Appellate Assistant Commissioner and may make such enquiry or cause such enquiry to be made and subject to the provisions of this Act, may pass such order thereon as he thinks fit.

(2) The Deputy Commissioner shall not pass any order under Sub-section (1) if - (a) the time for appeal against the order has not expired; (b) the order has been made the subject of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal or of a revision in the High Court; or (c) more than four years have expired after the passing of the order referred to therein.

2A. Notwithstanding anything contained in Sub-section (2), the Deputy Commissioner may pass an order under Sub-section (1) on any point which has not been decided in an appeal or revision referred to in Clause (b) of Sub-section (2), before the expiry on a period of one year from the date of the order in such appeal or revision or before the expiry of the period of four years referred to in Clause (c) of that

Sub-section, whichever is later.

(3) No order under this Section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard."

The scope of Section 35 of the Act was considered by a Division Bench of this Court in O.Kassim Kannu v. State of Kerala (1970) 26 STC 530 which held that the revisional power of the Deputy Commissioner including the power of further

investigation u/s 35 of the Act is to be used only to correct the illegality, irregularity or impropriety of the order sought to be revised and is not to be used in another field of jurisdiction, viz., the jurisdiction of the Sales Tax Officer to assess the escaped turnover u/s 19 of the Act.

7. The Division Bench relied on the decisions of the Supreme Court in *State of Kerala v. Appukkutty* (1963) 14 STC 242 *State of Kerala v. Cheria Abdulla and Company* (1965) 16 STC 875 *Swastik Oil Mills Ltd. v. H.B. Munshi*, Deputy Commissioner of Sales Tax (1968) 21 STC 383 *The Deputy Commissioner of Agricultural Income Tax and Sales Tax v. Dhanalakshmi Vilas Cashew Co.* (1969) 24 STC 491 and held that "the revisional power of the Deputy Commissioner is separate and distinct power; an independent jurisdiction and that the two powers operate in two fields so that they cannot overlap and the revisional power of the Deputy Commissioner cannot trench upon the power of the Sales Tax Officer to access escaped turnover. If it does, it oversteps its field and is thus beyond the Deputy Commissioner's jurisdiction". Another Division Bench of this Court in *C.C. Transport Company v. State of Kerala* (1970) 40 STC 444 where a question arose directly with reference to the provisions of Sections 19 and 35 of the Act and the Division Bench held that while the revisional power is restricted to the examination of the records for determining whether the order of assessment was according to law, the power to assess escaped turnover can be exercised in matters de hors the record of assessment proceedings and therefore these two Sections relate to different jurisdiction and different matters. It was also held that a valid order under the one is not an infringement of the power under the other. The Division Bench also relied on the very same decisions which were relied on by the earlier Division Bench in *Kassim Kannu's* case mentioned supra. In view of these two conflicting decisions a Full Bench of this Court was called upon to consider the question regarding the scope of the revisional power u/s 35 of the Sales Tax Act and as to whether in exercise of the said power it is open to the revisional authority to trench upon the power and jurisdiction of getting at the escaped turnover and bringing the same to tax or assessment. In *Madras Rubber Factory Ltd. v. The State of Kerala* (1979) 44 STC 208 the Full Bench after extracting the provisions of Sections 19 and 35 of the Act and also after extracting the analogous provisions of the General Sales Tax Act, 1125 and Section 15 of the said Act and Rule 33 of the Rules issued thereunder observed in paragraph 3 of the judgment as follows:

"3. In the face of these statutory provisions sketching the ambit of the respective powers and, as a matter of first impression, there appears to be no bar or inhibition against getting at escaped income in exercise of the revisional power so long as the grounds for exercise of that power are made out, viz., that the order is vitiated by illegality, irregularity or impropriety. This is the view that has been taken in more than one decision of the Supreme Court and of this and other High Courts. We are of the opinion that the contrary view which is reflected in at least one of the Division Bench rulings of this Court and in some of the other decisions cannot be sustained."

The Full Bench thereafter considered all the relevant decisions of the Supreme Court including the decisions considered by the earlier two Division Benches as also the other decisions of the other courts and held in paragraph 17 of the judgment as follows:

"17. We began the discussion of the question by recording our first impression on the statutory provision. The power of assessing escaped turnover and of revision are two distinct and separate powers. They have been conferred on two different authorities under Sections 19 and 35, the latter power being conferred on a superior authority. An examination of the authorities has only confirmed our first impression."

8. Thus the decision of the Full Bench is to the effect that there is no bar or inhibition against getting at escaped income in exercise of the revisional power, so long as the grounds for exercise of that power are made out, viz., that the order is vitiated by illegality, irregularity or impropriety.

9. The Supreme court in *Bombay Ammonia Pvt. Ltd. v. State of Tamil Nadu* (1969) 37 STC 517 held as follows:

"In view of the above, we are of the opinion that the suo motu power of revision of the Deputy Commissioner is of wide amplitude and can be exercised in favour of the revenue as well as the taxpayer in order to correct any error or illegality committed by the assessing authority in his order of assessment,"

The Supreme Court in *The Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon and Anr. v. Dhanalakshmi Vilas Cashew Co.* (1969) 24 STC 491 had occasion to consider the question as to whether the bar of limitation provided for bringing in escaped turnover under assessment was applicable to the exercise of revisional power by the Deputy Commissioner u/s 15(1) of the General Sales Tax Act, 1125. It was held that the bar of limitation provided for bringing in escaped turnover under assessment was not applicable to the exercise of revisional power. This decision was again followed by the Supreme Court in *State of Kerala v. K.E. Nainan* (1970) 26 STC 251. A Division Bench of this Court in the judgment dated 4th October, 2001 in T.R.C. No. 282 of 2001 and connected cases considered the question as to whether the exercise of power u/s 34(a)(i) of the K.G.S.T. Act is controlled by the period of limitation prescribed for bringing in escaped turnover in exercise of the power u/s 19 of the Act, which is vested in the assessing authority. The Division Bench relied on the decision of the Supreme Court in *Dhanalakshmi Vilas Cashew Company's* case and *K.E. Nainan's* case mentioned supra and held that the appellate authority while exercising power u/s 34(3)(a)(i) of the Act is not controlled by the period of limitation prescribed u/s 19 of the Act with the observation that the revisional power is also part of the appellate power.

10. From the decisions of the Full Bench of this Court and the decisions of the Supreme Court discussed supra, the following propositions emerge (1) the Deputy Commissioner while exercising powers u/s 35 of the Act - Supervisory

power -can get at escaped income so long as the grounds for exercise of that power are made out, viz., that the order is vitiated by illegality irregularity or impropriety and (2) the exercise of power u/s 35 of the Act is not controlled by the period of limitation prescribed for bringing in escaped turnover in exercise of the power u/s 19 of the Act which is vested in the assessing authority.

11. In the instant case, as already noted, the main contention of the petitioner is that the Deputy Commissioner cannot invoke the provisions of Section 35 of the Act for getting at escaped turnover as proposed in Ext. P-5 notice and that even if the Deputy Commissioner has got any such power is subject to the limitation provided for assessing the escaped turnover u/s 19 of the Act by the assessing authority.

12. In view of the principles laid down by the Supreme Court and by this Court discussed herein above, I am of the view that there is no merit in the said contentions taken by the petitioner. I accordingly dismiss this Original Petition. It is for the petitioner to file objections to Ext. P-5 notice and for the second respondent to pass orders in accordance with law after considering the said objections. The petitioner will file its objections to Ext. P-5 within a period of one month from today. In view of the fact that this is a matter of 1995 in respect of the assessment year 1989-90, I direct the second respondent to take a decision in the matter as directed above with a period of two months thereafter.