

(1997) 02 KAR CK 0076

In the Karnataka High Court

Case No : Writ Petition No"s. 14254 of 1992, 274 of 1995 and 32660 of 1996

Universal Transformers

APPELLANT

Vs

Assistant Commissioner of Commercial Taxes and Others

RESPONDENT

Date of Decision : 28-02-1997

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 5 (3) (a), 6 B

Citation : (2003) 133 STC 356

Hon'ble Judges : H.L. Dattu, J

Bench : Single Bench

Advocate : S. Narayana, for the Appellant; Shivayogiswamy, High Court Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Dutta, J.—This group of writ petitions had been heard together, because, a common question of law arises in all these cases. These petitions are disposed of by this common order.

2. Petitioner is common in all these petitions. Petitioner is a proprietary concern and registered both under Karnataka Sales Tax Act, 1957 (for short, "the Act") and Central Sales Tax Act ("CST Act", for short). Petitioner is engaged in the manufacture of electrical goods including transformers. The assessment years in question in these cases are 1989-90, 1992-93 and 1993-94.

3. During the assessment years in question, petitioner had undertaken the manufacture of transformers to M/s. Kirloskar Company, Bangalore. After such manufacture, petitioner has effected sale of such goods which are liable to tax under the Act, to the brand name holder namely, M/s. Kirloskar Company. The sale of such goods by the manufacturer to the brand name holder is deemed to be "not a sale" by the first dealer liable to tax under the proviso to Section 5(3) (a) of the Act.

4. Petitioner claimed exemption from levy of turnover tax u/s 6B of the Act for

the assessment years in question on the pretext that the sale of branded goods by the manufacturer to the brand name holder would not constitute turnover in the hands of the petitioner by virtue of proviso to Section 5(3)(a) of the Act.

5. The Sales Tax Officer while framing the assessment orders for the aforesaid assessment years has refused to exempt turnover tax as claimed by the petitioner in his returns.

6. The only dispute in these petitions is about the incurability of transaction relating to the branded goods in the "total turnover" of the petitioner for the purpose of levy of turnover tax u/s 6B of the Act. The question which requires to be considered and decided is whether the exemption from payment of sales tax under the proviso to Section 5(3)(a) of the Act would extend the exemption from payment of turnover tax u/s 6B of the Act also, when the provision for exemption from the payment of turnover tax is made in the section itself ?

7. Sri S. Narayana, learned counsel for the petitioner contends that in view of the proviso to Section 5(3)(a) of the Act, sale of branded goods by the petitioner/manufacturer to the brand name holder is deemed to be "not a sale" by the first dealer liable to tax and therefore, even for calculating for rate purpose for levy of turnover tax, the sales turnover of branded goods should not be included in the total turnover of the dealer. In that view of the matter, the learned counsel submits that the clarification issued by the Commissioner of Commercial Taxes in CLR. CR 192/87-88 dated June 5, 1987 is not only invalid and illegal and further assessment framed relying on the clarification is not only bad but contrary to the provisions of Section 6B of the Act. In support of his thinking, the learned counsel relies upon the observations made by Supreme Court in the case of A.V. Fernandez Vs. The State of Kerala, , the decision of this Court in the case of Madhur Trading Co. [1993] 90 STC 537 ker and B.P. Automobile's case [1984] 55 STC 93 ker.

8. Per contra, Sri Shivayogiswamy, the learned counsel for revenue sought to justify the impugned order made by the Sales Tax Officer and strongly resists the reliefs sought by the petitioner.

9. The Sales Tax Officer, while framing the assessments for the assessment years 1989-90, 1992-93 and 1993-94 has observed as under :

"I have examined the objections and found that objections relating to branded goods sale are acceptable. However, the objection in respect of turnover tax is rejected as not tenable, since the assessee is liable to pay turnover tax on branded sale u/s 6B of the Act."

10. Section 5 of the Act is the charging provision. It speaks of levy of tax on sale or purchase of goods. Section 5(3)(a) specifies single point levy in respect of certain goods by the first or earliest of successive dealers in the State. Proviso provided to this sub-section is relevant for the purpose of this case. The same reads as under :

"Provided also that where any goods liable to tax under this Act are produced or manufactured by a dealer with the name or trade mark registered under the Trade and Merchandise Marks Act 1958 (Central Act 43 of 1958) of any other dealer and which are not used by the latter as (raw materials, component parts or packing materials) as defined under the explanation to Section 5A, the sale of such goods by the dealer who has produced or manufactured to the dealer who is the brand name or trade mark holder, shall not be deemed to be, but the subsequent sale of such goods by the dealer having the right either as proprietor or otherwise to use the said name or the trade mark, either directly or through another, on his own account or on account of others shall be deemed to be the sale by the first dealer liable to tax under this section."

11. Proviso to the sub-section carves out an exception to main sub-section. The essential ingredients of the aforesaid provision are:

- "(a) the goods must be liable to tax under the Act ;
- (b) that goods must be produced or manufactured by a dealer;
- (c) the production or manufacture should be for the brand name or trade mark holder ;
- (d) the brand name holder should not use the goods purchased as raw materials, component parts or packing materials ;
- (e) the sale of such goods by the manufacturer to the brand name holder is deemed not to be a sale by the first dealer liable to tax ; and
- (f) the subsequent sale of such goods by the brand name holder or his agent or any other person acting on his behalf is deemed to be the sale by the first dealer liable to tax under the sub-section."

12. The use of the expression "deemed" in the proviso to Sub-section 5(3)(a) of the Act clearly indicates that even though the supply of produced or manufactured goods by the manufacturer to the brand name holder would come within the definition of "sale" but the Legislature gives the transaction an artificial construction and says it is not a sale by the first dealer liable to tax. By this deeming provision, Legislature creates a fiction and thereby excludes the transaction which is a sale as "not a sale" for the purpose of Section 5(3)(a) of the Act.

13. In these petitions, we are concerned with the effect of the proviso on the other charging section, viz., Section 6B of the Act.

14. Section 6B of the Act is an independent charging section to tax the turnover of a dealer at the prescribed rate irrespective of the fact whether any part of such turnover has suffered any tax under any other provisions of the Act. Section itself provides for certain exemptions. Section 6B makes it clear that a dealer is liable to pay turnover tax if his total turnover is not less than 10 lakhs, whether or not the whole or any portion of such turnover is liable to tax under any other

provisions of the Act. First proviso in the section, declares that turnover tax is not payable on that part of the turnover which relates to Clauses (i) to (xiii). The other proviso appended to the section declares that no other deductions is permissible from the total turnover of a dealer apart from the exemptions enumerated under the first proviso.

15. In the charging section, we have the expressions like "total turnover" and "turnover". The word "total turnover" is defined under the Act to mean the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax. Likewise, the expression "turnover" is also defined to mean the aggregate amount for which the goods are bought or sold or supplied or distributed by a dealer, whether for cash or for deferred payment or valuable consideration.

16. For the purpose of imposition of tax u/s 6B of the Act, the preliminary requirement is to find out the dealer who is liable to pay the turnover tax. The Act envisages computation of total turnover of a dealer by including turnover in all goods of a dealer at all places of business whether or not the whole or any portion of such turnover is liable to tax. After the computation is made at the stage of the assessment, turnover will be computed by excluding therefrom that part of the turnover which relates to Clauses (i) to (xiii).

17. Keeping in view the relevant charging provisions under the Act, let me now advert to the problem posed before the court in these petitions.

18. The proviso to Section 5(3)(a) of the Act, states that sale of the branded goods by the manufacturers to the brand name or trade mark holder shall not be deemed to be a sale for the purpose of this section. The proviso is confined in its application, only to Sub-section (3)(a) of Section 5 of the Act and not for the purposes of the Act. In other words when the petitioner/manufacturer sells the transformers, which goods are liable to tax under the Act, to M/s. Kirloskar Electric Company, the trade mark holder, Legislature mandates that such transaction is not a sale by the first dealer for the purpose of Section 5(3)(a) alone even though the activity would come within the meaning of the expression "sale" as defined u/s 2(t) of the Act. Legislature further mandates that the transfer of property in the goods by the brand name holder to the other is deemed to be a sale by the first dealer liable to tax under Sub-section (3)(a) of Section 5 of the Act. It is pertinent to notice here itself, that goods are liable to tax but the transfer of property in the goods by the manufacturer to the brand name holder is exempted from levy of sales tax. It is again to be noticed that in the normal course that subsequent sale would not have been exigible to tax under the Act but the Legislature by creating a fiction imposes liability to pay sales tax on a subsequent dealer, who would not otherwise be liable to pay tax under the Act. The Legislature by using the expression "deemed" brings such subsequent dealer to the net of chargeability to tax under the Act.

19. Section 6B of the Act creates levy of turnover tax under certain specified

circumstances. The liability to pay turnover tax is not on the total turnover of a dealer. For the purpose of imposition of tax u/s 6B of the Act, the preliminary requirement is to find out the dealer who is liable to pay tax. For calculating this tax, the total turnover of a dealer is necessary. For arriving at this total turnover, the turnover exempted u/s 5(3)(a) necessarily requires to be added as has been done by the Sales Tax Officer. The turnover u/s 5(3)(a) by the manufacturer is included only for the purpose of classifying or identifying the dealer but not for the purpose of imposing turnover tax on the dealer. The Supreme Court in *A.V. Fernandez Vs. The State of Kerala*, was pleased to explain the distinction between exemption from tax and non-liability to tax of a commodity. The court was pleased to observe as under :

"Sales or purchases in respect of which there is no liability to tax imposed by the statute cannot at all be included in the calculation of turnover for the purpose of assessment and the exact sum which the dealer is liable to pay must be ascertained without any reference whatever to the same.

There is a broad distinction between the provisions contained in the statute in regard to the exemptions, of tax or refund or rebate of tax on the one hand and in regard to the non-liability to tax or non-imposition of tax on the other. In the former case, but for the provisions as regards the exemptions or refund or rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are *prima facie* liable to tax and the only thing which the dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. In the latter case, the sales or purchases are exempted from taxation altogether. The Legislature cannot enact a law imposing or authorizing the imposition of a tax thereupon and they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed."

20. In the instant case, there cannot be any dispute that the sale of goods mentioned in Section 5(3)(a) of the Act has to be included in the total turnover and at the stage of assessment, turnover in respect of such goods must be excluded while calculating turnover tax. Therefore, it cannot be said that the goods mentioned in proviso to Section 5(3)(a) of the Act is taken out of the purview of the Act altogether and a person who deals in such goods is not to be treated as a dealer under the Act at all. Bearing in mind the distinction pointed out by Supreme Court in *A.V. Fernandez Vs. The State of Kerala*, , it must be held that the sale of branded goods made by the petitioner are liable to be included in the total turnover and the only thing that the petitioner is entitled to claim deduction of sales under proviso to Section 5(3)(a) of the Act from the total turnover in order to arrive at the turnover on which turnover tax can be imposed. In that view of the matter, it cannot be said that the transactions in the

instant case are taken out of the ambit of the Act itself. The exemption as I have indicated earlier, is only in respect of transactions under proviso to Section 5(3) (a) of the Act. Consequently, it follows that the petitioner is liable to pay turnover tax u/s 6B of the Act.

21. For the reasons stated, I do not find any merit in the contentions canvassed by learned counsel for the petitioner. Accordingly, petitions are liable to be dismissed. Hence, the following order--

Petitions are dismissed. Rule discharged in the facts and circumstances of the case, parties are directed to bear their own costs.