

(2002) 10 KL CK 0075

In the High Court Of Kerala

Case No : T.R.C. No's. 46 of 2000 and 277 of 2001

West Coast Industrial Gases Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 29-10-2002

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 2, 5(1)

Citation : (2003) 132 STC 177

Hon'ble Judges : K. Balakrishnan Nair, J;G. Sivarajan, J

Bench : Division Bench

Advocate : K.K. Vijayaraghavan and S.K. Devi, for the Appellant; Georgekutty Mathew, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

G. Sivarajan, J.—An assessee under the Kerala General Sales Tax Act, 1963 (for short, "the Act") is the revision petitioner in both these cases. The assessment years concerned are 1985-86 and 1986-87. The question that arises for consideration in these two cases is as to whether the amount received by the assessee from the customers for detention of the cylinders in which gas is sold to the customers beyond the period stipulated on the reverse of the sale bills can be deemed to be consideration for the transfer of the right to use cylinder exigible to tax under the Act in view of explanation (3B) to Section 2(xxi) of the Act.

2. The assessee is a dealer in industrial gases and medical oxygen. It supplies industrial gases/medical oxygen to its various customers in cylinders. As per the stipulation in the sale bill, the cylinder has to be returned to the assessee within ten days of the supply. If for any reason the cylinder is not returned within the said period, the instruction in the bill provides for payment of a rent of 75 paise per day for the period after the expiry of ten days up to a period of 20 days and thereafter at the rate of Re. 1 per day till it is returned to the assessee. In the assessments for the two years, i.e., 1985-86 and 1986-87, the assessee had

received certain amounts by way of rent for the delayed return of the cylinders. The assessing authority had included the said amount as turnover exigible to tax under the Act in view of Section 5(1)(iii) of the Act. The assessee filed appeal against the assessment order before the Deputy Commissioner (Appeals), A.I.T. and S.T., Ernakulam wherein the assessee, inter alia, challenged the inclusion of the rent. The first appellate authority agreed with the assessing authority and rejected the claim. This was confirmed by the Tribunal in second appeal.

3. Mrs. S.K. Devi, learned counsel appearing for the assessee, submits that the transaction in question cannot be brought to tax u/s 5(1)(iii) of the Act for the reason that there is no transfer of right to use the cylinder by the assessee. The counsel further submits that the assessee had only sold industrial gas and medical oxygen in cylinders and the provision for payment of the rent provided on the reverse of the sale bill was only to ensure that the cylinders are returned promptly by the customers. The counsel also submits that the assessee had no intention to supply cylinders by way of transfer of right to use the same for consideration. The counsel in support of her contentions relied on the decision of the Orissa High Court in *Asiatic Gases Ltd. v. State of Orissa* [2001] 121 STC 405 and the decision of the Supreme Court in *State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd.* [2002] 126 STC 114.

4. The learned Government Pleader appearing for the respondent-State submits that since the assessee had received rent from the customers for retaining the cylinders beyond the grace period, the said amount is liable to be taxed under the provisions of Section 5(1)(iii) of the Act. According to the Government Pleader, the receipt of rent clearly shows that it was as a result of the transfer of the right to use the cylinder given by the assessee. The Government Pleader also submits that the cylinder is definitely "goods" falling under the definition of "goods" in Section 2(xii) of the Act. He, in support of the said contentions, relied on the decision of the Andhra Pradesh High Court in *Industrial Oxygen Company Pvt. Ltd. v. State of Andhra Pradesh* [1992] 86 STC 539, the decisions of the Supreme Court in *State of Maharashtra v. Britannia Biscuits Company Limited* [1995] 96 STC 642, *Premier Breweries v. State of Kerala* [1998] 108 STC 598 ; (1998) 1 KLT 186 (SC), *20th Century Finance Corporation Ltd. v. State of Maharashtra* [2000] 119 STC 182 ; (2000) 8 KTR 378 and *Kalyani Breweries Ltd. v. State of West Bengal* [1997] 107 STC 190 ; (1998) 6 KTR 277 and the decisions of this Court in *Rohini Panicker v. Additional Sales Tax Officer* [1997] 104 STC 498 ; (1997) 5 KTR 112 and *Adbul Salam v. City Corporation of Thiruvananthapuram* (1999) 3 KLT 75 (S.N. 77). The Government Pleader on the basis of these decisions submits that the Tribunal and the authorities are perfectly justified in assessing the receipt by way of rent under the provisions of Section 5(1)(iii) of the Act.

5. We have already set out the minimal facts that the assessee is a dealer in industrial gases and medical oxygen and that the sale is only of gases. There was no sale of cylinders to the customers and the sale bill will very clearly show that

the sale is only of gases. As such the instruction on the reverse of the bills clearly provides for return of the cylinders within ten days of the supply and in case the cylinder is not returned within the stipulated period, the customers are obliged to pay rent at the rate of 75 paise per day for 20 days and thereafter at the rate of Re. 1 per day till the cylinders are returned to the petitioner. The petitioner had received certain amount by way of rent from the customers also. Now, we have to consider the question as to whether the said rents received by the petitioner can be brought to tax u/s 5(1)(iii). Section 5(1)(iii) of the Act reads as follows :

"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 fifty 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).....(ii)..... (iii) in the case of transfer of the right to use any goods for any purpose whether or not for a specified period at the rate of six per cent at all points of such transfer on an aggregate turnover of fifty thousand rupees and above."

As per the said section every dealer whose total turnover for a year is not less than Rs. 50,000 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 in the case of transfer of the right to use any goods for any purpose at the rate of 6 per cent at all points of such transfer on an aggregate turnover of Rs. 50,000 and above. Thus, in order to attract the provisions of Section 5(1)(iii) it has to be established that (1) the total turnover of a dealer other than a casual trader exceeds Rs. 50,000, (2) the turnover must be the result of the transfer of the right to use any goods for any purposes. In the instant case there is no dispute that the total turnover of the petitioner exceeded to Rs. 2 lakhs. So the only question to be considered is as to whether the turnover which is sought to be included u/s 5(1)(iii) of the Act is the consideration for the transfer of the right to use any goods. There is no dispute that the cylinder is "goods" falling within the meaning of Section 2(xii) of the Act. In order to say that there is a transfer of the right to use the goods, there must be an agreement between the dealer and the customer for giving the right to use the goods absolutely for a period. In the instant case, the assessee never wanted to transfer the right to use the cylinder otherwise than in the case of sale of gases, which were conveyed only in cylinders. Till the entire gas is used the cylinder will necessarily have to be retained by the customer. Such incidental retention of the cylinder by the customers and the provision for payment of some rent to the petitioner for such retention cannot be treated as a part of the agreement between the parties for transfer of right to use the cylinder for consideration. According to us, the consideration in the form of rent provided on the reverse of the sale bill is only for ensuring the proper return of the cylinders by the customers. Such transaction cannot be treated as a transfer of right to use the cylinder by the

petitioner to the customers.

6. In these circumstances, we are of the definite view that the incidental receipt of certain amounts by way of rent for the delayed return of the cylinders by the customers will not fall within the meaning of the expressions "transfer of the right to use any goods". The Andhra Pradesh High Court in *Industrial Oxygen Company Pvt. Ltd. v. State of Andhra Pradesh* [1992] 86 STC 539 considered the question whether sales tax was exigible u/s 5-E of the Andhra Pradesh General Sales Tax Act on the hire charges for the gas cylinders in which gas was sold. The petitioner in that case is a manufacturer of industrial gases such as oxygen, acetylene, etc. It filled the gases produced by it in cylinders and sold them to customers. The gas cylinders in which the gas was sold were given on loan to customers for their use on a rent-free basis for a limited period. After that stipulated period, hire charges per cylinder per day were charged by the petitioner. The hire charges so recovered were brought to tax u/s 5-E of the Andhra Pradesh General Sales Tax Act, 1957. The Andhra Pradesh High Court has taken the view that the cylinders were goods and they were actually being handed over to the customers by the petitioner, and the customers had physical possession of the cylinders. There was transfer of the right to use the cylinders as containers of the gases purchased by the customers. The Andhra Pradesh High Court relying on an earlier decision of its own in *Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer* [1990] 77 STC 182 held that whether there is a transfer of the right to use goods or not is a question of fact which has to be determined in each case having regard to the terms of the contract under which there is said to be a transfer of the right to use goods. The Andhra Pradesh High Court also held that "the cylinders did not continue to be in the possession of the petitioner herein ; possession of the cylinders was delivered to the customers. These facts satisfy the requirement of Section 5-E". The Orissa High Court in *Asiatic Gases Ltd. v. State of Orissa* [2001] 121 STC 405 on almost similar circumstances held that the possession and custody of the cylinders by the customers for 14 days was permissible but the possession beyond 14 days was without authority for which the petitioner was charging a certain amount for early return of the cylinders and that the said consideration was received by way of penalty. Referring to the term "transfer of the right to use", the court observed that it denotes an agreement between two parties. It was further noted that there was an agreement of transfer of the right to use the cylinders for the first 14 days only and that beyond 14 days, the detention was without authority or in total disregard of the terms of the contract and as such, there was no transfer of the right to use the cylinders beyond the free loan period of 14 days. It was further held that the amount received by the petitioner on account of delay in return of cylinders by the purchaser could not be held to be taxable u/s 2(g)(iv) of the Orissa Sales Tax Act. In fact the decision of the Andhra Pradesh High Court in *Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer* [1990] 77 STC 182 was taken up before the Supreme Court and the said decision was affirmed by the Supreme Court in *State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd.* [2002]

126 STC 114. In that case the Rashtriya Ispat Nigam Ltd., which owned the Visakhapatnam Steel Project, allotted different works to contractors. It supplied sophisticated machinery to the contractors for being used in the execution of the contracted works and received charges for the same. The question arose is as to whether the charges received for supplying sophisticated machinery can be assessed to sales tax u/s 5-E of the Andhra Pradesh General Sales Tax Act, 1957. The High Court of Andhra Pradesh, on a consideration of the agreement of the respondent with the contractors, found that the effective control of the machinery, even while the machinery was in use, was with the respondent, the contractors were not free to make use of the machinery for other works or move the machinery out during the period the machinery was in use and held that the transactions between the respondent and the contractors did not involve the transfer of right to use the machinery in favour of the contractors and the hire charges could not be brought to tax u/s 5-E. The Supreme Court has affirmed the said decision by holding that the transaction did not involve the transfer of the right to use the machinery in favour of the contractors and that in the absence of satisfying the essential requirement of Section 5-E, the hire charges collected by the respondent from the contractors were not exigible to sales tax. The observation made by the Supreme Court reads as follows :

"The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to Clauses 1, 5, 7, 13 and 14, it becomes clear that the transaction did not involve transfer of right to use the machinery in favour of contractors. The High Court was right in arriving at such a conclusion. In the impugned order, it is stated and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent-company, the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move, it out during the period the machinery was in his use ; the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against respondent's possession and control of the machinery. It may also be noticed that even the Appellate Deputy Commissioner, Kakinada, in the order dated November 15, 1999 in regard to assessment years 1986-87 and 1987-88 held that under the terms and conditions of the agreement there was no transfer of right to use the machinery in favour of the contractor. Although it cannot be said that the appellant was estopped from contending otherwise in regard to assessment year 1988-89, it is an additional factor and circumstance, which supports the stand of

the respondent."

7. On a consideration of the decisions of the Andhra Pradesh and Orissa High Courts, we are inclined to accept the view taken by the Orissa High Court wherein it is clearly stated that the term "transfer of the right to use" denotes an agreement of transfer of the right to use the cylinders for the first 14 days only and beyond that period the detention was without authority or in total disregard of the terms of the contract and as such there was no transfer of the right to use the cylinders beyond the free loan period of 14 days and the rent charged can only be treated as penalty. The Andhra Pradesh High Court in fact has not set out any principle or logic behind the conclusion reached by them to the effect that the consideration received by the assessee will amount to consideration for transfer of the right to use the goods. The High Court also assumed that mere possession of the cylinders with the customers will amount to transfer of goods.

8. Now, we will advert to the decisions relied oft by the learned Government Pleader. It must be noted that the decisions of the Supreme Court in *State of Maharashtra v. Britannia Biscuits Company Limited* [1995] 96 STC 642, *Premier Breweries v. State of Kerala* [1998] 108 STC 598 ; (1998) 1 KLT 186 and *Kalyani Breweries Ltd. v. State of West Bengal* [1997] 107 STC 190 ; (1998) 6 KTR 277 are not concerned with Section 5(1) of the Act and, therefore, the principles laid down in regard to the question as to whether the deposit for return of tins or bottle deposits can be treated as taxable turnover has no relevance so far as the question as to whether the delayed return of cylinders by the customers and the receipt by way of rent will fall u/s 5(1)(iii) of the Act. Of course the decision in *Rohini Panicker v. Additional Sales Tax Officer* [1997] 104 STC 498 (Ker) ; (1997) 5 KTR 112 (Ker) was concerned with the eligibility to tax on the transaction of lending video cassettes to the members of a club and it is exigible to tax u/s 5(1)(iii) of the Act because that was a direct transfer of goods, i.e., the assessee is lending video cassettes for consideration and, therefore, the division Bench rightly held that the transaction is exigible to tax u/s 5(1)(iii) of the Act. As already noted, in the instant case there is no question of transfer of right to use. It is only for the detention beyond the stipulated period a rent is provided, that cannot be treated as turnover received for transfer of the right to use the cylinders.

For all these reasons, we are of the view that the amount by way of rent received for the delayed return of the cylinder is not liable to be assessed u/s 5(1)(iii) of the Act. We accordingly set aside the orders of the two appellate authorities on this issue and direct the assessing authority to revise the assessment order by deleting the said amount from the assessment.

Both the revisions are allowed as above.