

K.V.Abdul Kadar, Proprietor Kevee Supari Traders

Vs

State of Kerala

(S. P. Bharucha, V. N. Khare JJ)

29.01.1998

JUDGMENT

V.N.KHARE J

1.This Civil Appeal is directed against the judgment dated 26th June, 1992 passed by the High Court of Kerala.

2.According to the appellant, it purchases aeronauts locally and after processing them dispatches the same to agents in the North Indian States for sale on consignment who effect sales according to the market trends and render accounts, sales statements to the appellant. Drafts or cheques for sale proceeds less expenses and commission are also sent simultaneously and the appellant has been paying sales tax for each month by working out the purchase value involved in the sales effected by the agents monthly. It is also stated that at the close of each financial year sometimes certain stocks of goods remain with the agents and the appellant pays sales tax on the purchase value of such stock in subsequent year as and when the stock is sold and the accounts of sales in respect thereof are received from the agents as the stock acquires the quality of last purchase only when the goods are sold.

3.The final sales tax assessment of the appellant for the year 1987-88 was completed by an order dated November 30, 1989. While passing the assessment order the Sales Tax Officer disallowed the contention of the appellant that closing stock valued at Rs.38,91,289.52 pending with the agents outside the State is liable to be excluded. Consequently, the appellant was sent a demand for Rs.1,79,400.00 and surcharge of Rs.11,953.00. Aggrieved, the appellant challenged the said order of assessment by means of a Writ Petition before the High Court of Kerala, but the same was dismissed and a Writ Appeal against the said decision of the Learned single Judge preferred before the Division Bench of the High Court also came to be dismissed by the judgment under appeal.

4.In this appeal the question that arises for consideration is, whether the purchases of the closing stock of goods as on 31st March, held by agents outside the State, could be brought to tax as having attained the quality of last purchase before that date under explanation to Section 2(xxvi) and Section 8(b) of the Act.

5.Before we deal with the argument of learned counsel for the appellant, it is necessary to notice the legal position prior to introduction of Explanation to Section 2(xxvi) of the Act in respect of tax liability of an assessee on the purchases of closing stock of goods on 31st March, held by the agents outside the State. In The State of Madras Vs.I.Narayanaswami Naidu and another (21 STC, 1), this Court was of the view that, under Section 4 of the Madras General Sales Tax Act, a dealer was not

liable to pay sales tax on purchases of goods until the purchases acquired the quality of being the last purchases inside the State. In other words, when the assessee filed a return and declared the stock in hand, the stock in hand could not be said to have been acquired by last purchase, because the assessee might still during the next assessment year sell it or he might himself consume it or the goods might be destroyed. This Court was further of the view that the assessee would be entitled to claim before the assessing authorities that the character of acquisition of the stock in hand was undermined; in the light of subsequent events it might or might not become the last purchase inside the State, and, therefore, the assessee was entitled to claim deduction in respect of the value of the stock as being purchases other than last purchases of goods.

6. It is clear that, in order to give effect to the aforesaid judgment, and further to ensure that the revenue due to the State does not escape assessment, the State Legislature inserted an Explanation to Section 2(xxvi) of the Act defining "total turnover". The Explanation to Section 2(xxvi) was added by Act No.21 of 1978. The Explanation stated that, in the case of every dealer liable to tax under Section 5 regarding the goods which are taxable at the point of last purchase in the State and which are held as a closing stock on the last day of a financial year, the amount for such goods were purchased by the dealer shall be deemed also to be part of his turnover for the subsequent year or each of the subsequent years until such goods are either sold by him in the State or such purchase acquires the character of last purchase in the State in the hands of such dealers and in case such purchase acquires the character of last purchase in the State in the hands of such dealer, the turnover in respect of such purchase shall be liable to tax in the year in which the purchase acquires the character of last purchase. This indicates that the goods which are liable to tax as a last purchases point and form the closing stock of a year, shall be shown in the subsequent year as a part of total turnover until they are sold and the goods acquire the quality of last purchase, exigible to tax. This explanation came to be interpreted by a Division Bench of Kerala High Court in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue(Taxes), Trivendrum Vs.Keveyam & Co.and others (1986(63) STC, 387).The High Court of Kerala interpreting the Explanation held, "that there should not be any distinction between the closing stock of the goods held by an assessee inside the State and outside the State as the goods sent to his agents outside the State on consignment basis still continued to be the goods of the assessee and as the assessee had got the power of disposal, even over such goods sent outside the State, it was open to the assessee to recall the goods at any time and deal with it in any manner. Therefore, the goods which moved outside the State to be held by the agents of the assessee for consignment sales did not become exigible to tax."

7. After the aforesaid decision, it was felt that the existing legislation was not sufficient to keep track of the goods sent outside the State resulting in loss of revenue to the State. Consequently the Governor of Kerala promulgated an ordinance which was subsequently replaced by Act No.6 of 1988 and came into effect from February 19, 1988. This Act amended the Explanation to Section 2 (xxvi) by inserting therein the words "but subject to the provision of Section 8". Since we are here concerned with the interpretation of amended Explanation to Section 2(xxvi) and Section 8 of the Act, it is necessary to set out these provisions here.

"2(xxvi) "total turnover" means 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, including the turnover purchase or sale in the course of inter state trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India:

Explanation :- Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of section 8 in the case of goods which are taxable at the point of last purchase in the State by a dealer liable to tax under Section 5 and which are held as closing stock on the last day of any financial year, the amount for which such goods were purchased by the dealer shall be deemed also to be a part of his total turnover subsequent year or each of the subsequent years until such goods are either sold by him in the State or such purchase acquires the character of last purchase in the State in the hands of such dealer and in case such purchase acquires the character of last purchase in the State in the hands of such dealer, the turnover in respect of such purchase shall be liable to tax in the year in which the purchase case acquires the character of last purchases;

8.Stage of levy of taxes in respect of imported and exported goods: where in the case of any goods tax is leviable at one point in a series of sales or purchase, such series shall,

(a) in the case of goods imported into the State either from outside the territory of India or from any other State in India, be deemed to commence at the stage of the sale or purchase effected immediately after the import of such goods;

(b) in the case of goods exported out of the state of any place outside the territory of India or to any other State in India, be deemed to conclude at the stage of the sale or purchase effected immediately before the export of such goods."

8.Learned counsel for the appellant urged that the purchase could not be brought to tax despite the amendment in Explanation. In other words, the argument is that the amendment by Act No.6 of 1988 has not achieved the desired result of bringing to tax the closing stock of goods held outside the state as on 31st March. It is also urged that though the amendment made to Explanation to Section 2(xxvi) is subject to the provisions of Section 8, that Section on its language is not sufficient to impute the time of attaining of quality of last purchase on the purchase of goods held as a closing stock outside the State by the assessee or his agents, and, therefore, the amendment to Explanation to Section 2(xxvi) making itself subject to Section 8, has not achieved the intended object.

9.It does not appear to us that there is any difference between the two arguments of learned counsel for the appellant. We, therefore, proceed to deal both the arguments together. We have already noticed that the unamended Explanation to Section 2(xxvi) was introduced with a view to give effect to the decision of this Court in Narayanaswamy Naidu (supra) and further to secure the interest of revenue by making closing stock within the reach and knowledge of department by treating the goods exported outside the State as part of the total turn over in subsequent year, till the goods attain the quality of last purchase of goods. The non-obstante clauses used in the unamended Explanation to Section 2(xxvi) whittled down the provisions of Section 8 of the Act, and therefore, the provisions of Section 8 could not be applied for the purpose of levy of tax on the goods exported outside the State till they attained the quality of last purchase of goods. Subsequently, it was felt that the existing provisions of Explanation to Section 2(xxvi) has not achieved the desired result. The Legislature therefore amended the Explanation to Section 2(xxvi) by introducing therein the words "but subject to the provisions of Section 8" by Act No.6 of 1988. The Statement of Objects and Reasons of Act No.6 of 1988 are these:-

"In the case of goods taxable at the point of last purchase in the State there are

chances that the dealers may open branches at different places in the State and effect direct purchases from producers to avoid turnover tax. Moreover the existing intermediary dealers may change themselves as agents of the last purchasers to avoid turnover tax. The commodities in respect of which this could happen are rubber, tea, pepper, areca nut and dried ginger. Government decided to amend the Act suitable so as to extend the liability to pay turnover tax to the taxable point also in respect of these items. According to clauses (b) of Section 8 of the Kerala General Sales Tax Act, 1963 the point of levy of purchase tax will conclude where the goods are exported outside the State. The Kerala High Court in its decision reported in (1986) 63 STC 387 has held that the closing stock of goods held outside the State will not acquire the character of last purchase till it is sold. Under the cover of this decision, many dealers claim that their stock of goods held outside the State will not acquire the character of last purchase until the goods are sold and as such they are not liable to pay tax on such goods. As a result, Government is losing huge amount to tax. To overcome this situation Government decided to amend the Act suitably."

10. Having regard to the phraseology and the objects of the amending Act extracted above, it is fairly clear that the amendment in Explanation to Section 2(xxvi) was made with a view to alter the legal position that closing stock held outside the State will not acquire the character of last purchase till it is sold. Prior to passing of the amendment Act, non-obstante clause occurring in the Explanation to Section 2(xxvi) did not permit the application of Section 8(b) of the Act, where the goods were exported outside the State, but after the amendment the width of non-obstante clause in the Explanation was narrowed down as the Explanation to Section 2(xxvi) has become subject to Section 8. What Section 8(b) lays down is that, in the case of goods on which tax is leviable only at one point in a series of sales or purchases, and such goods are exported out of the State to any place outside the territory of India or to any other State in India, the series of purchase shall be deemed to conclude at the stage of the sale or purchase effect immediately before the export of such goods. The fiction created in Section 8(b) is that, purchase of goods exported out of the State is deemed to have been effected when the sale or purchase immediately preceding the export was made. The question whether a particular purchase is the last purchase or not has to be decided in terms of Section 8(b) of the Act. On this interpretation, as soon as the goods are exported it attains the state of last purchase and is liable to tax irrespective of the fact that such goods are still held by agents outside the State. Thus, the legal position that emerged after the amendment is that, all the purchases of the closing stock of goods exported outside the State and held by agents are deemed to attain the quality of last purchase and exigible to tax, we have, therefore, no doubt in our mind that, by the amendment in the Explanation, the Legislature has altered the legal position prior to amendment that purchases of closing stock or goods on 31st March, held by agents outside the State, would not be brought to tax having attained the quality of last purchase before that date. We, therefore, do not find any merit in the contentions of learned counsel for the appellant.

11. For the foregoing reasons, the appeal fails and is hereby dismissed with costs.