

SUPREME COURT OF INDIA

Haleema Zubair, Tropical Traders

Vs.

State of Kerala

C.A.No.6707 of 2008

(S.B. Sinha and Cyriac Joseph JJ.)

19.11.2008

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Appellant, Haleema Zubair, is an assessee under the *Kerala General Sales Tax Act, 1963* (for short 'the Act'). She is said to be the proprietress of two concerns, - one known as M/s. Tropical Traders and another M/s. Poseidon Food Company.

3. The said Tropical Traders is a dealer in ceramic tiles. The business of M/s. Poseidon Food Company was to render services to various exporters as regards inspection and certification of quality of the items sought to be exported. The total turnover for the purpose of payment of sales tax was disclosed on the basis of the business carried out in the name of M/s. Tropical Traders. Whereas the taxable turnover was shown as 28, 20,474.97, an addition of Rs.45,80,168.09 thereto was made by the Assessing Authority assessing a sum of Rs.3,58,87,960.97 by way of total turnover. The order of assessment proceeded on the basis that receipt shown as commission amounting to Rs.45, 80,168.09 from M/s. Poseidon Food Company is not supported and proved by any documentary evidence. Appellant contended that the services so rendered is not a 'sale' and thus, the said order of assessment is wholly illegal and without jurisdiction.

4. An appeal was preferred thereagainst. Before the appellate authority the appellant produced income-tax returns, orders of assessments passed by the income-tax officer, orders placed by the exporters and the certificates granted by Marine Products Export Development Authority (MPEDA), Cochin.

5. By reason of an order dated 24th October, 2000 the first appellate authority upon noticing that the assessee had produced copies of the certificates issued by the MPEDA, Cochin and copies of letters issued by various parties requesting the appellant to inspect the goods to be exported, held that the professional services rendered to the exporters involving skill and knowledge did not constitute any 'transfer of property'. It was held that the levy of tax on the

receipt of commission for the sum of Rs.45,80,168.09 was not in order. The appellate authority for the purpose of assessment of tax reduced the additional income which was added by the taxing authority in the taxable turnover from 5 % to 2 = %.

6. Aggrieved by and dissatisfied therewith both the parties preferred appeals before the Sales Tax Appellate Tribunal in terms of Section 12 of the Act.

7. By an order dated 20th February, 2003, the Tribunal held as under:-

"We are afraid that the first appellate authority has not correctly understood the legal position involved. The observation of the first appellate authority that the sale for valuable consideration alone is exigible to tax does not appear to be correct. As per Section 5(1)(iii) of the KGST Act the consideration received in the case of transfer right to use any goods for any purpose is exigible to tax. We also notice that by a strange reasoning the first appellate authority shifted the burden of proof regarding the taxability of the disputed receipt to the assessing authority, contrary to the provisions of Section 12 of the KGST Act, as per which the burden of proving that any transaction of a dealer is not liable to tax shall lie on the dealer. We do not think that the assessee was able to discharge this burden of proof as enjoined under Section 12 of the KGST Act. From the available materials on record the first appellate authority was therefore, not justified in deleting the receipt of Rs.45,80,168/- from the turnover of the assessee. It follows that the order of the assessing authority in this regard as has also to be restored thereby allowing the State appeal to that extent."

8. Revision petition filed thereagainst by the appellant has been dismissed by the High Court by its order dated 4th August, 2006, stating:-

"Even though Section does not provide a presumption that such unexplained amount represents sales turn over, we have no doubt in our mind that the Assessing Officer is free to consider what exactly is the nature of receipt. If it is a net credit in the form of an income, it may even be possible for the officer to take it as income gross up the turn over (sic) as representing unaccounted sales and assess the same. In this case, the officer has taken the amount as unaccounted sales, which is probably the minimum damage that could be caused to the petitioner by virtue of Section 12 of the Act. In other words, we uphold this addition as a necessary consequence of the petitioner's failure to explain the receipt in this account."

9. A review application filed thereagainst has also been dismissed by an order dated 22nd March, 2007.

10. Mr. Bali, learned counsel appearing on behalf of the appellant urged:

“(i) The learned Tribunal as also the High Court committed a serious error in so far as they failed to take into consideration that the appellant having produced documents to show that two sister concerns of the appellant had been carrying out two different

businesses, the income derived by one could not have been added to the sales turnover, although the business of the other does not occasion any sale.

(ii) Although burden of proof in terms of Section 12 of the Act is on the assessee but having regard to the authentic documents produced by the appellant, the same must be held to have been discharged.

(iii) The orders of the learned Tribunal as well as the High Court are manifestly erroneous in so far as they failed to take into consideration the distinction between an order of assessment under the Income Tax Act and the one under the Sales Tax Act.”

11. Mr. Dinesh, learned counsel appearing on behalf of the respondent, however, would draw our attention to the averments made in the review application which is to the following effect:

"9. In this connection, the petitioner is also producing a list of persons/exporters/importers from whom commission was received during the period from 1.4.1988 to 31.3.1988 aggregating to Rs.45,80,168.09. The above document conclusively supported the petitioner's case that the sum of Rs.45,80,168.09 is not liable to be assessed to Sales Tax. The petitioner was unable to bring the above documents and evidence before this Hon'ble Court at the time of hearing of the Sales Tax Revision due to reasons beyond control. The dismissal of Sales Tax Revision would result in great hardship and prejudice and unbearable financial burden for the petitioner." to submit that the said documents do not appear to have been filed before the assessing authority and, thus, admittedly the appellant could not discharge the burden of proof cast upon her in terms of Section 12 of the Act.”

12. The Act indisputably is a taxing statute. The jurisdiction of an assessing authority, therefore, is confined to assess tax on taxable turnover. Its primary duty is to ascertain as to whether the figures furnished by the assessee are correct or not.

13. Assessment of sales tax must be on sale of goods. There is no bar in law for the same assessee to carry out different businesses. If the contention of the appellant is correct, the business carried out by her of ceramic tiles involving transactions of sales and purchase has no connection with the professional services rendered by her to the exporters.

14. The sine qua non or the condition precedent for passing of an order of assessment is transaction of sale. Professional service rendered does not constitute sale. Such a professional service rendered by a person attracts service tax, which is a different nature of tax, as has been held in *Bharat Sanchar Nigam Ltd. and another v. Union of India and others*¹ stating:-

"84. As we have said Article 366(29-A) has no doubt served to extend the meaning of the word "sale" to the extent stated but no further. We cannot presume that the constitutional amendment was loosely drawn and must proceed on the basis that the parameters of "sale" were carefully defined. But having said that, it is sufficient for

the purposes of this judgment to find, as we do, that a telephone service is nothing but a service. There is no sales element apart from the obvious one relating to the handset, if any. That and any other accessory supplied by the service provider in our opinion remain to be taxed under the State sales tax laws. We have given the reasons earlier why we have reached this conclusion."

15. It is true that in terms of Section 12 of the Act the burden is on the assessee. The said provision reads thus:-

"12. Burden of proof. - (1) The burden of proving that any transaction of dealer is not liable to tax under this Act shall lie on such dealer.

(2) The burden of proving that the dealer has not received fair market price on any transaction shall lie on such dealer.

(3) The burden of proving the genuineness of the transport of goods using the documents prescribed in section 29, shall lie on such dealer."

16. A provision relating to "reverse burden", must be construed having regard to the nature of the statute; as the general law is that the burden of proof would be on the State as has been held by this Court in *Cooperative Company Ltd. V. Commissioner of Trade Tax, U.P.*² in the following terms :-

"16. In absence of any stipulation made in the contract of sale for the purpose of levy of sales tax or otherwise, the Revenue Authorities must arrive at a finding as to whether there had been any implied condition of transfer, burden of proof wherefor would be on the Revenue. Consideration of (sic - for) a part of goods may be held to be a condition precedent for constituting a sale, but therefore each case must be judged on its own facts."

17. Section 12 of the Act, however, places the burden on the assessee. The said provision would be attracted subject to the condition that first, a transaction of sale has taken place; secondly that one of the parties thereto is a dealer.

18. A dealer has been defined in Section 2(viii) to mean -

"(viii) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, transferring the right to use any goods or supplying by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment, or for commission remuneration or other valuable consideration and includes:

(a) xxx xxx xxx

(b) a casual trader;

(c) a commission agent, a broker or a delcredere agent or an auctioneer or any other mercantile agent, by whatever name called, who carried on the business of buying, selling, supplying or distributing goods [executing works contract, transferring right to use any goods or supplying by way of or as part of any service, any goods] on behalf of any principal;

(d) a non-resident dealer or an agent of a non- resident dealer, or a local branch of a firm or company of association of body of persons whether incorporated or not situated outside the State;

(e) a person who, whether in the course of business or not, sells;

(i) goods produced by him by manufacture, agriculture, horticulture or otherwise; or

(ii) trees which grow spontaneously and which are agreed to be severed before sale or under the contract of sale;

(f) a person who whether in the course of business or not:

(1) transfers any goods, including controlled goods whether in pursuance of a contract or not, for cash or deferred payment or other valuable consideration;

(2) transfers property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(3) delivers any goods on hire-purchase or any system of payment by instalments;

(4) transfers the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(5) supplies, by way of or as part of any service or in any other manner whatsoever, goods, being food or any other articles for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration);

Explanation.-(1) A society (including a cooperative society, club or firm or an association or body of persons, whether incorporated or not) which whether or not in the course of business, buys, sells, supplies or distributes goods from or to its members for cash or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act;

Explanation.-(2) The Central Government or a State Government, which, whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash or for deferred payment, or for commission, remuneration or

other valuable consideration, shall be deemed to be a dealer for the purposes of this Act.

(g) a bank or a financing institution which, whether in the course of its business or not, sells any gold or other valuable article pledged with it to secure any loan, for the realization of such loan amount;

Explanation I.-Bank for the purposes of this clause includes a Nationalised Bank or a Scheduled Bank or a Co-operative Bank;

Explanation II. - Financing Institution means a financing institution other than a bank."

19. The business activities relating to transaction of M/s. Poseidon Food Company unless otherwise proved cannot bring the appellant within the purview of definition of 'dealer'.

20. If she was not a dealer, the professional fees earned by her would not be exigible to payment of sales tax; only because the appellant happens to be the proprietress of M/s. Tropical Traders also.

21. Both the assessing officer as also the High Court had noticed not only the payment of income-tax during the relevant assessment years but also the certificates issued by MPEDA, Cochin and other documents. The High Court did not take into consideration the contention of the appellant that by production of such documents the burden of proof, if any, has been discharged by her. Furthermore for attracting Section 12 of the Act the foundational facts must be established.

22. The High Court furthermore committed a serious error in so far as it failed to draw a distinction between the assessment under income tax and assessment under sales tax. Whereas income tax is levied on income under the Income Tax Act irrespective of the sources from which such an income had been derived, sales tax is levied only on the quantum of sales and, therefore, element of transaction of sale is pre-requisite for levy of sales tax.

23. This aspect of the matter has been considered by this Court in *Girdhari Lal Nannelal Vs. The Sales Tax Commissioner, M.P.*³ wherein it was held:-

"7. The approach which may be permissible for imposing liability for payment of income-tax in respect of the unexplained acquisition of money may not hold good in sales tax cases. For the purpose of income-tax it may in appropriate cases be permissible to treat unexplained acquisition of money by the assessee to be the assessee's income from undisclosed sources and assess him as such. As against that, for the purpose of levy of sales tax it would be necessary not only to show that the source of money has not been explained but also to show the existence of some material to indicate that the acquisition of money by the assessee has resulted from

transactions liable to sales tax and not from other sources. Further, whereas in a case like the present a credit entry in respect of Rs. 10,000 stands in the name of the wife of the partner, no presumption arises that the said amount represents the income of the firm and not of the partner or his wife. The fact that neither the assessee-firm nor its partner or his wife adduced satisfactory material to show the source of that money would not, in the absence of anything more, lead to the inference that the said sum represents the income of the firm accruing from undisclosed sale transactions. It was, in our opinion, necessary to produce more material in order to connect the amount of Rs. 10,000 with the income of the assessee-firm as a result of sales. In the absence of such material, the mere absence of explanation regarding the source of Rs. 10,000 would not justify the conclusion that the sum in dispute represents profits of the firm derived from undisclosed sales"

24. For the reasons aforementioned the impugned judgment cannot be sustained which is set aside accordingly.

25. The appeal is allowed. The matter is remitted to the assessing authority to consider the matter afresh on the basis of the materials placed by the appellant, namely - income tax returns, orders of assessment, certificates issued by MPEDA, Cochin etc. The other documents filed by the appellant before the revisional authority may also be taken into consideration. The State, if so advised, may also file additional documents. No costs.

¹(2006) 3 SCC 1

²(2007) 4 SCC 480

³(1996) 3 SCC 701