KERALA HIGH COURT

Kutty and Co

Vs

State of Kerala

(V Gopalan Nambiyar, C.J. T C Menon, J.)

23.03.1978

JUDGMENT

V.P. Gopalan Nambiyar, C.J.

1. These tax revision cases are in respect of certain assessments to sales tax passed on the assessee for the assessment years 1968-69, 1969-70 and 1970-71. The assessee is a dealer in firewood, who, according to him, had contracted with the Gwalior Rayons Ltd. for the sale and purchase of firewood. The controversy is in regard to the nature of the contract between the assessee and the Gwalior Rayons and, in particular, the commodity or the article which was really the subject-matter of the contract. The assessee would contend that it was "firewood" assessable at 1 per cent under item 55 of the First Schedule of the Kerala General Sales Tax Act, 1963, read with Section 5(1) thereof. On the other hand, the revenue would contend that what was sold was not "firewood" but something other than the same-whether timber or not-assessable at the residuary rate of 3 per cent (during the relevant years in question) under Section 5(2) of the Act. The Tribunal has written a very long order discussing several decisions and various considerations. There was difference of opinion among the members of the Tribunal, the Chairman and the Departmental Member holding against the assessee, that the contract was not for "firewood" but for "pulpwood"; and the Accounts Member taking a view in favour of the assesseee. The Appellate Assistant Commissioner had also held in favour of the assessee that the contract was for the supply of firewood.
2. We have been taken through such materials as are available on record to determine the subject-matter of the contract between the assessee and the Gwalior Rayons Ltd. We have some difficulty on account of the paucity of relevant material, not all of which have, for one reason or other, not been placed on record or incorporated in the record by the authorities below. We think it was necessary that this should have been done.
3. Apart from the above difficulty or infirmity, we are also satisfied that the approach to the question made by the Tribunal has not been quite correct. The Tribunal should first and foremost have posed the question: What was the material that the seller intended to supply and the purchaser intended to buy? Was it, as the assessee would contend, "firewood", or was it, as counsel for the revenue would have it, something other than firewood, whether timber, murukku, "pulpwood" or something else ? According to counsel for the revenue, murukku cannot pass as firewood on account of its high watery content. These are considerations to which the Tribunal has not bestowed sufficient attention. Counsel for the assessee has stressed that the tender

notification was for the supply of firewood, that the sale bills were for firewood, that the forest authorities had passed the commodity as firewood; and that neither the debarking of the wood nor the specifications added to the supply of the article, nor the use, if any, to which the article was put, for serving as raw material for the factory, can change the commodity into something other than what was the subject-matter of the contract between the parties. Before us, counsel for the revenue did stress to some extent at least that it was improper and unlikely that a factory, like the Gwalior Rayons Pulp Factory, would have required such a considerable amount of firewood, whereas, as a factory engaged in the production and manufacture of rayon pulp, it was more easily understandable that its requirement was "murukku" for the purpose of manufacture of rayon pulp. We are not prepared to dismiss this aspect presented by counsel for the revenue as totally unworthy of consideration. It appears to us, this again is an aspect of the matter to which attention has got to be paid by the Tribunal in evaluating the nature of the contract and in determining the subject-matter of the bargain between the parties.

4. We were somewhat troubled why a company like the Gwalior Rayons should enter into a contract with the assessee to smuggle raw material or something other than firewood, labelling the subject-matter of the contract as firewood. Why should, we asked ourselves, the company be a party to defraud the revenue or tax due to the State ? Counsel for the revenue has an explanation which certainly requires consideration, namely, that sales tax, although initially payable by the assessee, can be passed on to the company and, therefore, from the point of view of the company also, it is not totally inconceivable that it was interested in lightening its burden. These have carried us to rarefied regions into which, we are afraid, the Tribunal had not directed its attention. We feel it would be unfair for us to pronounce one way or the other on considerations and aspects which did not loom large before the Tribunal and which it had no occasion to deal with. All things considered, we. think it necessary to set aside the order of the Tribunal and to remit the matter back to it for fresh consideration and disposal. The Tribunal will consider the question, taking on record, in accordance with law, all the necessary documents relating to the contract and the dealings and the conduct of the parties which throw light on the subject-matter of the bargain and the contract between the parties and proceed to deal with the question in the light of the observations contained in this judgment.

5. There is a second controversy that has been agitated in Tax Revision Cases Nos. 65 and 66 of 1976, with respect to the assessment years 1969-70 and 1970-71. That relates to the exemption from sales tax, under Rule 9(f) of the Kerala General Sales Tax Rules, of the transport charges incurred by the assessee in respect of the article that was the subject-matter of the contract between the assessee and the company. Rule 9(f) of the Rules reads:

9. Determination of taxable turnover.-In determining the taxable turnover, the amounts specified in the following clauses shall, subject to the conditions specified therein, be deducted from the total turnover of the dealer:...

(f) all amounts falling under the following two heads, when specified and charged for by the dealer separately, without including them in the price of goods sold ;

(i) freight;

(ii) charges for delivery ;....

Under the rule, all that is needed to claim exemption is that freight must have been specified and charged for separately without including it in the price of the goods sold. There is abundant material on record which has been referred to by the Tribunal itself and by the Appellate Assistant Commissioner to show that in the cases under consideration the transport charges were specified and charged for separately under the rule. But it is contended by counsel for the revenue that this circumstance by itself would not entitle the assessee to claim the deduction

under the rule. For this, reliance was placed on the decision of the Supreme Court in Dyer Meakin Breweries Ltd. v. State of Kerala [1970] 26 S.T.C. 248 (S.C.). Speaking with respect to the rule, the Supreme Court held that the appellant before it would not be entitled to claim deduction for transport charges of the liquor from its factories to the warehouse at Ernakulam. But it is clear on the facts that the transport was prior to the sale. This was what the court observed :

It is common ground that the sale of the liquor took place in Ernakulam. The company arranges to transport liquor for sale from the factories to its warehouse at Ernakulam. It was not brought for any individual customer. All the expenditure incurred is prior to the sale and was evidently a component of the price for which the goods were sold. It is true that separate bills were made out for the price of the goods ex factory and for 'freight and handling charges'. But, in our judgment, the Tribunal was right in holding that the exemption under Clause (f) of Rule 9 applies when the freight and charges for packing and delivery are found to be incidental to the sale and when they are specified and charged for by the dealer separately and expenditure incurred for freight and packing and delivery charges prior to the sale and for transporting the goods from the factories to the warehouse of the company is not admissible under Rule 9(f). Rule 9(f) seeks to exclude only those charges which are incurred by the dealer either expressly or by necessary implication for and on behalf of the purchaser after the sale when the dealer undertakes to transport the goods and to deliver the same or where the expenditure is incurred as an incident of sale. It is not intended to exclude from the taxable turnover any component of the price, expenditure incurred by the dealer which he had to incur before sale and to make the goods available to the intending customer at the place of sale.

The decisions of the Madras High Court in State of Madras v. R.M.K. Viswanatha Filial [1957] 8 S.T.C. 601 and of the Andhra Pradesh High Court in Motilal Hari Prasad and Bros. v. State of Andhra [1959] 10 S.T.C. 20 support the view, which we have expressed, although we may observe that we do not subscribe to all the reasons given in the first case for the conclusion recorded by the Madras High Court.

Counsel for the assessee drew our attention to a decision that appeared very germane and appropriate to the context, namely, Agricultural Farms Ltd. v. State of Tamil Nadu [1974] 34 S.T.C. 143. That considered the decision of the Supreme Court noticed earlier. It was pointed out by the Madras High Court that the assessee in that case had extracted limestones and transported the same to the buyer's place of business in pursuance of the agreement of sale entered into by it which specifically provided for the price of the limestones at the place of extraction and also for the supply and delivery charges payable to the buyer. In such circumstances, the Madras High Court upheld the claim for deduction in relation to the supply and delivery charges. We think the decision is appropriate and must govern the facts of this case.

6. We are of the opinion, that in T. R. C. Nos. 65 and 66 of 1976, the assessee's claim to deduction in respect of transport charges must be upheld. We do so ; and for determining the main question in regard to the nature and the subject-matter of the agreement, along with T. R. C. No. 64 of 1976, we set aside the order of the Tribunal and send the cases back to the Tribunal for fresh disposal. We make no order as to costs.