KERALA HIGH COURT

Season Rubbers

Vs

State of Kerala

(P Subramoniam Poti, A C.J., K Bhaskaran and G Vadakkel, JJ.)

17.07.1981

JUDGMENT

P. Subramoniam Poti, AG. C.J.

1. A novel and interesting question arises in these cases. A Division Bench of this Court in the judgment in T. R. C. No. 88 of 1977 has spoken on this, but since another Division Bench of this Court doubted the correctness of that view these cases have been referred to a Full Bench. That is how the cases are now before us.

2. Under the scheme of the Sales Tax Act single point tax is leviable under Sub-section (1) or Sub-section (2) of Section 5 of the Act in respect of certain goods. The First Schedule to the Act specifies these goods, the point of levy and the rate of tax. Some items of goods are taxable at the last point of purchase in the State. The rate of tax prevalent at the time of purchase may not be the rate of tax at the time the goods are disposed of later, which disposal gives the character of last purchase to the purchase made earlier. If the rate of tax prevalent at the time of such disposal is different from the rate of tax prevailing at the date of purchase at what rate should tax be levied ? If there is no change of rate of tax in the meanwhile this question may not arise. But if there is, one or other of the two rates will have to be applied. The sales tax department has taken the stand that the rate to be applied is the rate prevailing at the time the purchase qualifies to be the last purchase by reason of the subsequent event which gives the earlier purchase the character of last purchase. The goods purchased may be sold inside the State again and if that happens the earlier purchase will not be the last purchase in the State. If the goods become unavailable by being consumed either in manufacture or otherwise or if the goods are exported outside the State, or if the goods are destroyed the earlier purchase becomes the last purchase in the State. According to the assessees, tax being on the purchase despite the fact that the purchase attains the character of last purchase later, it is the rate prevalent at the time of purchase that would be relevant. This stand taken by the assessees has not been accepted by the assessing authority, the Appellate Assistant Commissioner or the Appellate Tribunal. Hence these revisions at the instance of the assessees.

3. The revision petitioner in T. R. C. No. 68 of 1980 is a dealer in rubber taxable at the last purchase point in the State by a dealer who is liable to tax under Section 5 of the Act during the year 1974-75 which is the year with which we are concerned in this revision. The rate of tax at

such single point up to 30th June, 1974, was 3 per cent and it was enhanced to 5 per cent from 1st July, 1974. The dispute between the assessee and the sales tax department concerned the turnover of rubber purchased till 30th June, 1974. Such rubber was sold in July, 1974, and later. The rate of tax then was 5 per cent. Rubber purchased prior to 1st July, 1974, was, sought to be taxed at 5 per cent since according to the department such purchases, had become last purchases only subsequent to 30th June, 1974.

4. In T.R.C. No. 121 of 1980 the petitioner is a dealer in coir products taxable at the last purchase point in the State by a dealer who is liable to be taxed under Section 5. The year in this case also is 1974-75. Up to 1st July, 1974 coir products were exempt from tax. By a Notification S. R. O. No. 391 of 1974 cancelling the earlier exemption given in 1963 by a notification, last purchases became taxable. The dispute is whether the goods purchased prior to 1st July, 1974, but sold after 1st July, 1974, were liable to be taxed at the rate in force after 1st July, 1974.

5. The Sales Tax Appellate Tribunal treated the decision in *State of Madras v. Narayanaswami Naidu*[1] as authority in support of the stand taken by the sales tax department that the purchases of goods attained the quality of last purchases only by the later event of consumption or disposal otherwise or sale by export and it was only then that the tax liability arose consequent upon which the rate of tax is to be the rate prevalent then. We have to examine here the scope of the decision of the Supreme Court in *State of Madras v. Narayanaswami Naidu*[2]

6. In *Abdulsalam Rowther v. State of Kerala*[3] this Court held that when goods were taxable at the point of last purchase in the State, purchases which happen to be the last purchases in any assessment year are liable to be taxed as last purchases in the State since the year is the unit. A similar view was expressed by the Mysore High Court in *Hormusji Hirjibhoy & Co. v. Commercial Tax Officer*[4]. The Madras High Court dissented from these decisions in *State of Madras v. Narayanaswami Naidu*[5] The case before the Supreme Court in *State of Madras v. Narayanaswami Naidu*[6] was an appeal against the Madras decision at the instance of the State of Madras. The counsel for the appellant contended before the Supreme Court that the tax under the Madras General Sales Tax Act being a yearly tax what happens to the goods in subsequent years cannot be taken into consideration for determining the taxability of any purchase of declared goods inside the State. According to counsel the taxable event is the last purchase in the State during the assessment year and if stocks were held at the end of the assessment year it followed that the assessee holding the stocks was the last purchaser in the State and such last purchaser must be taxed in that year. The Supreme Court did not approve of this reasoning. The court was of the view that in view of the liability to tax being limited to the sale or purchase inside the State only at the point specified in the Second Schedule the dealer was not liable to pay tax on the purchase until the purchase acquired the quality of being the last purchase inside the State. When a dealer declares his stock at the end of the year such stock could not be said to have acquired the quality of last purchase since the goods are liable to be sold just as they are liable to be consumed or destroyed later. He was entitled to claim before the assessing authorities that the "character of acquisition of the stock in hand was undetermined; in the light of subsequent events it may or may not become the last purchase inside the State". Though the Supreme Court agreed with the Madras view, it did not agree with the reasoning in the illustration given in the Madras judgment. The illustration was: One can visualise a case, for example, where goods mentioned above purchased on the 30th of March, 1960, may be exported by the purchaser himself outside the State on the 2nd of April, 1960. In that case the goods could not be assessed in 1960-61 in the

hands of the exporting purchaser, because the taxable event did not occur in that year; it could not be assessed in the hands of the seller in 1959-60 because though the taxable event occurred in that year, the single point stage was not reached in that year. One possible way of dealing with such a case is to assess it subsequently as escaped turnover. Referring to this illustration the Supreme Court said thus: In our opinion, in this illustration, the assessee would be liable in the financial year 1960-61 as the purchases became the last purchases in that year. The learned Advocate-General places considerable reliance on the observation in the judgment of the Supreme Court just now quoted by us. According to him the liability arises only in the year in which the goods are exported outside the State since it is only then that the purchases by a dealer became the last purchases. It is a similar plea urged before the Appellate Tribunal that seems to have persuaded the Tribunal to consider the rate applicable as the rate said to be prevalent at the time of the later event referred to as taxable event by the learned Advocate-General.

7. The question is not whether tax liability arises by reason of an event which happens subsequent to the purchases. That only locates the time at which the liability arises. It arises then because the earlier purchases had an undetermined character till then and the character is determined only by the subsequent event. On such determination the tax liability arises. To that extent the Supreme Court decision certainly supports the case of the State. But the question here cannot be resolved merely by determining the time at which the liability to tax arises. The liability to tax nevertheless is on the transaction of purchase. The sales tax itself is a tax which the State is authorised to impose by entry 54 of List II in the Seventh Schedule to the Constitution of India. It is a tax on sale or purchase of goods. Section 5 of the Sales Tax Act provides for tax liability on the taxable turnover of a dealer. In the case of goods specified in the First and Second Schedules such tax liability arises at the rates and only at the points specified against such goods in the First and Second Schedules, as the case may be. In the case of other goods it arises on all points of sale at the specified rate. The point specified in the case of goods with which we are concerned in this case is the point of the last purchase by a dealer who is liable to tax under Section 5. The point being thus identified as point of last purchase and the rate being that specified in the First Schedule, what remains is only to identify that point. Though such point may not be identified immediately, it could be determined easily on the basis of the subsequent event. If a person purchases goods on a certain day and deals with the goods in such a manner on a later day resulting in the earlier purchase becoming the last purchase such last purchase of the goods could be said to have taken place on the day the goods were actually purchased and not on the day the goods were subsequently dealt with. In other words the concept of last purchase involves the requirement of there being a purchase and that purchase being identified as the last purchase. This identification can be only on a later date. When that is so identified it is the earlier purchase which acquires the character of last purchase. It is one thing to say that it becomes taxable at the last purchase point only when it is located as a last purchase by determination of factors which give it the character of last purchase and it is another to say that it is taxable as a last purchase at the rate prevalent at the time when it is so identified as the last purchase. If the tax is levied on the last purchase and at the rate which is applicable to the last purchase, emphasis is not to the acquiring of the character of "last" in regard to such purchase but to the purchase itself. We do not think that the Supreme Court had occasion to consider the rate of tax applicable under such circumstances. The court was only considering whether the purchases could be taxed in the very year of purchase or only when the purchases acquired the character of last purchase.

8. In *Government of Andhra v. Nagendrappa*[7] the Andhra High Court had occasion to consider the question of propriety of taxation on turnover of untanned hides and skins exported abroad. Rule 16(2)(ii) of the Madras General Sales Tax (Turnover and Assessment) Rules provided for the levy of tax on all untanned hides or skins which were not sold to a tanner in the State but were exported outside the State on the dealer who was the last dealer not exempt from taxation under Section 3(3) who buys them in the State. It was contended in that case that the levy of the tax was not authorised under the Act and the Rules and even if it was so authorised the Act and the Rules are repugnant to Article 286(1)(b) of the Constitution. Dealing with this question the Andhra High Court observed thus : The single point is selected by making the last purchaser in the series of sales liable for the tax and it is only when the stage of export is reached in the series of sales by successive dealers, that the tax becomes exigible. But it is not the transaction of export sale on which the tax is levied. The tax is levied on the purchase which precedes the export sale. The taxable event is really the purchase and this is shown by fixing the quantum of the .turnover at the price paid by the dealer for the purchase and not the price realised by him on the export sale. The fact that unless the goods were exported, liability to tax would not fasten does not lead to the inference that what is taxed is the export sale.

The court further said in that case thus : The export by the dealer merely marks the final stage of series of purchases by one licensed dealer from another and it is at that stage that the taxable event, namely, the last purchase, arid the person who is liable to pay the tax, namely, the last purchaser, are both determined. In other words, the tax is really one on the transaction of purchase anterior to the sale for export or export sale. Dealing with a similar contention the High Court of Madras had said in *State of Madras v. K.H. Chambers Ltd*[8]*. thus :* The taxable event is really the purchase and the quantum of turnover reflects this. It is no doubt true that unless the goods were exported, the tax liability would not fasten but that has no effect upon the critical event which is the basis of the tax.... In other words, the tax is really One on the transaction of purchase anterior to the export, the factum of the export figuring merely as marking the final stage of a series of purchases by one licensed dealer from another, on the occurrence of which the taxable event, namely the last purchase, is determined. With great respect we subscribe to the view that the taxable event is really the purchase but the taxable event is determined on the occurrence of the event which determines the purchase as last purchase. The view which we have expressed here on the question in controversy is seen to have been expressed by the Madras High Court *in State of Madras v. Narayanaswami Naidu*[9] in the following words: Therefore the term 'last purchase in the State' must be understood in the sense we have already referred to, viz., that out of successive sales or purchases which take place in the State, the last purchase is the one in the series which takes place before the goods are exported outside the State or before they are consumed in a factory. The taxable event in the case of cotton is the purchase, but the tax liability is attracted to it only when that purchase also satisfies the test of being at the stage of last purchase, which stage has to be decided not by the fact that the year of assessment comes to a close before another sale takes place, but the fact of export outside the State or consumption by a factory occurs thereafter. In State of *Andhra Pradesh v. Murali Cafe*[10] a Full Bench of the Andhra Pradesh High Court had occasion to consider whether the amendment of the proviso to Section 5(1) of the Andhra Pradesh General Sales Tax Act which came into force on 1st August, 1963, entitled the assessing authority to levy tax at the rate prevailing up to the period 31st July, 1963, in accordance with the proviso as it stood prior to its amendment and in respect of the period subsequent to 31st July, 1963, at a different rate as provided for in the substituted proviso. Dealing with this question the Full Bench at page 409 said thus : It was, however, contended that the new proviso uses the words 'for the year* and since assessment is made at the end of the

assessment year, the provisions of the new proviso would apply to the whole year because it is that provision of law which was in force at that time. What is, however, overlooked in advancing this argument is that the change which has been brought about in the rates and in the manner of their application are substantive rights and liabilities which are accrued or incurred. The moment the transactions are completed, under the Act rights are accrued and they are not affected by the amended proviso. If the unaffected transactions have already attracted particular rates of tax and the manner in which those rates are to be made applicable, then if the new proviso is to be applied which involve new rates and a new manner of applying them, it will affect the vested rights and liabilities which the legislature never intended to affect. Nothing could have prevented the legislature by introducing some words which would have given the substituted proviso a retrospective operation. When the proviso directs the making of an assessment 'for the year', it does not indicate in any manner that the new rates and the method of their application would govern the old transactions as well. Making of an assessment for the year is only a procedural aspect and does not affect in any manner the substantive rights and liabilities which had accrued on the completion of the transactions. Although thus the assessment may be made for the year and may be made at the end of it, the assessment shall have to be made on concluded transactions at the rate and in the manner in which they are applied prior to 1st August, 1963, when the new proviso came into force, and the new rates and the manner of their application would govern the transactions completed after the new proviso came into force.

9. Now we may advert to a decision of a Division Bench of this Court in T. R. C. No. 88 of 1977, which led this reference to the Full Bench. The rate of tax prevalent at the time of the purchase of the goods which were taxed at the last purchase point was 4 per cent. When the purchases acquired the quality of the last purchases the rate of tax prevalent was 5 per cent. Referring to the decision of the Supreme Court in *State of Madras v. Narayanaswami Naidu*[11] the Division Bench said thus : The illustration and the Supreme Court's comment in regard to the same offer a clear pointer to the principle on which the decision in the instant case must be based. It was observed that the tax is on the last purchase in the State, and that the relevant point of time at which the tax has been collected is the point at which the goods purchased acquired the quality of last purchase. This is, only when the goods are either sold, consumed or exported. On the facts noticed in this case, this can only be after 1st April, 1969. At that point of time, the prevailing rate of tax was 6 per cent and not 4 per cent. The assessee is therefore liable to be assessed at 5 per cent. That was the conclusion of the Tribunal and in our view that conclusion is correct.
With great respect to the learned Judges of the Division Bench we do not think that beyond stating that the tax liability is determined by the subsequent event the Division Bench did not consider the question of rate of tax to be applied to the transaction of last purchase. That is the question we have endeavoured to consider here. Hence we think T.R.C. No. 88 of 1977 was wrongly decided. We hold that irrespective of the time at which the purchases are determined as last purchases liable to tax, the rate of tax would be that prevalent on the date of the purchases which are identified as last purchases subsequently. Accordingly the assessees in both the cases succeed. In T. R. C. No. 68 of 1980, the purchases prior to 1st July, 1974, are liable to be taxed only at 3 per cent which was the rate prevalent at that time. In T.R.C. No. 121 of 1980 the purchases prior to 1st July, 1974, are exempt from tax. The assessment will have to be modified accordingly. The tax revision cases are allowed as above. No costs.

Cases Referred.

1[1968] 21 S.T.C. 1 (S.C.)
2[1968] 21 S.T.C. 1 (S.C.)
3[1961] 12 S.T.C. 98
4[1962] 13 S.T.C. 773
5[1965] 16 S.T.C. 29
6[1968] 21 S.T.C. 1 (S.C.)
7 [1956] 7 S.T.C. 568
8[1955] 6 S.T.C. 157 at 179
9[1965] 16 S.T.C. 29
10[1971] 28 S.T.C. 399 at 409 (F.B.)
11[1968] 21 S.T.C. 1 (S.C.)