

Hamsa Vs. State of Kerala

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Court : Kerala

Decided On : Nov-25-2004

Reported in : 2005(1)KLT887

Judge : S. Sankarasubban and; K.R. Udayabhanu, JJ.

Acts : Kerala General Sales Tax Act, 1963 - Sections 17(3)

Appeal No. : S.T.R. No. 285 of 2003

Appellant : Hamsa

Respondent : State of Kerala

Advocate for Def. : Raju Joseph, Spl. Government Pleader

Advocate for Pet/Ap. : E.P. Govindan, Adv.

Disposition : Revision allowed

Judgement :

S. Sankarasubban, J.

1. Assessee is the revision petitioner. Assessment year is 1999-2000. The petitioner is a dealer in marble at Kottancherry, Kanhangad, Kasaragod District. He filed returns conceding a total turnover of Rs. 18,79,357.99 and claimed exemption for Rs. 10,18,943.75 being second sales for the years 1999-2000. The

petitioner's assessment for the year 1999-2000 was completed to the best of judgment fixing a taxable turnover of Rs. 24,09,680/-. The petitioner's claim for exemption being second sales was also rejected. It was submitted that there was no sufficient materials before the Assessing Authority warranting rejection of books of accounts and resorting to best judgment assessment.

2. The petitioner mainly contended before the Assessing Officer that the return was not correct. The Assessing Authority has relied on the report of the I.O.B. and further it also referred to the files of Mahamaya Traders from whom the tiles were purchased by the petitioner. The petitioner contended that the sales with the Mahamaya Traders was secondary sales. But the Assessing Officer took the view that the evidence of Mahamaya Traders does not find any entry in the accounts of Mahamaya Traders. Hence, those transactions were avoided and the assessment was completed.

3. The petitioner made a request for examination of Mahamaya Traders. But the Assessing Officer did not allow it and completed the assessment. In the appeal filed by the assessee, the Appellate Authority after stating that since there was no opportunity given to the assessee to cross-examine the witnesses, whose evidence was relied on by the Assessing Officer, set aside the order of the Assessing Officer and passed an order accepting the exemptions. Against that, the Revenue went in appeal before the Tribunal. The Tribunal has now held that there was no necessity to give an opportunity to cross-examine the witnesses.

4. We heard learned counsel for the petitioner and learned Government Pleader.

5. The relevant question that raised for consideration is whether the petitioner was entitled to cross-examine the witnesses, viz., Mahamaya Traders. There is no dispute that this was raised before the Assessing Officer, Appellate Authority and the Tribunal. But it was submitted that the third party was not available. Even the report of the Intelligence Officer was not given to the assessee.

6. This Court has held in *M. Doraiswamy, Krishna Stores, Palakkad v. State of Kerala* ((2001) 9 KTR 291) as follows:

'It is settled position in law that when tax authorities rely on accounts of a third party for the purpose of drawing adverse inference about acceptability of the books of accounts maintained by an assessee, opportunity for rebutting such materials has to be given. Where evidentiary material procured from or produced by a third party is sought to be relied upon for showing that the return submitted by the assessee was incorrect and incomplete, assessee is entitled to have the concerned third party summoned as witness for cross-examination. In the instant case, the point relating to alleged denial of opportunity was not pressed, as is evident from the observations of Tribunal that except the two points urged and dealt with by it, no other point was raised. That being the position, we are not inclined to entertain these revision applications'.

Admittedly, the Assessing Authority did not give an opportunity to cross-examine the witness. The Appellate Authority held that because no opportunity was given to cross-examine the witnesses, the assessment order has to be set aside and an opportunity has to be given to the assessee to cross-examine the witnesses. The Tribunal took the view that since there were records to show that there was no transaction with Mahamaya Traders, it is not necessary to give an opportunity to the assessee to cross-examine the witnesses.

7. We are of the view that the above attitude adopted by the Tribunal is not correct. It is trite law that the assessee is entitled on the basis of the principles of natural justice, to an opportunity to cross-examine the third party, whose evidence was relied on by the Appellate Authority. In the present case, we find that no opportunity was given to cross-examine the witnesses, inspite of the request made by the assessee. Hence, we are of the view that the order passed by the Appellate Authority is correct. Hence, we set aside the judgment delivered by the Tribunal and we remand the matter to the Assessing Officer to give an opportunity to the assessee to cross-examine the witnesses, whose evidence have been relied on.

Tax Revision Case is allowed.