

Alpha Clays Vs. State of Kerala

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Court : Kerala

Decided On : Aug-05-2003

Reported in : 2004(2)KLT235; [2004]135STC107(Ker)

Judge : G. Sivarajan and; Kurian Joseph, JJ.

Acts : Kerala General Sales Tax Act, 1963 - Sections 5(1)

Appeal No. : T.R.C. Nos. 422, 424 and 425 of 2001

Appellant : Alpha Clays

Respondent : State of Kerala

Advocate for Def. : Georgekutty Mathew, Special Govt. Pleader

Advocate for Pet/Ap. : N.N. Divakaran Pillai, Adv.

Judgement :

1. The short question that arises for consideration in these cases is as to whether the hire-charges received by the assessee in respect of the excavator owned by it and used for excavating clay mine of M/s. Sulekha Clay Mines is liable to be assessed under Section 5(1)(iii) of the Kerala General Sales Tax Act, 1963, for short, 'the Act'.

2. All these tax revision cases arise from the common order of the Sales Tax Appellate Tribunal, Thiruvananthapuram, passed in T.A. Nos. 4, 5 and 6 of 2001

filed by the assessee under the Act. Assessee is the revision-petitioner. State of Kerala is the respondent. The assessment years concerned are 1995-96, 1996-97 and 1997-98, respectively.

3. During the three assessment years concerned, the assessee had received Rs. 2,88,580, 9,06,280 and 5,61,272 respectively towards lease charges of the excavator from M/s. Sulekha Clay Mines. The assessments of the petitioner for the years 1995-96 and 1996-97 were originally completed wherein the lease charges mentioned above were not included. The assessing authority therefore, initiated proceedings under Section 19 of the Act in respect of those two years. The assessment year 1997-98 was pending before the assessing authority at that time. In reply to the pre-assessment notice, the assessee contended that the lease charges received for the aforesaid three years are not liable to be included in the turnover for the purpose of assessment under the Act for the reason that the assessee had not transferred the right to use the excavator in favour of M/s. Sulekha Clay Mines during these years. The assessing authority had rejected the said contention on the ground that the accounts maintained by the assessee showed that the customer, namely, M/s. Sulekha Clay Mines had incurred expenses for the use of the excavator apart from payment of lease charges. This according to the assessing authority would show that the assessee had delivered possession of the excavator to M/s. Sulekha Clay Mines for their use. This finding of the assessing authority was confirmed by the first appellate authority and by the Tribunal in appeals filed by the assessee.

4. Sri N.N.D. Pillai, learned counsel appearing for the assessee, submits that in order to attract the provisions of Section 5(1)(iii) of the Act, there must be a transfer of the right to use the excavator. The counsel submits that in the instant case, there is absolutely no material on record to show that the assessee had parted with possession of the excavator during the period of lease in favour of M/s. Sulekha Clay Mines. The counsel also submits that the only material available on record, even according to the assessee, is some entries in the accounts to the effect that certain amount is due from M/s. Sulekha Clay Mines towards the expenses incurred by the assessee in respect of the use of excavator. The counsel submitted that the entries in the record which is mentioned by the

assessing authority would clearly show that the expenses were incurred by the assessee itself and that as per the understanding between the parties, only a percentage of the expenses incurred by the assessee has to be reimbursed by the customer. In short, the submission of the counsel is that during the relevant period, the effective control of the excavator was always with the assessee. The counsel in support of the aforesaid contentions had relied on the decisions of this Court in Deputy Commissioner of Sales Tax (Law) v. S. Bahulayan (1992) 1 KTR 137 and in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Bobby Rubber Industries [1998] 108 STC 410. The counsel has also relied on the decision of the Supreme Court in 20th Century Finance Corporation Ltd. v. State of Maharashtra [2000] 119 STC 182 and the decision in State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd. [2002] 126 STC 114.

5. The learned Government Pleader appearing for the respondent on the other hand submitted that in the instant case, there is clear finding by the authorities and the Tribunal to the effect that the assessee had delivered possession of the excavator to M/s. Sulekha Clay Mines for their use which is evident from the fact that the expenses for operating the excavator was met by M/s. Sulekha Clay Mines itself. The Government Pleader also relied on the further fact that the Tribunal has also found that even the maintenance cost in respect of the excavator was also met by the customer, namely, M/s. Sulekha Clay Mines. The Government Pleader in short submitted that from the aforesaid findings of the Tribunal, it is clear that the assessee had transferred the right to use the excavator to M/s. Sulekha Clay Mines and that the consideration received therefor, is exigible to tax under Section 5(1)(iii) of the Act. The Government Pleader relied on the decision of this Court in Rohini Panicker v. Additional Sales Tax Officer [1997] 104 STC 498 ; (1997) 5 KTR 112 and the decisions of the Supreme Court in Aggarwal Brothers v. State of Haryana [1999] 113 STC 317 ; (1999) 7 KTR 302 and in State of Uttar Pradesh v. Union of India [2003] 130 STC 1. The Government Pleader also further submitted that the decision of the Supreme Court in A.P. Pollution Control Board v. Prof. M.V.Nayudu AIR 1999 SC 812 has no application to the present case and further, the other decisions relied on by the counsel for the assessee are distinguishable.

6. There is no dispute in this case that what is sought to be assessed under Section 5(1)(iii) of the Act is the hire-charges/lease charges received by the assessee for use by M/s. Sulekha Clay Mines for excavation purposes. There is also no dispute with regard to the quantum of turnover sought to be assessed. The only dispute as already noticed is that, according to the assessee, the hire-charges/ lease charges received by the assessee is not exigible to tax under Section 5(1)(iii) of the Act. According to the State, the provisions of Section 5(1)(iii) are attracted to the facts of the case. The assessee's case, as already noted, is that the excavator was always in the possession and control of the assessee and that the assessee had used the excavator in the premises of M/s. Sulekha Clay Mines for excavating clay for them.

7. Before considering the rival contentions, it is necessary to bear in mind the relevant provisions of the Act and also the principles governing the matter. Section 5(1)(iii) of the Act reads as follows :

'5. Levy of tax on sale or purchase of goods.--(1) Every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than two lakh rupees and every casual trader or agent of a non-resident dealer, whatever be his total turnover for the year, shall pay tax on his taxable turnover for that year,--

(iii) in the case of transfer of the right to use any goods for any purpose (whether or not for a specified period) at the rate of six per cent at all points of such transfer on an aggregate turnover of rupees two lakh and above.'

The aforesaid provision applies only in the case of 'transfer of the right to use any goods'. The Supreme Court had considered the scope of the aforesaid expression in 20th Century Finance Corpn.'s case [2000] 119 STC 182, in the context of the challenges made against the provisions on various sales tax enactments of the States. In paragraph 27, the Supreme Court observed as follows :

'Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of

such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods.'

The question regarding the applicability of the provisions of Section 5(1)(iii) of the Act came up for consideration before this Court in Bahulayan's case (1992) 1 KTR 137 where the question was as to whether hire-charges received by a lorry owner for carrying goods on hire is exigible to tax. The division Bench of this Court after referring to the various provisions of the Act took the view that notwithstanding the very wide language used in the definitions of the words 'dealer' [Section 2(viii)(f)(4)], 'sale' [Section 2(xxi), Explanation (3B)], [Section 2(xxvii)] 'turnover' and in Section 5(1)(iii) of the Act the lorry hire charges received by the assessee is not exigible to tax under the Act. It was held that it cannot admit of any doubt that there is no transfer of any right to any person regarding the lorry to use the same for any purpose. Again, this question came up for consideration in Rohini Panicker's case [1997] 104 STC 498 (Ker), where the question arose as to whether the assessee-firm engaged in the business of video library would come within the definition of 'dealer' liable to be assessed under the Act. It was held in the said decision that leading of video cassettes is a transfer of right to use the goods within the explanation (3B) of Section 2(xxi) and that the assessee is also a 'dealer' within the definition. Again, this question was considered by yet another division Bench in which one of us (Sivarajan, J.) was a party in Bobby Rubber Industries' case [1998] 108 STC 410 (Ker). There, the question was as to whether the rent received for permitting the customers to use a hydraulic press belonging to the assessee is exigible to tax under the Act. The division Bench after considering the earlier decisions of this Court took the view that there is no

transfer of right to use a hydraulic press while hiring of the hydraulic press to various customers on machine hour basis. The Supreme Court in Rashtriya Ispat Nigam Ltd.'s case [2002] 126 STC 114 considered the provisions of Section 5-E of the Andhra Pradesh General Sales Tax Act in which also contained provisions similar to Section 5(1)(iii) of the Act where also the expression transfers the right to use any goods occurred. The assessee in that case owned Visakhapatnam Steel Project. For the purpose of steel project, it allotted different works to contractors. The respondent therein undertook to supply sophisticated machinery to the contractors for the purpose of being used in the execution of the contracted works and received charges for the same. The appellant made provisional assessment levying tax on hire charges under Section 5-E of the Andhra Pradesh General Sales Tax Act. The respondent filed a writ petition seeking declaration that the tax levied, exercising power under Section 5-E of the Act, on the hire charges collected during the period 1988-89 was illegal and unconstitutional. The State filed a counter-affidavit wherein it was contended as follows :

'....contending that the respondent was lending highly sophisticated and valuable imported machinery to the contractors engaged in the execution of the project work on specified hire charges ; the machinery was given in the possession of the contractor and he was responsible for any loss or damage to it and in view of the terms and conditions contained in the agreement, there was transfer of property in goods for use and on the amounts collected by the respondent as charges for lending machinery attracted tax liability under Section 5-E of the Act.'

The High Court after scrutiny and close examination of the clauses contained in the agreement, came to the conclusion that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to tax. The Supreme Court agreed with the High Court and observed that 'the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent-company, the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it

out during . the period the machinery was in his use, the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against respondent's possession and control of the machinery'. The Supreme Court in Aggarwal Brothers' case [1999] 113 STC 317, had also considered the expression 'transfer of right to use' in the context of lending of shuttering or construction material. The assessee in that case hired shuttering to builders and contractors who use it in the course of construction of buildings. The authorities under the Haryana General Sales Tax Act issued notices to the assessees requiring them to pay sales tax on such hire charges and assessment orders were also made. The assessing authority took the view that the hire charges received by it were sales within the meaning of Section 1(1)(iv) of the Haryana General Sales Tax Act. In a writ petition filed by the assessee challenging the constitutionality of the said section, the High Court while repelling that challenge found that possession of the shuttering material was transferred by the assessees to their customers for use during the construction of buildings and that the customers were in effective control of the shuttering during the periods it remained in their possession and therefore, the transactions fell within the amended definition of the word 'sale' as there was a transfer of the right to use the shuttering. The Supreme Court observed that where there is a transfer of a right to use goods for consideration, the requirement of the provisions of the Haryana General Sales Tax Act is satisfied and there is deemed a sale. It was further held that in that case, '.....the assessees owned shuttering. They transferred the shuttering for consideration to builders and building contractors for use in the construction of buildings. There can, therefore, be no doubt that the requirements of a deemed sale within the meaning of the abovementioned provision of the said Act are satisfied.' The Supreme Court had also occasion to consider this question in State of Uttar Pradesh v. Union of India [2003] 130 STC 1, in the context of supply of telephone facility to subscribers by the department of Telecommunications, Government of India. There, the Supreme Court has held that the supply of telephone facility including instrument will come within the expression 'transfer of right to use goods' and therefore, the rent received from the subscribers is exigible to tax under the sales tax enactment.

8. From all the aforesaid decisions, it is clear that in order to attract the provisions of Section 5(1)(iii) of the Act, particularly the expressions 'transfer of the right to use goods', there must be a parting with the possession of the goods for the limited period of its use by the assessee in favour of the lessees. In other words, so long as effective control of the goods is with the assessee, the rent received from the customers for Use of the goods will not attract the provisions of Section 5(1)(iii) of the Act. It is in those circumstances, it has been held by this Court in Bahulayan's case (1992) 1 KTR 137, that the hire charges received for use of the lorry is not exigible to tax under Section 5(1)(iii) of the Act, for, the effective control of the lorry was always with its owner. It is on this principle, it was held in Rokini Panicker's case [1997] 104 STC 498 (Ker), that lending of video cassette for use by the customers is exigible to tax under the Act, for, the possession of the video cassette is given to the customers for their use according to their will. It is in view of this legal position, the Supreme Court in Aggarwal Brothers' case [1999] 113 STC 317, has held that shuttering material is exigible to tax under law.

9. Coming to the present case, we find that the assessing authority and the two appellate authorities had clearly understood the scope of Section 5(1)(iii) of the Act, for, we find that all of them have proceeded on the basis that in order to attract Section 5(1)(iii) of the Act, the effective control of the goods must be with the customer. As already noted, the case of the assessee is that the effective control of the excavator was always with the assessee and that the customer, namely, M/s. Sulekha Clay Mines had only paid hire charges and a portion of the expenses incurred by the assessee. The respondent, however has taken the stand that since the customer had met a portion of the expenses incurred by the assessee, it must be presumed that the assessee had parted with the possession of the excavator in favour of the customer and therefore, it is a case of transfer of right to use the excavator in favour of the customer. According to us, the only material based on which the assessing authority and two appellate authorities have come to the conclusion that there is a transfer of the right to use the excavator in favour of M/s. Sulekha Clay Mines is the accounts maintained by the assessee where it is noted that a portion of the expenses incurred for operating the excavator is due from M/s. Sulekha Clay Mines. According to us, the aforesaid circumstance is not sufficient to come to the conclusion that the assessee had

parted with possession of the excavator for use by the customer, namely, M/s. Sulekha Clay Mines according to their discretion. A reading of the orders of the assessing authority would also show that the excavator was operated by a person engaged by the assessee and the operational expenses are also incurred by the assessee. It would also appear that as part of the arrangement between the assessee and M/s. Sulekha Clay Mines, 50 per cent of the operational expenses have to be met by the customer. However, we note that the Tribunal in the appellate order has stated that 'in this case, even the maintenance cost is met by the hirer' and therefore there must have some right over the excavator to M/s. Sulekha Clay Mines. It is not clear from the order as to the basis for arriving at such a finding, for, this aspect of the matter is not seen mentioned either by the assessing authority or by the first appellate authority.

10. On a consideration of these materials, we are of the view that the question as to whether there was a transfer of the right to use the excavator in favour of M/s. Sulekha Clay Mines has to be considered afresh, in the light of the principles laid down by this Court and by the Supreme Court. It is open to the assessing authority to collect all materials regarding arrangement between the assessee and M/s. Sulekha Clay Mines before deciding the said question. It is also open to the assessee to produce all materials and evidences in support of their contention that there is no transfer of right to use the goods. We accordingly, set aside the orders of the three authorities on this aspect and remit the matter to the assessing authority for passing fresh orders in accordance with law and in the light of the observations made hereinabove. It is open to the assessee to place all evidences before the assessing authority in support of his claim.

The tax revision cases are disposed of as above. A copy of this judgment under the seal of this Court with the signature of the Registrar shall be forwarded to the Income-tax Appellate Tribunal, Cochin Bench, Ernakulam.

Order on C.M.P. No. 4714 of 2001 in O.P. No. 422 of 2001 dismissed.

Order on C.M.P. No. 4717 of 2001 in T.R.C. No. 424 of 2001 dismissed.

Order on C.M.P. No. 4719 of 2001 in O.P. No. 425 of 2001 dismissed.

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