

V.K. Johney Vs. Executive Engineer, Division No. li, Kerala State Housing Board and ors.

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Court : Kerala

Decided On : Feb-05-1999

Reported in : [2000]118STC498(Ker)

Judge : P. Shanmugam, J.

Acts : Kerala General Sales Tax Act, 1963 - Sections 7(7B)

Appeal No. : O.P. No. 20983 of 1998 W and O.P. Nos. 20877, 23152 and 23273 of 1998

Appellant : V.K. Johney

Respondent : Executive Engineer, Division No. li, Kerala State Housing Board and ors.

Advocate for Def. : T.R. Harikumar, Adv. for respondent No. 1 and; V.M. Kurian, Government Pleader for respondents Nos. 2

Advocate for Pet/Ap. : M.C. Cherian and; Asha Cherian, Advs.

Disposition : Original petition dismissed

Judgement :

P. Shanmugam, J.

1. Sub-section (7B) of Section 7 as amended is under challenge Section 5 of the Kerala General Sales Tax Act, 1963, hereinafter referred to as 'the Act' is a charging section. Section 5(1)(iv) of the Act deals with the works contract. Section 7 of the Act deals with compounding of tax. Sub-section (7) of that section enables every contractor in civil works of construction to exercise an option to pay tax at the rate of two per cent on the whole amount of contract. Sub-section (7A) of Section 7 enables the contractor other than the civil work construction to pay tax at the rate of seventy per cent shown in the Fourth Schedule, Proviso to Sub-section (7A) states that if the contractor's contracted amount does not exceed rupees fifty lakhs, he can opt to pay tax at five per cent of such contracted amount.

2. Sub-section (7B), as it stood prior to April 1, 1998, obliged that every awarder shall deduct at the rate of 2 per cent in respect of civil contracts and 5 per cent in respect of other contracts. Subsequently Section 7(7B) of the Act is amended by the Kerala Finance Act, 1998 (Act 14 of 1998) making a distinction between registered contractor and unregistered contractor. In case of unregistered contractor the awarder has to deduct 70 per cent of the amount of tax. The amended provision is as follows :

'Every awarder shall deduct tax at the rate of two per cent in respect of civil contracts and five per cent in respect of other contracts from the payments made by him to any contractor liable to pay tax Under Section 5, and who is registered Under Section 13 and at the rate of seventy per cent of the rates shown in the Fourth Schedule against such contract where the transfer of goods involved in the execution of works contract is not in the form of goods or, as the case may be, at the rate applicable to the goods under this Act, where such transfer is in the form of goods, from any other contractor liable to tax Under Section 5 at every time, including advance payments, and remit it to the Government, on or before the fifth day of the succeeding month from the date of such deduction in the prescribed manner.'

3. The validity of this is challenged by learned counsel for the petitioner on the ground that the distinction made between registered and unregistered contractor is

discriminatory and illegal. It is further submitted that a difference in the rates of deduction on the basis of registration is arbitrary and illegal.

4. Learned Government Pleader who supported the amended provision submitted that Sub-section (7) is a method of collection of tax from an awarder. The department was finding it difficult to collect tax from unregistered contractors if later on found that they are liable to pay tax more than what has been deducted. Every contractor including the petitioners who want to opt to pay at the compounded rate has to make an application under Sub-section (8) of Section 7. Sub-section (8) states that the option has to be exercised either by an application or by an express provision in the agreement. Rule 30 of the Kerala General Sales Tax Rules, 1963 states that every dealer who decides to exercise option has to make an application for permission in a prescribed form on or before the first day of May of the year to which the option relates. Sub-Rule (2) provides for the assessing authority to conduct necessary enquiries and after which he shall pass an order granting or rejecting the application. A dealer is obliged to submit annual return in form No, 9. Sub-section (9) of Section 7 also obliges the assessing officer, on receipt of an application, either to grant permission or to reject the application for compounding.

5. Thus it could be seen that a provision for payment of tax at the compounded rates can be requested only by an application or by an express provision in the contract. That has to be addressed to the assessing authority who has to pass an order either granting or refusing permission to compound. Sub-section (7B) of Section 7 is an independent provision for compounding. Thus if there is no order of compounding the awarder is obliged to deduct the tax at the rate as set out under Sub-section (7B). Section 13 of the Act provides for registration of dealers. As per this provision every dealer whose total turnover in any year is not less than rupees one lakh has to get himself registered under this Act.

6. In other words the tax imposable Under Section 5(4) can be compounded Under Section 7(7) of the Act. But an order has to precede the compounding. In the hands of an awarder, a separate provision has been made to deduct 2 per cent in respect of civil contract and 5 per cent in respect of other contracts if he is a

registered contractor and on a different rate if he is an unregistered contractor. Petitioners are all unregistered contractors and they have not opted under Sub-section (7) or Sub-section (7A) of Section 7 of the Act and not obtained orders under Sub-section (8) or (9) of Section 7 of the Act. They being unregistered contractors, form a separate class of contractors. They are liable to pay the tax as per Section 5(1)(iv) and a direction to deduct 70 per cent of the rates, therefore, cannot be held to be unreasonable. If the contractors make an application for option, they may have to take out the registration Under Section 13 since they may come within the requirements. They cannot avoid taking registration and at the same time get the compounding. This provision being a provision for collection of tax must be liberally construed so as to avoid the evasion of tax. The following observation of their Lordships in *State of Kerala v. Builders Association of India* : AIR 1997 SC3640 will apply to the facts of this case too :

'.....Several taxing enactments contain provisions for composition of tax liability which may sometimes be in the interest of both the Revenue and the assesseees. It must also be remembered that in the field of taxation, the Legislature must be allowed greater 'play in the joints' as it is called. Allowance must also be made for 'trial and error' by the Legislature, as has been held in *R.K. Garg v. Union of India* : [1982]133ITR239(SC) .'

The registered dealers form a separate class and they can avail of the option. Whereas the petitioners are all dealers unregistered and they form different class inasmuch as even if they seek option they may have to take out registration and hence the question of discrimination does not arise.

For all these reasons, I hold that the amended provision is valid. The original petitions are dismissed.

Order on C.M.P. No. 37026 of 1998 in O.P. No. 20983 of 1998-W dismissed.