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Court : Kerala

Decided On : May-30-2002

Reported in : [2003]129STC389(Ker)

Judge : Kurian Joseph, J.

Acts : [Constitution of India](#) - Articles 14, 19(1) and 304; Kerala General Sales Tax Act, 1963 - Sections 10 and 59A

Appeal No. : O.P. Nos. 935, 2142, 2334, 2371, 4292, 4680 and 4749 of 2002

Appellant : Selvam Broilers (P) Ltd.

Respondent : Assistant Commissioner (Assmt.) and ors.

Advocate for Def. : Raju Joseph, Special Government Pleader,; Arikkat Vijayan Menon and;

Advocate for Pet/Ap. : K. Srikumar and; C. Natarajan, Senior Counsels

Disposition : Petition allowed

Judgement :

Kurian Joseph, J.

1. Chicken has been on the tax table of this Court for quite some time for the main reason that the State had not been finding it easy to prepare and promote Kerala

chicken. The State intends to support and promote poultry farmers in Kerala ; but is unable to reach at them and that is the unfortunate story unfolded in these cases. To quote from the counter-affidavit of the respondents 'it is respectfully submitted that from the year 1967-68 onwards the intention of the Government is to give special incentive to farmers in Kerala. Each time when notification is issued with the above intention clever dealers outside Kerala could take advantage of the notification by adopting skilful means. But the Government never intended to give any such benefit to outside Kerala people, because the clear intention ever since 1967 was to encourage poultry industry in Kerala'. The last of such attempts to encourage poultry farmers in Kerala has given rise to the present litigation. The impugned notification is S.R.O. No. 7/2002 dated January 4, 2002, exhibit P4 in O.P. No. 2371 of 2002.

2. Section 10 of the Kerala General Sales Tax Act, 1963 provides for exemptions. It reads as follows :

10. Power of Government to grant exemption and reduction in rate of tax.--(1) The Government may, if they consider it necessary in the public interest, by notification in the Gazette, make an exemption or reduction in rate, either prospectively or retrospectively in respect of any tax payable under this Act,--

(i) on the sale or purchase of any specified goods or class of goods, at all points or at a specified point or points in the series of sales or purchases by successive dealers, or

(ii) by any specified class of persons in regard to the whole or any part of their turnover.

(2) Any exemption from tax, or reduction in the rate of tax, notified under Sub-section (1),--

(a) may extend to the whole State or to any specified area or areas therein,

(b) may be subject to such restrictions and conditions as may be specified in the notification.

(3) The Government may by notification in the Gazette, cancel or vary any notification issued under Sub-section (1).'

In exercise of the power under the said section the Government has been issuing notifications exempting poultry farming from taxation. For the purpose of the present case it is not necessary to refer to the entire earlier history; it is sufficient to start from S.R.O. No. 1090/1999 dated December 31, 1999 given effect from January 1, 2000. By the said notification (item No. 14 of Schedule I) 'poultry farmers including hatcheries in the State' were totally exempted in the matter of 'turnover of sale of chicks and chickens'. It was amended by S.R.O. No. 291/2000 with effect from April 1, 2000 as follows :

14. (i) Hatcheries within the State Turnover of sale of poultry and their chicks hatched and reared by them within the State and meat obtained therefrom. (ii) Poultry farmers within the State Turnover of sale of poultry reared by them in their own farm, within the State, whether hatched by them or not, and the meat obtained therefrom.

The notification was again amended as per S.R.O. No. 877/2000 with effect from September 23, 2000 as follows:

14. (i) Hatcheries within the State Turnover of sale of chicks hatched by them within the State. (ii) Poultry farmers within the State Turnover of sale of poultry reared by them in their own farm within the State

whether hatched by them or not and the meat obtained therefrom.

The latest in the procession in S.R.O. No. 7/2002 with retrospective effect from 1-4-2000, which reads as follows :

14. (i) Hatcheries within

the State Turnover of the sale of poultry reared by

them in their own farm within the State,

whether hatched by them or not but run

on land owned by them and the meat

obtained therefrom. (ii) Poultry farmers

within the State Own farm does not include the farms

run on land taken on lease, mortgage,

licence or any other arrangement.

The effect of the latest and impugned amendment is that the exemption from tax could be available with effect from April 1, 2000 only to those who own and run a hatchery and poultry on land owned by them, specifically excluding land taken on lease, mortgage, licence or any other arrangement. The impugned notification is dated January 4, 2002 but given retrospective effect from April 1, 2000. The notification is challenged on all available grounds with particular reference to Articles 14, 19(1)(g) and 304 of the [Constitution of India](#). There is also a serious challenge on the retrospective operation. Being a matter of exemption and amendment in between naturally there is a challenge on ground of estoppel also. The challenge on estoppel is based on the clarification issued by the Commissioner under Section 59A of the Kerala General Sales Tax Act whereby it was clarified that the exemption would be extended to those who run poultry farm on leased land also. Section 59A(1), which alone is relevant for the purpose of

these cases, reads as follows :

'59A. Power of Commissioner of Commercial Taxes to issue clarification.--(1) If any dispute arises, otherwise than in a proceedings before any appellate or revisional authority or in any court or Tribunal, as to whether, for the purpose of this Act,--

(a) any person is a dealer; or

(b) any transaction is a sale ; or

(c) any particular dealer is required to be registered ; or

(d) any tax is payable in respect of any sale or purchase, or if tax is payable, the point and the rate thereof ; or

(e) any activity carried out in any goods amounts to or results in the manufacture of goods ;

such dispute shall be decided by the Commissioner of Commercial Taxes on application by a dealer or any other person.'

3. Arguments were mainly advanced by Senior Counsel Sri C. Natarajan for the petitioners and the Special Government Pleader (Taxes) Sri Raju Joseph. Sri Harisankar V. Menon, who appears for the additional fourth and fifth respondents, sails along with the State. I shall deal with the challenge on the retrospective operation first. That issue is no more *res Integra*, concluded in favour of the petitioners by two direct decisions on the point : (1) *M.M. Nagalingam Nadar Sons v. State of Kerala* reported in [1993] 91 STC 61 and (2) *Deputy Commissioner (Law) v. M.R.F. Ltd.* reported in [1998] 109 STC 306. Both decisions are on the interpretation of Section 10(3). It is held that power is given to the Government under Section 10(1) to issue any notification granting exemption or reduction in rate either prospectively or retrospectively; whereas under Sub-section (3), coming to the cancellation or variation of such notification no express power is conferred for retrospectively cancelling or varying a notification already issued under Section 10(1). The learned Special Government Pleader vigorously contended that the

impugned notification is not one either cancelling or varying any benefit already granted; but it is only a clarification as to what exactly was intended by the Government by the earlier notification in the matter of exemption. Hence it is contended that being a clarificatory amendment, it should be deemed to have been there with effect from the date of the original order, namely, April 1, 2000. I am afraid the contention cannot be accepted. Only in a case where an amending Act is purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit, a clarificatory amendment can be made with retrospective effect. May be the State intended such a purpose of restricting the benefit of sales tax exemption to those who own a farm in their own land in Kerala. But that meaning was not even implicitly conveyed in the language of the notification. The pre-amended notification only contemplated 'own farm' in Kerala to qualify for exemption. It needs no explanation to understand that for owning a farm one need not have own land. These are two entirely different concepts. Without owning any land at all one can own and run a farm, which is an activity which only needs land and not own land. In other words owner of land where a poultry farm is conducted can be one person and another legal person is entitled and capable of owning a poultry farm in the same land. So long as a restrictive meaning for 'own land' was not there in the pre-amended notification it cannot be said that the poultry farms in Kerala, even if they are run on leased, mortgaged or licensed land, do not qualify for exemption. In that view of the matter, the Commissioner is perfectly justified in issuing exhibit P3 clarification dated September 27, 2001 to the effect that as per the terms of the pre-amended notification a poultry farm run on leased, mortgaged or licensed land within the State of Kerala is entitled for sales tax exemption. The reference in the pre-amended notification is only to the activity within the State. That the activity should be in own land is a new concept as such introduced by the amended notification. It is neither a clarification nor an explanation of the earlier notification. Therefore, the impugned notification cannot have any retrospective operation at all, if it is otherwise valid.

4. It is also significant to refer to the explanatory note to the impugned notification which would show that the State itself was of the view that the pre-amended notification could lead to an interpretation regarding the poultry farming within the

State without owning any land. The note reads as follows :

Explanatory note.--(This does not form part of the notification, but is intended to indicate its general purport). As per item 14(ii) of Schedule I of Notification S.R.O. 1090/99 and amended by S.R.O. 291/ 2000 which was effective from 1-4-2000, exemption is available to poultry farmers within the State in respect of turnover of poultry reared by them in their own farms within the State. Notification S.R.O. 291/2000 was issued on the basis of the announcement made in para 206 of the budget page for 2000-2001, wherein it was announced, in order to help poultry farmers in the State, the exemption in respect of poultry and poultry meat is proposed to be limited to poultry farmers and hatcheries in the State. The notification as presently worded leads to an interpretation that the exemption could be available even to a person who run the farms on leased land.

Government have decided to limit the interpretation to farmers who run the farm on land on which they have full ownership.'

The State itself having understood the potential of the pre-amended notification of being interpreted as stated above, and intending now to limit the interpretation, it cannot be said that the present amendment is a clarification. It is an amendment introducing a new concept and therefore, as already stated above, the amendment cannot operate retrospectively cancelling the benefit already given by the pre-amended notification. In that view of the matter it is also not necessary to deal with in detail the contention raised by the additional 4th and 5th respondents that some of the petitioners themselves had understood the scope of the pre-amended notification as presently amended. The law maker itself having understood the possibility of another interpretation in favour of the assessee, there is no justification in estopping those petitioners from banking on the said possibility. In the words of K. Venkataswami, J. in Commissioner of Income-tax, Bombay v. Podar Cement Pvt. Ltd. : [1997]226ITR625(SC) . 'There is no presumption as to a tax. Nothing is to be read in--nothing is to be implied. We can look only fairly at the language used. Nonetheless, the tax laws have to be interpreted reasonably and in consonance with justice'.

5. It is also now a well-settled proposition that if two views are possible the view that is favourable to the assessee has to be followed while construing a taxing statute. It is profitable to refer to a few decisions of the apex Court. In Commissioner of Income-tax; Punjab v. Kulu Valley Transport Co. P. Ltd. : [1970]77ITR518(SC) , the apex Court held 'even if two views are possible the view which is favourable to the assessee must be accepted while construing the provisions of a taxing statute'. In Commissioner of Income-tax, West Bengal II v. Naga Hills Tea Co. Ltd. : [1973]89ITR236(SC) , the Supreme Court while construing the provisions of the Finance Act, 1959 observed as follows :

'If a provision of a taxing statute can be reasonably interpreted in two ways, that interpretation which is favourable to the assessee, has got to be accepted.'

In Hindustan Lever Ltd. v. Municipal Corporation of Greater Bombay : [1995]3SCR807 while considering a property tax matter it was held that in the case of a taxing provision 'an interpretation beneficial to the assessee, in case two interpretations are reasonably possible, has to be given. This is a well-settled position in law'. In the light of such guidance I have no hesitation to hold that the position prior to the amendment being capable of interpreting in favour of the assessee to the effect that for owning a poultry farm one need not possess own land, the amendment cannot operate retrospectively. There is also no justification in denying such benefit to the poultry farmers till the impugned amendment explicitly limiting the interpretation contending that the Government intended otherwise earlier also. As held in a Bench decision of the Madras High Court in S. Kannappa Mudaliar v. State of Madras [1968] 21 STC 41, 'tax cannot be the result of intendment, but the produce of express specification.'

6. Then comes the question on the vires of the impugned notification. The issue based on the challenge under Articles 14, 19(1)(g) and 304 of the [Constitution of India](#) is also no more res Integra. In respect of the very same subject-matter a Division Bench of this Court has dealt with the issue in detail in P.P. Baby Archana Traders v. Additional Sales Tax Officer [2002] 126 STC 368, The relevant portion at paragraph 2 reads as follows ;

'2. Government of Kerala in exercise of its power under Section 10 of the Kerala General Sales Tax Act, 1963, granted exemption and reduction in the rates of sales tax for several dealers and on different goods. By S.R.O. No. 1090/99 Government of Kerala granted exemption to poultry farmers within the State of Kerala on their turnover of sale of poultry reared by them in their own farm within the State and sale of meat obtained therefrom. By S.R.O. No. 291/ 2000 the said exemption has been extended to all farmers within the State of Kerala on the turnover of sale of poultry reared by them in their own farm in the State. According to the petitioner, by the said notification exemption is restricted and limited to only poultry farmers within the State of Kerala while the poultry farmers having poultry farms in other States like State of Tamil Nadu are denied exemption in respect of sale of poultry reared by them in their own farm at Tamil Nadu. Counsel submitted various notifications issued by the State Government granting exemption only to those poultry farms situated in the State of Kerala and denying the same to the poultry farms situated outside the State of Kerala is discriminatory and violative of Article 14 of the [Constitution of India](#). According to the counsel, it is also violative of Article 301 of the [Constitution of India](#). Counsel submitted subjecting the petitioner to levy of sales tax under the Kerala General Sales Tax Act while granting exemption to identical poultry farmers in the State of Kerala is highly discriminatory violating the guarantee of Article 304(a) of the Constitution. When the matter came up for hearing we directed respondents to file an affidavit detailing the correct position. Affidavit was filed by the Assistant Commissioner (Law) II, Office of the Deputy Commissioner (Law), Ernakulam. Affidavit reads as follows :

'In the instant case chicks or chickens reared in hatcheries or poultry farms within the State are exempted from payment of tax under the KGST Act ; even though such persons have the liability to pay tax, the same is not collected from them. Therefore the goods, namely, chick or chicken are not exempted from the levy of tax.....Economic development of the State or any part of the State is also a duty cast on the State by the Constitution. As a part of discharge of that duty if the Government is giving any exemption or subsidy to any particular industry in any particular area or throughout the State to a category of the industry it cannot be called a colourable legislation. In order to compensate any such concession or

subsidy given by one State the other State can invoke such power by giving exemption or subsidy. Therefore, there is no basis in saying that by the exemption given the goods are differently treated and which is absolutely prohibited under the Constitution.' We find it difficult to accept the contention of the counsel for the petitioner that non-granting of exemption to petitioner is violative of Article 14 or 304(a) of the [Constitution of India](#).'

Reference is also made in the said decision to the apex Court judgment in Video Electronics Put. Ltd. v. State of Punjab [1990] 77 STC 82. It was further held as follows :

'Power of the Union or State to exercise legitimate regulatory control is independent of the restrictions imposed by Articles 302 and 305. A contention was raised by the counsel for the petitioner that impugned notification is unconstitutional and violative of Article 19(1)(g) of the [Constitution of India](#). We are of the view the said contention cannot be accepted. Not being a fundamental right, the infringement of Article 301 cannot be challenged under Article 226 of the Constitution on the ground that it violates Article 19(1)(g) of the [Constitution of India](#). Article 304 of the Constitution enables the State Legislature to impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. Supreme Court in Video Electronics Private Ltd. v. State of Punjab [1990] 77 STC 82 held that Article 304(a) cannot be read in isolation. It is to be read in the context of other provisions in the Constitution and also the obligations of the State under Articles 39 and 38 of the Constitution cannot be given a go by. Viewed in the abovementioned legal perspective we are of the view that the contention of the learned counsel for the petitioner cannot be sustained.'

Sri C. Natarajan, learned Senior Counsel made a strenuous effort contending that the said decision of the division Bench is rendered per incuriam, having not referred to various other judgments by the apex Court. However, I am not persuaded to, nor am I bound to enter into such an investigation, faced with a binding decision, that too a decision relying on a Supreme Court decision. Unless the judgment of the apex Court is clearly distinguishable or one which has lost its

binding force in view of later authoritative pronouncements by the apex Court, there is no point in making such a roving enquiry investigation so as to reopen a settled position. That apart on the facts of the instant case, it cannot be said that the power of exemption is used in a colourable manner to create unfavourable bias. There are 'justifiable and rational reasons for differentiation' as noted from the counter-affidavit. Therefore, the impugned notification is perfectly *infra vires* the constitutional provisions mentioned above. It needs no elaborate discussion to also hold that it is *intra vires* Section 10 of the KGST Act since under the said provision the Government is competent to issue a notification in the matter of tax concession or exemption.

7. The legislative competence being not in dispute, what is to be considered is the manner of exercise of it and whether it hits other provisions under the statute, or the constitutional provisions. What remains to be considered in this context is only the aspect of reasonableness. Being a matter of concession, it is for the State to decide on its policy in the matter of granting tax concessions and it is not for this Court to interfere with the policy decisions of the State since they are well within their powers to adopt such policy. Whether that policy is wise or foolish is not for this Court to decide. But this Court is certainly entitled to go into the reasonableness of the legislation. In that view of the matter the contention that the present amendment is not reasonable and beneficial to the targetted group since the poor and small farmers of this State having only limited extent of own land are not possessed with the wherewithal to scientifically run a poultry farm, assumes some relevance. However, that contention need not be gone into in these proceedings, lacking in proper pleadings and particularly at the instance of the petitioners who do not represent the interest of such farmers.

8. The last contention to be dealt with is regarding estoppel. For one thing it has to be seen that there is no estoppel against law. It has also to be specifically noted that even the pre-amended notification and the clarification by the Commissioner under Section 59A did not provide for any specified period for the concession. Not only that Section 59A clarification is a power exercised by the Commissioner for Commercial Taxes whereas the impugned notification is issued by the Government under Section 10. The Government itself having come up with a new

notification clearly specifying the terms of the concession, the clarification issued by the Commissioner under the terms of pre-amended notification ceases to have any legal consequences. The contention on promissory estoppel will not also be available to the assessee since the Government has now declared their policy on tax concession for which they are entitled to. Once the policy is constitutionally tested to be valid, there cannot be any contention on the ground of promissory estoppel particularly since the earlier policy and the clarification issued by the Commissioner are not time bound. Therefore, that contention also fails.

9. Learned counsel for the additional 4th and 5th respondents further contended that even if the original petitions are allowed some of the petitioners will not be entitled to any benefit in view of the factual background of their case. This is a matter for the assessing authority to consider and this Court need not go into the matter at this stage.

The original petitions are allowed to the extent of declaring that the impugned notification S.R.O. No. 7 of 2002 does not have retrospective operation. It is for the parties to pursue the individual cases on the basis of the above declaration.

Order on C.M.P. No. 4271 of 2002 in O.P. No. 2371 of 2002-G dismissed.

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