

Cit Vs. K.E. Kesavan and Sons

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Court : Kerala

Decided On : Jan-13-2003

Reported in : [2003]129TAXMAN514(Ker)

Appeal No. : I.T. Reference No. 62 of 1999 13 January 2003

Appellant : Cit

Respondent : K.E. Kesavan and Sons

Advocate for Pet/Ap. : P.K.R. Menon, *for the Revenue*

Judgement :

G. Sivarajan, J.

The Income Tax Appellate Tribunal, Cochin Bench at the instance of the department has referred the following question of law for the decision of this court :

'Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in upholding the decision of the Commissioner (Appeals) deleting the sum of Rs. 9,11,380 deemed as profit under section 41(1) of the Income Tax Act for the assessment year 1987-88 ?'

2. The matter arises under the Income Tax Act, 1961 (hereinafter referred to as the Act). The brief facts necessary for the decision of this case are as follows : The respondent-assessee is a partnership firm carrying on business in the export of

marine products. During the course of the assessment for the year 1987-88 the relevant accounting period ended 31-12-1986 the assessing officer noted that in the balance sheet of the firm as on 31-12-1986 there was a provision of Rs. 27,01,111 towards purchase tax liability. The assessing officer also found that out of the total provision of Rs. 27,01,111/Rs. 17,89,732 had already been taxed in the earlier years. Regarding the balance sum of Rs. 9,11,380 the assessing officer took the view that the same can be brought to tax under section 41(1) of the Act. This view was taken on the basis of the decision of the Supreme Court in *Sterling Foods v. State of Karnataka* (1986) 63 STC 239 which has taken the view that the raw prawns purchased and the processed prawns exported are one and the same commodity. The said decision was rendered by the Supreme Court on 21-7-1986, i.e., during the previous year relevant to the assessment year 1987-88. The assessing officer had accordingly brought to tax the sum of Rs. 9,11,380 as deemed profit under section 41(1) of the Act in the assessment for the year 1987-88. In appeal by the assessee the Commissioner (Appeals)-I, Kochi allowed the appeal directing deletion of this sum of Rs. 9,11,380. This is confirmed by the Tribunal in appeal by the department. It is against the said order of the Tribunal the question of law specified in paragraph 1 of the judgment is referred for decision of this court.

3. Though notice was served on the respondent, nobody entered appearance. Sri P.K.R. Menon, learned senior standing counsel for the revenue submits that the sum of Rs. 9,11,380 added by the assessing officer as deemed income of the assessee represents the deduction of the provision of purchase tax liability made in the earlier assessment years and that in view of the decision of the Supreme Court in *Sterling Foods* case (supra) there is a cessation of the purchase tax liability during the previous year relevant to the assessment year in question and consequently the said amount was rightly treated as deemed income of the assessee in the assessment for the year 1987-88. The senior counsel further submitted that the Tribunal has wrongly caused the burden on the revenue to establish that there is cessation of liability during the previous year relevant to the assessment year in question. The senior counsel alternatively submitted that at any rate, when the Tribunal felt that there is no material on record to show that there is cessation of the purchase tax liability during the previous year relevant to

the assessment year in question the Tribunal should have remitted the matter to the assessing authority to enable the department to produce the requisite evidence in that regard.

4. We have considered the matter. Admittedly the sum of Rs. 9,11,380 added in the assessment for the year 1987-88 represents provision for purchase tax liability allowed in the earlier assessment years. The only ground on which the assessing officer has assumed that there is cessation of liability in respect of the said amount during the previous year relevant to the assessment year is the decision of the Supreme Court in Sterling Foods case (supra) rendered on 21-7-1986 which falls within the previous year relevant to the assessment year in question. The Tribunal has rightly noted that the question regarding the purchase tax liability is not solely dependent on the question decided by the Supreme Court in Sterling Foods case (supra) and, therefore, unless the assessment under the Sales Tax Act is completed allowing the claim it cannot be said that there is cessation of liability to purchase tax which is a condition precedent for invocation of section 41(1) of the Act. Of course the Tribunal has stated in the appellate order that there was no material brought on record by the department to show whether the sales tax assessment had since been closed. According to us that is the relevant circumstances to show the real position with regard to the purchase tax liability of the respondent-assessee for if the assessment is completed by granting exemption claimed under section 5(3) of the Central Sales Tax Act the position would be clear that there is cessation of purchase tax liability atleast in the assessment stage. The assessee has taken the stand that the assessment for the relevant assessment year is pending before the assessing officer. The Tribunal, in the absence of any contra material, has acted on that basis and held that the department has not established that there is cessation of purchase tax liability during previous year relevant to the assessment year warranting invocation of section 41(1) of the Act.

5. As already noted, the decision of the Supreme Court in Sterling Foods case (supra) deals only on the question regarding the identity of the goods purchased and the goods exported. In that decision the Supreme Court has held that the raw prawns purchased and the processed prawns exported are substantially one and

the same commodity. In order to claim exemption from payment of sales tax on the purchase turnover of prawns under section 5(3) of the C.S.T. Act the assessee has to establish that raw prawns were purchased after obtaining a foreign contract and that the same goods purchased had been exported. So, even after the decision of the Supreme Court one more question as to whether the goods exported were purchased pursuant to an anterior contract with a foreign party has to be decided by the assessing authority in the assessment under the Sales Tax Act. Only if the assessee satisfies this condition also exemption under section 5(3) of the C.S.T. Act can be allowed. If the sales tax assessment for the relevant year had not been completed during the previous year relevant to the assessment year in question it cannot be said that there is cessation of liability to purchase tax during the previous year relevant to the assessment year in question.

6. As already noted, the assessee had contended that the assessment was pending. The department did not adduce any evidence to show that the sales tax assessment has been completed granting exemption to the assessee from payment of purchase tax. However, we give one more opportunity to the department to produce evidence, if any, available to show that the purchase tax liability of the assessee has been determined by completing the sales tax assessment during the previous year relevant to the assessment year 1987-88. This is for the reason that the assessing officer was under the impression that the question regarding the purchase tax liability has been concluded by the decision of the Supreme Court in Sterling Foods case (supra). In these circumstances we decline to answer the question referred to us. We set aside the appellate order of the Tribunal and direct the Tribunal to dispose of the appeal as directed within a period of 3 months from the date of receipt of a copy of this judgment. If the department does not produce the sales tax assessment order determining the purchase tax liability establishing the cessation of the purchase tax liability in question the Tribunal is free to pass appropriate orders including restoration of the original order.