

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

THURSDAY, THE 11TH DAY OF JUNE 2015/21ST JYASHTA, 1937

OT.Rev.No. 64 of 2014 ()

ORDER IN TA(VAT) 814/2011 of KERALA VALUE ADDED TAX APPELLATE
TRIBUNAL, ERNAKULAM DATED 12-09-2013

REVISION PETITIONER/RESPONDENT/REVENUE :

THE STATE OF KERALA
REPRESENTED BY THE DEPUTY COMMISSIONER (LAW)
COMMERCIAL TAXES, ERNAKULAM.

SENIOR GOVERNMENT PLEADER SRI.LIJU STEPHEN

RESPONDENT/APPELLANT/ASSESSEE :

M/S WHIRLPOOL OF INDIA
BUILDING NO.XVIII/10A, ST.JOSEPH'S MINOR SEMINARY
COCHIN UNIVERSITY P.O., SOUTH KALAMASSERY-682 022.

R1 BY ADV. SMT.K.LATHA

THIS OTHER TAX REVISION (VAT) HAVING BEEN FINALLY
HEARD ON 05-06-2015, THE COURT ON 11.06.2015 PASSED THE
FOLLOWING:

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A: TRUE COPY OF THE PENALTY ORDER DATED 20.09.2010 ISSUED BY THE INTELLIGENCE OFFICER, SQUAD NO.1, COMMERCIAL TAXES AT EDAPALLY, ERNAKULAM.

ANNEXURE B: TRUE COPY OF THE 1ST APPELLATE ORDER DATED 30.12.2010 IN KVATA NO.3398/2010 PASSED BY THE DEPUTY COMMISSIONER (APPEALS), COMMERCIAL TAXES, ERNAKULAM.

ANNEXURE C: CERTIFIED COPY OF THE 2ND APPELLATE ORDER DATED 12.09.2013 OF THE TRIBUNAL IN T.A.(VAT) NO.814/2014.

RESPONDENT'S ANNEXURES: NIL

//TRUE COPY//

P.A. TO JUDGE

smv

**ANTONY DOMINIC
&
SHAJI P. CHALY, JJ.**

O.T.(Rev) No.64 of 2014

Dated this the 11th day of June, 2015

ORDER

Shaji P. Chaly, J.

This revision is preferred by the Revenue against the order of the Kerala Value Added Tax Appellate Tribunal, Ernakulam in T.A.(VAT) No.814 of 2011 dated 12.09.2013, by which order the learned Appellate Tribunal interfered with the order passed by the Intelligence Officer imposing penalty and which was affirmed by the 1st appellate authority under Section 47(6) of the Kerala Value Added Tax Act, 2003 (hereinafter referred to as “the KVAT Act” for short) and deleted the same.

2. Brief facts contained in the penalty order which are required to be noticed for the disposal of this revision alone are stated hereunder:

3. The assessee is a registered dealer under the KVAT Act engaged in the sale of various consumer products like home appliances. While transporting air conditioners in vehicles bearing Nos.TN28AB 5664 and TN 09AL 6159, the Intelligence

Inspector, Squad No.1, Commercial Taxes, Ernakulam intercepted vehicles and noticed that air conditioners were being transported from Sea Port of Chennai to Ernakulam without proper documents as prescribed under Section 46(3) of the KVAT Act. The Intelligence Officer after providing the assessee sufficient opportunity to object to the penalty proposed and after providing a hearing, found that the assessee has attempted to evade tax and therefore, penalty was imposed under Section 47 (6) of the KVAT Act.

4. Even though the assessee preferred statutory appeal, the first appellate authority confirmed the order of penalty imposed by the Intelligence Officer. Aggrieved, assessee preferred appeal before the learned Appellate Tribunal which interfered with the order of the authorities below and held that since there was no attempt for evasion of tax, the penalty imposed by the Intelligence Officer cannot be sustained and accordingly the penalty was deleted. It is thus aggrieved by the order of the Appellate Tribunal this revision is preferred by the Revenue.

5. Heard the learned Senior Government Pleader Sri.Liju Stephen and the learned counsel for the respondent assessee Smt.K.Latha.

6. The thrust of the contention advanced by the learned Government Pleader before us is that the non-availability of the documents that are prescribed under sub-section of Section (3) of Section 46 of the KVAT Act, with specific reference to absence of delivery note, along with the goods under transport, was a circumstance of attempted evasion of tax and therefore the Tribunal went wrong in deleting the penalty.

7. Learned Senior Government Pleader submits that the goods intercepted on transit were air conditioners imported from China and the imported goods were taken to Ernakulam from Chennai Port without necessary documents as provided under the KVAT Act. The documents found on inspection revealed that the goods were imported at the assessee's office at Faridabad, Haryana and that there was no document supporting the consignment to justify the transportation to Ernakulam. Further from the commercial invoice issued by a company viz., M/s. Kelong International Inc., Hong Kong dated 05.05.2010 to Whirlpool of India Ltd., Faridabad, Haryana, there is no mention about the transportation of goods to Ernakulam wherein the branch office of the company is situated. Apart from the same, the other documents such as the photocopy of bill of

lading dated 05.05.2010 to Whirlpool of India Ltd., Faridabad, Haryana, Form KK bearing Nos.11514 and 11515 dated 18.06.2010 issued by the Clearing and Forwarding Agent, M/s. Flyjac Logistics (P) Ltd Chennai, letter typed on a blank photocopy of Whirlpool Home Appliances without any particulars and signed by authorised signatory of Whirlpool India Ltd.,Cochin which contains no date with the registered office shown as Pune, in which it is stated that there is no sales involved in the transaction, Goods Consignment Note dated 18.06.2016 from M/s.Shree Maruthy Enterprises, Chennai, photocopy of packing list dated 05.05.2010 from M/s.Kelon International Inc., to Whirlpool India Ltd, Haryana and photocopy of bill of lading dated 05.05.2010 of M/s.Whirlpool India Limited, Haryana, which accompanied the goods did not satisfy the requirements of Section 46(3) of the KVAT Act and therefore there is suspected evasion of tax. The 1st appellate authority has fully endorsed the findings of the Intelligence Officer and confirmed the penalty.

8.The learned Appellate Tribunal considering the contentions so advanced by the assessee and the Revenue has come to the following conclusions in paragraph 5 of the order.

“We have considered the contentions advanced by both sides. The only question to be decided in this case is as to whether the consignment of goods was supported by proper documents under the Act. The appellant has filed before the Tribunal copies of Bill of Lading, Commercial invoice from China, pack list, Form KK issued by Flyjac Logistics Pvt. Ltd., Channai (C&F Agent). Goods consignment note and copies of stock register from 21.06.2010 to 03.09.2010. It is an undisputed fact that the goods were imported from China. The records placed before us would show that the goods were imported from China to M/s.Whirlpool India Ltd, Faridabad, Haryana. The Form KK issued by the Flyjac Logistics Pvt. Ltd., Chennai (C&F agent) and the consignment note would show that the goods imported as per the bill of lading and commercial invoice were transferred to M/s.Whirlpool India Ltd., South Kalamasserry, Cochin. It is very clear that M/s.Whirlpool India Ltd, Cochin had not directly imported the goods from China. Therefore, we are of the view that the appellant cannot use delivery note in Form 15 to the above consignment. But the consignment was supported by bill of lading, commercial invoice, packing list, form KK issued by C&F agent, and consignment note and the consignment was declared at the Walayar Check Post. We therefore hold that there is no evasion or attempt of evasion of tax in this case. Considering the facts and circumstances of the case, we are of the

view that there is no justification for imposing penalty under Section 47(6) of the Act. We, therefore set aside the orders of the authorities below and direct the concerned officer to refund the amount collected as penalty.”

9. Assailing the findings of the learned Appellate Tribunal counsel for the Revenue submits that even assuming that the documents appreciated by the Tribunal accompanied the goods under transport, same will not satisfy the requirements provided under Section 46(3) of the KVAT Act. Apart from the same, he also contended that since the goods were transported interstate, Form 15 delivery note is a mandatory requirement and therefore the findings of the Appellate Tribunal cannot be sustained.

10. To substantiate the contentions so raised, he relied on the judgment of the Hon'ble Apex Court in State of **Tamilnadu v. Kerala State Small Industries Development and Employment Corporation Ltd** reported in 2001(5)SCC 430 and canvassed for the proposition that since the goods are transported interstate a delivery note is a compulsory requirement as contemplated under Section 46(3).

11. We have gone through the said judgment and we are of the opinion that, that was a case where the respondent

Corporation had imported cement in Tuticorin, Tamilnadu and after the import of the cement, the same was sold from there itself to various parties in State of Kerala and thereupon there was an attempt of evasion of payment of interstate sales tax by showing that cement was despatched to the warehouse of the Corporation under the guise of stock transfer whereas in fact, it was a sale directly to the customers, from Tamilnadu. In that circumstances only, Hon'ble Apex Court interfered with the judgment of the High Court of Madras which in turn had interfered with the concurrent orders right from the officer concerned to the Appellate Tribunal which held that there was attempted evasion of tax. The facts of the said case has no bearing on the case before us since in the said judgment, it was clearly found that interstate sale of the cement took place and the Corporation had attempted for evasion of tax. Here in this case the Revenue has no case that the goods intercepted on transit were sold goods to customers of the assessee company in Kerala.

12. Yet another decision pointed out by the counsel for the Revenue is the judgment reported in **K.Gopinathan Nair v. State of Kerala** [(1997) 10 SCC 1]. That was the case where

the appellants were engaged in the purchases of imported cashew kernels and export of cashew nuts after processing. Prior to 1970 they could import cashew kernels from African countries under Open General Licence. But after the issuance of Notification No.3-1970 dated 31.08.1970 under the Import Trade (Control) Order, cashew kernels could be imported only through a chanalising agency, viz., the Cashew Corporation of India (CCI). Consequently, the assessee has imported their requirement of cashew kernels from African countries through CCI after collecting information regarding the requirement of the actual users through the chanalising agency. Thereafter acting on its own and not as agent of the local users, CCI imported cashew kernels on whole sale basis by entering into independent contracts with the foreign exporters. The question raised in this case was, "as to whether the purchase of such imported cashew kernels by the assessee from the CCI were in the course of import and therefore immune under Section 5(2) of the Central Sales Tax Act from liability to tax under the Kerala General Sales Tax Act". The said question or the principles laid down in the judgment have no bearing at all to the facts of the case before us and therefore the said judgment will not be of

any help or assistance to the Revenue.

13. Learned counsel for the assessee has contended that the assessee is a multi national company registered under the KVAT Act and Rules and is paying tax to the Value Added Tax Authorities in accordance with law and without default for the past several years. Further the counsel contends that the documents accompanied the goods were sufficient or satisfactory proof for the ownership of the goods and therefore there is no attempt of evasion of tax made by the assessee.

14. Learned Appellate Tribunal after verifying the documents and satisfying itself about the genuineness of the same, came to the conclusion that as per the bill of lading, commercial invoice and the consignment note, the goods were transferred to M/s.Wirlpool India Limited, South Kalamassery, Cochin and further that the consignment was supported by packing list, Form KK issued by the C&F agent and further that the consignment note was also declared at the Walayar Check Post maintained by the Kerala State Government.

We have considered the rival contentions advanced by the parties, the questions of law raised by the Revenue and other attendant facts and circumstances and are of the considered

opinion that the conclusions arrived at by the Appellate Tribunal do not suffer from any illegality or infirmity warranting interference invoking the powers conferred on us under Section 63 of the KVAT Act. Therefore, the revision fails and it is accordingly dismissed.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

smv