IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

WEDNESDAY, THE 15TH DAY OF JULY 2015/24TH ASHADHA, 1937

WA.No. 588 of 2009 (D) IN WP(C).25623/2005

AGAINST THE ORDER/JUDGMENT IN WP(C) 25623/2005 of HIGH COURT OF KERALA DATED 21-11-2008

APPELLANT(S)/PETITIONER IN THE WPC:

M/S.SUPER PACKAGING INDUSTRIES
RAVIPURAM, ERNAKULAM.
REPRESENTED BY ITS MANAGING PARTNER, N.X.GEORGE.

BY ADVS.SRI.M.GOPIKRISHNAN NAMBIAR
SRI.P.GOPINATH
SRI.P.BENNY THOMAS
SRI.K.JOHN MATHAI
SRI.KURYAN THOMAS

RESPONDENT(S)/RESPONDENTS IN WPC:

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1. THE SALES TAX OFFICER, II CIRCLE,
II CIRCLE, ERNAKULAM.

2. THE STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO THE, GOVERNMENT
TAXES DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

R BY GOVERNMENT PLEADER SHRI S. SUDHEESHKUMAR

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 24/6/2015, ALONG WITH WPC. 37214/2009, WPC. 19448/2010, WPC. 2934/2013, THE COURT ON 15/7/2015 DELIVERED THE FOLLOWING:

T.R. RAMACHANDRAN NAIR &
K.P. JYOTHINDRANATH, JJ.
- -
W.A.Nos.588/2009 and W.P.(C) Nos.37214/2009, 19448/2010 and 2934/2013
- -
Dated this the 15th day of July, 2015

JUDGMENT

Ramachandran Nair, J.

The appellant in the writ appeal is the petitioner in the three writ petitions. Since a common legal point arises for consideration, all the cases were heard together.

2. The interpretation of Section 5(3) of the Central Sales Tax Act, 1956 (for short 'CST Act') arises for consideration in these cases. W.A. No.588/2009 is treated as the leading case. The appellant is a registered dealer under the Kerala General Sales Tax Act, 1963 and Central Sales Tax Act, 1956. The business of the firm is manufacture and sale of packing materials (paper cartons). The appellant filed W.P.(C) No.25623/2005 which was dismissed by a learned Single Judge, from which the writ appeal is filed. Therein, the challenge was against Ext.P4 assessment order under the CST Act. The year of assessment

shown is 2002-2003. In W.P.(C) No.37214/2009 the assessment years are 2005-2006 and 2006-2007 and Exts.P10, P11, P2 and P13 assessment orders are under challenge. In W.P.(C)No.19448/2010, the assessment year is 2007-2008 and Exts.P6 to P9 orders are under challenge. In W.P.(C) No.2934/2010, the assessment years are 2008-2009 and 2009-2010 and Exts.P1 and P3 are under challenge.

3. The contentions raised by the appellant in all these cases are the same. The case pleaded is that the firm had effected inter-state sale of paper cartons to various exporters in the course of export outside the State. Exemption was claimed on the said turnover under Section 5(3) of the C.S.T. Act. The sales were supported by Form H declarations. The assessing authorities have rejected the claims and disallowed exemption. They have also held that the sales of packing materials are liable to tax at the rate of 1% if the sales are supported by C Form or D Form declarations. The tax at 1% is payable as provided under SRO No.958/2002, as against the normal tax at 4%, if sales are supported by C & D declarations and 10% in other cases.

4. The said contentions have been elaborated by the learned

counsel for the appellant by stating that the packing cartons were used by the exporters for export of various items. The contract between the exporters and foreign buyers is to export the goods in packed condition. The goods cannot be exported without the aid of packing material. Therefore, the sale of packing materials to exporters is for the purpose of complying with the export orders and it squarely falls within Section 5(3) of the CST Act. It is also pointed out that the sale is supported by Form H declarations.

5. Learned counsel for the appellant submitted that all the ingredients of Section 5(3) of Act are thus attracted on the facts of these cases. He also relied upon the following decisions:

> **Moncompu Egg Store v. State of Kerala** {(1981) 48 STC 518 - Kerala}, S**tate of Tamil Nadu v. Catherene Traders and another** {(1991) 81 STC 228 - Madras}, **State of A.P. v. Standard Packings** {(1995) 96 STC 151 - A.P.}, **Kusum Laminating and Packaging Industries v. State of Tamil Nadu** {(1996) 101 STC 476 - Madras) and **Allappy Company Limited v. State of Kerala** {(2012) 20 KTR 69 - Kerala).

Our attention was also invited to the decision of the Constitution Bench of the Apex Court in **State of Karnataka v. Azad Coach Builders Pvt. Ltd. and another** {(2011) 19 KTR 73 - SC).

6. While opposing the contentions of the learned counsel for the appellant, learned Senior Government Pleader submitted that the sale of packing materials by the appellant/petitioner to exporters cannot get the benefit under Section 5(3) of the CST Act. What is important as per the said provision is to find out whether the goods exported are identical to the goods purchased as the last sale. Herein, SRO No.958/2002 gives a concessional rate at 1% for packing materials. The said benefit alone is which the appellant can claim. It is submitted that the decision of the Constitution Bench in **Azad Coach Builders Pvt. Ltd.'s case** (supra) will govern the issue. Packing materials were never sought for by the foreign buyers from the exporters and it is not a case of export of any packing materials. Packing materials are only used for wrapping the goods which are the subject matter of export and no independent contract has been proved, for export of packing materials.

7. For easy reference, we extract below Section 5(3) of the CST Act:

> "5. When is a sale or purchase of goods said to take place in the course of import or export.--
>
> (1) and (2) xxxxxxxxxxxxx
>
> (3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

It will also be necessary to refer to the definition of 'goods' in Section 2 (d) of the CST Act which reads as follows:

> "(d) "goods" includes all materials, articles, commodities and all other kinds of movable property, but does not include newspaper actionable claims, stocks, shares and securities."

Section 5(3) of the Act has to be understood in the light of the decision of the Constitution Bench of the Apex Court in **Azad Coach Builders' case** (supra). It is clear from sub-section (3) of Section 5 that the last sale or purchase of any "goods" preceding the sale or purchase occasioning the export of "those goods" out of the territory of India, shall also be deemed to be in the course of such export. The decisions are to the effect that the identity of goods should be maintained for getting the benefit of Section 5(3) of the Act.

8. Before going further, we will refer to the judgment of the learned Single Judge which is under challenge in W.A.No.588/2009. In paragraph 2 of the judgment it was held by the learned Single Judge that "Section 5(3) provides for exemption of sale to exporters only for the purchase made by the exporter against advance exports orders for export of goods. The petitioner has no case that the goods purchased by the exporter from the petitioner were goods which are exported as such. In other words, export orders produced by the petitioner from the buyers were for export of other goods by the exporter and the items sold by the petitioner was used for packing of such goods. Section 5(3) provides for exemption only on sale to exporter of goods which are exported by the exporter against prior orders for export. In other words, raw materials, packing materials, etc. purchased by the exporter are not separately covered by Section 5(3) of the Act which provides for exemption only for the goods exported." The learned Single Judge also noticed that it is only because of non availability of exemption for

sale of packing material to exporters under Section 5(3) of the Act, the Government granted an incentive by way of reduction in rate of tax to suppliers of packing materials to exporters for packing goods for export.

9. For considering the legal point, it will be profitable and advantageous to refer to the interpretation placed by the Constitution Bench of the Apex Court in **Azad Coach Builders' case** (supra) on Section 5(3) of the Act. The Bench has referred to the relevant portion of the Statement of Objects and Reasons in paragraph 16 of the judgment which we reproduce below:

> "According to the Export Control Orders, exports of certain goods can be made only by specified agencies such as the State Trading Corporations. In other cases also, manufacturers of goods, particularly in the small scale and medium sectors, have to depend upon some experienced export house for exporting the goods because special expertise is needed for carrying on export trade. A sale of goods made to an export canalizing agency such as the State Trading Corporation or to an export house to enable such agency or export house to export those goods in compliance with an existing contract or

> order is inextricably connected with the export of the goods. Further, if such sales do not qualify as sales in the course of export, they would be liable to States sales tax and there would be a corresponding increase in the price of the goods. This would make our exports uncompetitive in the fiercely competitive international markets. It is, therefore, proposed to amend, with effect from the beginning of the current financial year, Section 5 of the Central Sales Tax Act to provide that the last sale or purchase of any goods preceding the sale or purchase occasioning export of those goods out of the territory of India shall also be deemed to be in the course of such export if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order, for, or in relation to, such export."

Therein, it has been explained that a sale of goods made to an export canalizing agency such as the State Trading Corporation or to an export house to enable such agency or export house to export those goods in compliance with an existing contract or order is inextricably connected with the export of the goods.

10. The Constitution Bench then considered the effect of Article 286(1)(b) of the Constitution of India in paragraph 18 and stated that

under Article 286(1) of the Constitution, the court has to examine whether any tax is being imposed by the State Legislature on the sale or purchase of goods "in the course of the import of the goods into or export of the goods out of the territory of India." In order to resist imposition of sales tax by the State, the assessee will have to establish the identity of the goods sold to be exported out of the territory of India. In order to fulfil an export obligation, if an exporter purchases goods and as a result of some processing the identity and character of the goods change then it will not be a case of export of the same goods."

11. The provision has been analysed in paragraphs 23 and 24 which we reproduce below:

> "23. When we analyse all these decisions in the light of the Statement of Objects and Reasons of the Amending Act 103 of 1976 and on the interpretation placed on Section 5(3) of the CST Act, the following principles emerge:
>
> - To constitute a sale in the course of export there must be an intention on the part of both the buyer and the seller to export;

- There must be obligation to export, and there must be an actual export.

- The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export.

- To occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it, without which a transaction sale cannot be called a sale in the course of export of goods out of the territory of India.

24. The phrase 'sale in the course of export' comprises in itself three essentials: (i) that there must be a sale: (ii) that goods must actually be exported and (iii) that the sale must be a part and parcel of the export. The word `occasion' is used as a verb and means 'to cause' or 'to be the immediate cause of'. Therefore, the words `occasioning the export' mean the factors, which were immediate cause of export. The words `to comply with the agreement or order' mean all transactions which are inextricably linked with the agreement or order occasioning that export. The expression `in relation to' are

> words of comprehensiveness, which might both have a direct significance as well as an indirect significance, depending on the context in which it is used and they are not words of restrictive content and ought not be so construed.

12. Going by the same, there are various elements to be proved to constitute a sale in the course of export. There must be an intention on the part of the buyer and the seller to export. There must be an obligation to export which may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export. Importantly, it was held that there must exist such a bond between the contract of sale and the actual exportation, to occasion an export. Each link should be inextricably connected with the one immediately preceding it. Without it, a transaction sale cannot be called a sale in the course of export of goods out of the territory of India. It was also held that the sale must be part and parcel of the export and the goods must be actually exported. Therefore, the important link to be proved is one that the local sale or purchase between the parties is inextricably linked with the export of the goods

and if so, an exemption would be applicable.

13. Under Section 5(3) of the CST Act, both the goods should be the same goods, and the inextricable links will, therefore, have to be established.

14. If we consider the issue in the light of the interpretation placed by the Constitution Bench of the Apex Court in **Azad Coach Builders Pvt. Ltd.'s case** (supra), the moot question will be whether the sale by the appellant/petitioner will satisfy the tests laid down therein.

15. The decision of a Division Bench of this Court in **Moncompu Egg Store's case** {(1981) 48 STC 518) related to the interpretation of Section 5A(1)(c) of the KGST Act. Therein, the item sold in inter-State commerce was eggs. Eggs had to be sent with proper package. It was held by the Division Bench that there was a sale of packing materials attracting exception under Section 5A(1)(c) of the Act. The said section is attracted in case the goods so purchased are despatched to any place outside the State in the course of inter-State trade or commerce and the interpretation of the said provision was considered

by the Division Bench therein. Of course, the learned counsel for the appellant relied upon the same to contend that the same will show that packing materials had to be used for the inter-State commerce.

16. The issue considered in **Catherene Traders' case** {(1991) 81 STC 228} by the Madras High Court was whether the sale of packing materials to an exporter by way of polythene bags for packing banians will attract the exemption under Section 5(3) of the CST Act. In paragraph 6 it was held that if it is found that the last sale of goods was a sale or purchase in the course of the export of the goods within the territory of India, then it will be fully covered by Section 5(3). The Bench did not consider the question as to whether the purchase or sale are of the same goods which are meant for export, but emphasis was given to the incidence of last sale of goods alone. In the light of the interpretation placed by the Constitution Bench, in **Azad Coach Builders Pvt. Ltd.** (supra) as noted already, the various links will have to be established.

17. The decision of the Andhra Pradesh High Court in **Standard Packings'case** {(1995) 96 STC 151} considered only one aspect, i.e.

whether the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India, was for export. The transaction therein was sale of gunny bags for use as containers for goods meant for export. It was held that Section 5(3) is attracted. Therein also, the provision was considered on a different footing.

18. In **Kusum Laminating & Packaging Industries' case** {(1996) 101 STC 476}, the ultimate conclusion turned on a finding that in the said case there are facts on record to conclude that polythene bags were also exported, according to the contract between the exporter and foreign buyers. Exemption was claimed for the packing material, viz. polythene bags used for packing barytes powder. The Bench concluded that therein the identity of the goods was established with regard to the polythene bags sold by the assessee and the polythene bags in which the barium sulphate was packed and exported by the exporter and only on that basis the claim for exemption was allowed.

19. In the case considered by a Division Bench of this Court in **Allappy Company Ltd.'s case** {(2012) 20 KTR 69} the goods

exported were coir products. Tags and labels were also attached with the goods (each of the coir products) while exporting them. The petitioner therein was engaged in the manufacture and export of coir products and he outsourced the tags and labels from printing presses. The Division Bench took the view that in the said case admittedly tags and labels were printed by the supplier-printing press in terms of the petitioner's orders, which were in conformity with export orders. So much so, the commodity even at the time of printing or manufacturing is earmarked for export after purchase. The petitioner attached the tags and labels to the products exported also. Therefore, it was held that the commodity purchased was for export by attachment to the coir products without any change whatsoever and so much so, the decision of the Constitution Bench in **Azad Coach Builders' case** (supra) will apply.

20. But as far as the facts herein is concerned, they have no parallel to the facts under which the said decision was rendered, obviously. What is clear from Section 5(3) of the CST Act is that the goods purchased and the goods exported should be the same. The argument

of the learned counsel for the appellant is that in the orders of the foreign buyers, they have indicated that the goods should be sent as packed goods. But evidently, the exemption under Section 5(3) is in relation to the "goods purchased". It should precede the sale or purchase occasioning the export of those goods. It cannot be said that the purchase of packing materials get the colour of 'goods' which were "exported". The goods, even going by the case of the appellant, are something else like cashew kernels, marine products, food products, etc. It cannot be said that the cartons supplied by the appellant will therefore get the character of "goods exported". If that be so, the sale of packing materials cannot be treated as sale in the course of export. The decisions relied upon by the learned counsel for the appellant, of Madras High Court and Andhra Pradesh High Court turned on the issue that the transaction could be treated as the last sale or purchase of goods. Whether the packing materials will get the colour as "goods exported", was not considered therein. Therefore, those decisions are distinguishable.

21. According to us, in the light of the interpretation placed by the

Constitution Bench in **Azad Coach Builders' case** (supra), the issue will have to be considered by examining whether all the ingredients of Section 5(3) of the CST Act are satisfied. The important aspect pointed out by the Constitution Bench in the above decision is that there has to be an inextricable link between the local sales or purchase with the export of goods. For occasioning 'export', there must be a bond between the contract of sale and the actual exportation. Such a link, according to us, is absent as far as the sale of packing cartons by the appellant, to the exporters are concerned. It is also important to notice that there should be an intention on the part of both the buyer and the seller to export. The Constitution Bench specifically held that the word "occasion" in Section 5(3) of the CST Act means "to cause" or "to be the immediate cause of".

22. As we have already observed, the appellant will have to establish the identity of the goods sold with the goods meant to be exported out of the territory of India. It cannot be said that packing materials as such were meant for export but they were used only for wrapping the "goods which were exported". The said distinction

clearly goes against the contentions of the appellant. It cannot be said that the packing materials sold by the appellant and the goods exported are the same. It is also not their case that they had sold the goods which were exported with the packing materials like paper cartons. Herein, evidently the goods exported were purchased by the exporter from other sources. What is described as sale by the appellant is only the packing cartons alone which were never exported as such and the goods exported are different. That, according to us, will take out the case of the appellant from the purview of Section 5(3) of the CST Act. The commitment of the exporter to the foreign buyer under their agreement is to export the goods covered by the orders of foreign buyers. Even if they should be in packed form, as we have already noticed, the appellant has not supplied those goods in the packed form, to the exporters for export. The transaction, going by the provision, should be first one with the exporter and the foreign buyer and the next one is with the exporter and the penultimate seller like the appellant. That inextricable link is absent, going by the facts of this case. There is a contract or understanding between the exporter and another seller from whom the goods exported were purchased. As far as packing materials are concerned, the intention on the part of both buyer and seller to export, is absent.

23. Therefore, we are unable to agree with the contentions raised by the learned counsel for the appellant. As rightly pointed out by the learned Senior Government Pleader, the provisions of Section 5(3) of the CST Act will not come to the aid of the appellant for claiming exemption. We therefore fully agree with the view taken by the learned Single Judge in the judgment impugned in W.A. No.588/2009.

Hence, the writ appeal as well as the writ petitions are dismissed. The parties will suffer their costs.

(T.R. RAMACHANDRAN NAIR, JUDGE.)

(K.P. JYOTHINDRANATH,, JUDGE.)

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