

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

THURSDAY, THE 18TH DAY OF JUNE 2015/28TH JYAISHTA, 1937

W.A.No. 1531 of 2008 (D)

AGAINST THE JUDGMENT IN W.P.(C) NO. 32431/2000 OF HIGH COURT OF KERALA DATED
14-11-2007

APPELLANTS/RESPONDENTS NO.2 & 3:

1. ASSISTANT COMMISSIONER (ASSMT.) II,
SPECIAL CIRCLE II, KOZHIKODE.
2. STATE OF KERALA, REPRESENTED BY ITS
CHIEF SECRETARY, SECRETARIAT, THIRUVANANTHAPURAM.

BY SR. GOVERNMENT PLEADER, SRI. LIJU STEPHEN

RESPONDENTS/PETITIONER & 1ST RESPONDENT:

1. SWASTHIK ENTERPRISES, K.K. ROAD,
KOZHIKODE, REPRESENTED BY ITS MANAGING PARTNER
P.K. HASHIR AHAMED.
2. SALES TAX APPELLATE TRIBUNAL,
ADDL. BENCH, KOZHIKODE.

R1 BY SRI. N. MURALEEDHARAN NAIR

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 10-06-2015, ALONG WITH
WA. 1787/2009, THE COURT ON 18.06.2015 DELIVERED THE FOLLOWING:

P.T.O.

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

W.A.Nos.1531 of 2008 & 1787 of 2009

Dated this the 18th day of June, 2015

JUDGMENT

Shaji P. Chaly, J.

These writ appeals are filed by the Revenue against the judgment of the learned Single Judge in O.P.No.32431 of 2000 dated 14.11.2007 and the order in R.P.No.1003 of 2008 dated 26.09.2008. By the judgment under appeal, the learned Single Judge allowed the original petition by setting aside the rectification order of the learned Sales Tax Appellate Tribunal, Additional Bench, Kozhikode passed under Sec.43 of the K.G.S.T Act and thereby exempted the 1st respondent from payment of turnover tax for the relevant year in question. The Review Petition referred above was filed by the 1st respondent seeking to review the judgment to the extent the learned Single Judge has not considered the contention regarding the nature of the power exercised by the Tribunal while entertaining the Rectification Application filed by the Revenue.

That Review Petition was allowed by order dated 26.09.2008. Thus the subject matter of these two writ appeals, filed against the judgment in the Original Petition and the Review Petition are common in nature, and therefore were heard together and are disposed of together.

2. Brief facts required for the disposal of these appeals are stated hereunder:

3. The 1st respondent, a registered assessee under the Kerala General Sales Tax Act (hereinafter referred to as "the Act" for short), was a dealer in hill produce. For the years 1990 and 1991, the assessment of the respondent was completed fixing the total and taxable turnover of Rs.6,09,17,766/- and Rs.3,52,65,650/- respectively. Subsequently, the Deputy Commissioner, Commercial Taxes, in exercise of the powers vested on him under Sec.35 of the Act, initiated *suo moto* proceedings against the assessee for the escaped turnover of pepper, dry ginger and arecanut amounting to Rs.73,69,830/-which was subjected to tax under Sec.8(1) of the Act, and escaped turnover tax under Sec.5(2A) of the Act, for want of production of the declaration mentioned in S.R.O. No.717/88, so as to enable it to claim exemption

from turnover tax under Sec.5(2A) of the Act. Accordingly, the Deputy Commissioner, Kozhikode set aside the order of assessment and remanded the case back to the assessing authority for fresh disposal so as to bring the escaped turnover into assessment under Sec.5(2A) of the Act.

4. Being aggrieved by the said order of the Deputy Commissioner, the 1st respondent preferred appeal before the Sales Tax Appellate Tribunal, Addl. Bench, Kozhikode. Even though the learned Tribunal found that the 1st respondent who was liable to produce the declaration in the form annexed to S.R.O No.717/88 to prove payment of turnover tax from the previous dealer, in order to claim exemption from payment of turnover tax, has failed to produce the same, he is entitled to produce other proof, as laid down in the judgment in '**K.V. Gangadharan v. Addl. Sales Tax Officer**' reported in 1993 K.L.J (Tax Cases) 432 and allowed the appeal. As a result, the 1st respondent became entitled to claim exemption from payment of turnover tax by virtue of the notification cited above.

5. However, later vide Ext.P2 application dated 13.11.1997, Revenue sought rectification of the order of the Tribunal by invoking the powers conferred on it under Sec.43 of the Act, on the ground that the learned Tribunal while passing Ext.P1 order dated 03.03.1997 in Tribunal Appeal No.66 of 1996 did not take into consideration the effect of the exemption notification referred above, and further that the 1st respondent was entitled to get the benefit of the notification if only he produces declaration evidencing payment of turnover tax by the purchaser before the penultimate purchaser of the hill produce, as contemplated under the exemption notification referred supra. After evaluating the facts and circumstances and the law involved in the subject matter, the learned Tribunal had rectified its earlier order and had passed Ext.P3 order dated 10.08.2000 by which it has held that the respondent assessee is not entitled to get the benefit of the notification referred to above, since it has failed to produce declaration from the purchaser before the penultimate purchaser within the State. Further, it was held by the learned Tribunal that the assessee is not entitled to get the benefit of the judgment in ***K.V.Gangadharan's*** case (*supra*) for the

reason that the alternative proof suggested in the aforesaid judgment is the production of proof of the payment of turnover tax by the previous purchaser to the penultimate purchaser within the State. Since the petitioner has not produced any such proof, it is not entitled to get the benefit of the alternative proof suggested in the aforesaid judgment.

6. The assessee, aggrieved thereupon, filed the writ petition, mainly contending that it is entitled to the benefit of the ratio laid down in the judgment of **K.V. Gangadharan's** case (*supra*). The learned Single Judge allowed the writ petition setting aside the rectified order of the learned Tribunal and holding that since the 1st respondent is the last purchaser of the hill produce within the State, that by itself is a proof that the purchaser before him has paid turnover tax. Even though the 1st respondent had challenged the competency of the Tribunal to entertain the rectification application, that contention was not considered and therefore, R.P.No.1003/2008 was filed and the order allowing the R.P. is the subject matter of Writ Appeal No.1787 of 2009.

7. Heard the Senior Government Pleader, Sri. Liju Stephen and the learned counsel for the 1st respondent, Sri. V.K.Shamsudeen, at length.

8. Before we proceed to consider the sustainability of the judgment of the learned Single Judge, we deem it only appropriate that the notification S.R.O. No.717/88 is extracted to evaluate the situation in an effective manner:

"S.R.O No.717/88-- In exercise of the powers conferred by section 10 of the Kerala General Sales Tax Act, 1963 (15 of 1963), the Government of Kerala, having considered it necessary in the public interest so to do, hereby make an exemption in respect of the turnover tax payable by dealers under sub-section (2A) of section 5 of the said Act, on the turnover of the following goods at all points of purchases except at the point of purchase preceding the purchase in the course of export or at the point of purchase previous to the last purchase in the State, which is not exempted from turnover tax, subject to the condition that any dealer who claims exemption on such turnover tax shall produce before the assessing authority concerned a declaration from the dealer who paid the turnover tax in the Form annexed to the notification.

- (1) Garbled pepper;*
- (2) Ungarbled pepper;*
- (3) Arecanut;*

(4) *Dried Ginger.*

The notification shall be deemed to have come into force with effect from 1st July, 1987.

ANNEXURE

Form of declaration to be furnished by a purchasing dealer for claiming exemption from turnover tax at other points.

1. I/We
(Here enter the name and full postal address of the purchaser) dealer(s) in goods taxable at the point of purchase in the State, have purchased goods of the description given below from Shri./Messers.....(Here enter the name and full postal address of the seller(s)).

2. My/Our turnover tax for the year is not less than Rupees Fifty Lakhs and I/We have paid turnover tax on the turnover of goods mentioned below.

3. My/Our Registration Certificate Number is (Here enter R.C. No.)

4. I/We am/are registered dealer(s) on the rolls of the Sales Tax Office(Here enter the name of the Salestax Office) and I/we have filed our return for the month of(Here enter the month previous to which the purchase relates) along with proof of payment of turnover tax due for the goods which I/we am/are liable to pay.

Particulars of goods purchased

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Sl. No.	No. and date of purchasing bill issued by the purchaser	Description of goods	Quantity ----- No. of packages	Wt.	Value of goods purchased	Turnover tax due & paid	Remarks

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(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

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Place: Name, signature and status of
the persons signing the declaration.

Date: *Note: (1) The declaration shall be filed in duplicate and shall be signed
by the person who is authorised to sign return in Form
No.9.*

*(2) Any subsequent purchaser may furnish the declaration
furnishing the details prescribed therein.*

9. At this stage, we also deem it appropriate to consider the scope of Sec.5(2A) of the Act. Sub-section (2A) in Sec.5 was introduced into the Act as per the Kerala Finance Act 18 of 1987. Sub-section (2A) provided for the levy of turnover tax on the turnover of goods as specified therein at the rate of half per cent on the turnover of goods coming under the Ist or Vth Schedule to the Act, thereby tax is levied on all dealers whose turnover exceeded Rs.25 lakhs in a year. Therefore, consequent to the introduction of sub-section (2A) to Sec.5, every dealer who has in excess turnover of Rs.25 lakhs was bound to pay turnover tax on the goods coming under Ist or Vth Schedule to the Act on all points. To put it otherwise, same is a multi point tax depending on attaining the turnover specified therein.

10. But the State Government by virtue of the powers conferred on it under Sec.10 of the Act, in order to provide relief against the payment of turnover tax on all points,

decided to collect tax only from one person in the series of sales or purchases. To put it otherwise, relief is provided from payment of tax on all points except one, but with a rider that "any dealer who claims exemption of such turnover tax, should produce before the assessing authority concerned, a declaration from the dealer who paid the turnover tax in the form annexed to the notification". Therefore, from a reading of the notification, it can be seen that the exemption granted under the said notification is available only to those dealers producing declaration from the dealer who paid the turnover tax in the format prescribed along with the notification extracted above. Admittedly, the assessee had not produced such a declaration so as to avail the benefit of the said notification. It was found so by the learned Tribunal in its original order, but the learned Tribunal has granted the benefit of the said notification to the assessee purportedly as per the alternative proof as laid down in the judgment in **K.V. Gangadharan's** case (*supra*).

11. The Tribunal while passing the original order without appreciating the nature of alternative proof suggested in **K.V. Gangadharan's** case (*supra*), granted exemption to the

assessee, by holding that since it is the last purchaser within the State, that by itself is a proof to show that there was a previous purchaser who has suffered the turnover tax and therefore the assessee is entitled to get the benefit of the judgment in ***K.V. Gangadharan's*** case.

12. This is the exact argument put forth by the learned counsel for the 1st respondent also before us. But, on a reading of the notification and the judgment cited *supra*, we are unable to sustain the contention advanced by the learned counsel for the assessee, in view of the fact that the alternative proof suggested in ***K.V. Gangadharan's*** case is nothing but proof of payment of turnover tax by the previous dealer. Admittedly, that has not been produced by the assessee and therefore, we are of the considered opinion that the assessee is liable to pay turnover tax and the judgment rendered in ***K.V. Gangadharan's*** case will not enure to his benefit.

13. Faced with this situation and obviously to wriggle out of it, the learned counsel for the 1st respondent contended that under Sec.43 of the Act, the power to rectify any error apparent on the face of the record is only that kind of error

which must strike one on merely looking at the record and would not require any long drawn process of reasoning on points, where two opinions are possible. To substantiate the said contention, the learned counsel has drawn our attention to Ext.P2 Rectification Application and contended that the same is running into several pages and the complicated nature of the said application itself is a proof sufficient to hold that the rectification application submitted by the Revenue was not one which could be considered under Sec.43 of the Act. To draw support to the said contention, he has brought our attention to the judgment in '**Deva Metal Powders (P) Ltd. v. Commissioner, Trade Tax, Uttar Pradesh**' [(2008) 2 SCC 439] and particularly to paragraphs 10, 11 and 15 of the said judgment and pointed out that the proposition laid down by the Hon'ble Apex Court in the said judgment is to the effect that a review is by no means an appeal in disguise whereby the erroneous decision is re-heard and corrected, but lies only for correcting errors which are patent. He has also drawn our attention to the judgment of the Hon'ble Apex Court in '**Smt. Meera Bhanja v. Smt. Nirmala Kumari Choudhury**' [AIR 1995 SC 455] and particularly to paragraph 8 of the said

judgment, wherein also the Hon'ble Apex Court had occasion to rule upon the nature of error that can be corrected in similar circumstances. On the other hand, the learned Senior Government Pleader, by relying upon the judgment in **'Maharana Mills (Private) Ltd. v. Income-Tax Officer, Porbandar'** reported in Vol.XXXVI ITR 350, has drawn our attention to the third paragraph at page 359, wherein the judgment in **'Venkatachalam v. Bombay Dyeing and Manufacturing Co. Ltd.'** reported in (1958) 34 I.T.R 143 is quoted, which we also quote to consider the issue before us, reads thus:

"At the time when the Income-tax Officer applied his mind to the question of rectifying the alleged mistake, there can be no doubt that he had to read the principal Act as containing the inserted proviso as from April 1, 1952. If that be the true position then the order which he made giving credit to the respondent for Rs.50,603-15-0 is plainly and obviously inconsistent with a specific and clear provision of the statute and that must inevitably be treated as a mistake of law apparent from the record. If a mistake of fact apparent from the

record of the assessment order can be rectified under section 35, we see no reason why a mistake of law which is glaring and obvious cannot be similarly rectified.”

It is true that, errors that are expected to be rectified under Sec.43 of the Act are those kind of errors which are easily discernible from the face of the order itself by a cursory glance of the person considering the same.

14. Bestowing our anxious consideration to the arguments advanced by the learned counsel for the 1st respondent as well as the learned Senior Government Pleader for the Revenue, and also on going through Ext.P2 Rectification Application, we find that it is a long drawn application running into several pages. At the same time, the error that is pointed out on the face of the record is a patent error committed by the learned Appellate Tribunal, by not taking note of the conditions imposed in the notification, the satisfaction of which alone would enable an assessee to claim its benefit or on producing satisfactory evidence suggested by this Court in **K.V. Gangadharan's** case (*supra*). Therefore, we find that the error is easily discernible and on that issue, there is no possibility of two views.

15. In fact, the judgment in **K.V. Gangadharan's** case is rendered by a learned Single Judge on a challenge against the validity of the conditions incorporated in three notifications issued by the State Government granting exemption to various kinds of dealers from payment of turnover tax including the one extracted above, from payment of turnover tax under Sec.5(2A), except at one point. The learned Single Judge upheld the Constitutional validity of the mandatory requirement of production of declaration in the form annexed to the notification, in order to avail the benefit of the turnover tax by a dealer. In paragraph 24 of the said judgment, it was held as follows:

"24. My conclusions therefore are:

(a) The notifications S.R.O Nos.715, 716 and 717 of 1988 are valid in entirety.

(b) If any dealer wants to avail of benefit of exemption granted by these notifications, he has to produce the declaration in the form annexed to notifications, but he may be permitted to prove requisite fact by other satisfactory evidence produced for the purpose in lieu of the declaration.

(c) The turnover tax is liable to be paid every month after the taxable turnover exceeds the prescribed minimum limit, at the rates applicable for the level of

turnover reached.

(d) The levy of turnover tax is constitutionally valid.

(e) No demand in form No.14D of the Kerala General Sales Tax Rules, 1963 could be issued unless there is an admission of liability for turnover tax in the monthly returns filed. If the dealer does not admit any liability, the assessing authority has to follow the procedure prescribed for completion of an assessment and issue of demand in order to fasten the dealer with liability."

16. This judgment was affirmed by the Division Bench of this Court in the judgment reported in '**Kallangodan Spices v. Addl. Sales Tax Officer**' [(1995) 96 STC 467] (even though the cause title is seen to be different, the appeal was against the very same judgment in **K.V. Gangadharan's** case). Sub-paragraph (b) in paragraph 24 quoted above, the learned Single Judge has dealt with the kind of evidence that is to be produced for the purpose of availing benefit in lieu of the declaration mentioned in the notification.

17. Therefore, on a reading of paragraph 24 of the judgment in **K.V. Gangadharan's** case, it is categoric and clear that the subject matter of the rectification application is regarding compliance of the mandatory requirement of

producing the declaration and the alternative proof that is suggested in the judgment noticed above. In that view of the matter, we are of the opinion that the rectification sought by the revenue was on sustainable grounds and the error apparent on the face of the record was a striking one and was a pure question of law in the light of the notification as well as the judgment in ***K.V. Gangadharan's*** case. Therefore, we do not find any illegality in the rectification application or the order, rectifying the error apparent on its original order by the Tribunal.

18. In that view of the matter, we set aside the judgment of the learned Single Judge in O.P.No.32431 of 2000 dated 14.11.2007 and also the order in R.P.No.1003 of 2008 in the aforesaid Original Petition dated 26.09.2008, thereby allow the appeals and restore Ext.P3 rectified order of the Tribunal in I.P.No.233/97 in I.P.No.32/96 in T.A.No.66/96 dated 10.08.2000.

19. However, considering the long pendency of the litigation and that too consequent to the default on the part of the Revenue to raise the points appropriately in the appeal pending before the Tribunal, we hold that the assessee shall

not be liable to be penalised and shall be exempted from payment of any interest to the tax on the turnover escaped, provided the tax due is remitted within six weeks from today.

Writ appeals are allowed, but in the facts and circumstances of the cases, without costs.

Sd/-
**ANTONY DOMINIC
JUDGE**

Sd/-
**SHAJI .P. CHALY
JUDGE**

//true copy//

P.S. to Judge

St/-