

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

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

S.TRev.No. 31 of 2015

AGAINST THE ORDER IN TA 112/2012 of S.T.AT ADDL.BENCH, ERNAKULAM DATED 31-01-2015

PETITIONER/REVISION PETITIONER/APPELLANT:

M/S.KERALA SHIPPING AND INLAND NAVIGATION CORPORATION LTD.
GANDHI NAGAR, UDAYANAGAR, KOCHI 20

BY ADVS.SRI.E.P.GOVINDAN
SMT.G.DEEPA
SRI.SOMANATH K.G

RESPONDENTS/RESPONDENTS/REVENUE:

THE STATE OF KERALA
REPRESENTED BY THE SECRETARY, TAXES DEPARTMENT
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001

R BY GOVERNMENT PLEADER SRI.LIJU STEPHEN

THIS SALES TAX REVISION HAVING COME UP FOR ADMISSION ON
15-07-2015, ALONG WITH STRV. 32/2015, STRV. 33/2015, THE COURT ON THE SAME
DAY PASSED THE FOLLOWING:

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A: TRIBUNAL ORDER DATED 31.1.2015 IN T.A.NOS.112/12, 113/12 & 114/12 PASSED BY THE KERALA AGRL.INCOME TAX & SALES TAX APPELLATE TRIBUNAL, ADDL.BENCH, ERNAKULAM.

ANNEXURE B: TRUE COPY OF ASSESSMENT ORDER DATED 29.6.2010 FOR THE YEARS 2002-2003.

ANNEXURE C: TRUE COPY OF APPELLATE ORDER DATED 14.8.2012 IN STA 423/2010 PASSED BY THE DY. COMMISSIONER (A), COMMERCIAL TAXES, ERNAKULAM.

ANNEXURE D: TRUE COPY OF APPEAL MEMORANDUM DATED 12.12.2012 FILED BEFORE THE APPELLATE TRIBUNAL, ERNAKULAM.

ANNEXURE E: TRUE COPY OF ARGUMENT NOTE DATED 12.1.2015 FILED BEFORE THE TRIBUNAL.

ANNEXURE F: TRUE COPY OF REPLY DATED 25.6.2010 AGAINST THE PRE-ASSESSMENT NOTICE FILED BY THE PETITIONER COMPANY.

ANNEXURE G: TRUE COPY OF AGREEMENT DATED 3.9.2002 BETWEEN THE PETITIONER COMPANY AND FACT LTD.

ANNEXURE H: TRUE COPY OF THE WORK ORDER DATED 6.3.2002 ISSUED BY THE INDIAN OIL CORPORATION.

ANNEXURE I: TRUE COPY OF THE ORDER DATED 14.12.2001 ISSUED BY THE DISTRICT COLLECTOR, ERNAKULAM FOR TRANSPORTING THE DRINKING WATER TO VARIOUS ISLANDS.

// TRUE COPY //

P.A. TO JUDGE

ANTONY DOMINIC & SHAJI P.CHALY, JJ.

S.T.Rev.Nos.31,32 & 33 of 2015

Dated this the 15th day of July, 2015

JUDGMENT

Antony Dominic, J.

These revision petitions are filed by the assessee, challenging the orders passed by the Kerala Agricultural Income Tax and Sales Tax Appellate Tribunal, Additional Bench, Ernakulam in T.ANos.112/12, 113/12 and 114/12. By the said order, assessment orders passed for the assessment years 2002-2003, 2003-2004 and 2004-2005 under the KGST Act against the assessee, treating charges received by them for hiring of barges and boats as turn over, which was substantially confirmed by the First Appellate Authority, were upheld by the Tribunal.

2. We heard the counsel for the revision petitioner and the learned Government Pleader appearing for the respondent.

3. The assessee is a Government Company owning boats and barges. During the assessment years in question, the assessee had entered into agreements with clients like FACT, IOC and BPCL for transportation in their boats and barges their products and raw materials. The assessee had also entered into agreement with the District Collector for transportation of drinking water. As consideration for the work undertaken, the assessee

had received charges. Treating the said receipts of the assessee as hire charges, and that the same is towards the transfer of the right to use the boats and barges, attracting section 5(iii) of the KGST Act the assessments in question were completed. It is this assessment, which has been upheld by the First Appellate Authority and the Tribunal and which is called in question before us.

4. Section 5(iii) of the KGST Act provided that every dealer whose total turn over for a year is not less than the amounts specified therein shall pay tax on his taxable turn over for the year and in the case of transfer of the right to use any goods for any purpose (whether or not for a specified period). Section also specified the rate of tax that is payable at all points of such transfer. The provision contained in Article 366(29A)(d) of the Constitution of India provides 'tax on the sale or purchase of goods' includes -- a tax on the transfer of the right to use any goods for any purpose, based on which, Section 5(1)(iii) was incorporated in the KGST Act was interpreted by the Apex Court in its judgment in Bharat Sanchar Nigam Ltd. & another v. Union of India and others [145 STC 91 (SC)]. In that judgment, the Apex Court has held that

to constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

- (a) There must be goods available for delivery.*
- (b) There must be a consensus ad idem as to the identity of the goods.*
- (c) The transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;*
- (d) For the period during which the transferee has such legal right, it has to be the exclusion to the transferor--this is the necessary concomitant of the plain language of the statute--viz., a "transfer of the right to use" and not merely a licence to use the goods;*
- (e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.*

5. Subsequently, the meaning of the expression 'deemed sale' again came up for consideration of the Apex Court. In State of Andhra Pradesh and another v. M/S Rashtriya Ispat Nigam Ltd. (2002) 10 KTR 272 (SC) where it was held that the fact that the machinery is leased out to a contractor does not mean that the effective control of the

machinery even while it was in the use of the contractor was that of the contractor, in as much as the contractor was not free to make use of the machinery for the works other than the project work of the awarder or move it out during the period the machinery was in his use.

6. The principles governing the interpretation of Section 5(1)(iii) of the KGST Act being the above, the question is whether the conclusion of the Tribunal that hire charges received by the assessee attracts levy of tax under Section 5(1)(iii) is correct or not. The Tribunal being the last fact finding authority constituted under the KGST Act, should necessarily evaluate the provisions of the contract entered into between the assessee and its clients and other documentary evidence that are produced by the assessee in order to come to its conclusions. However, a reading of the order passed by the Tribunal shows that it has examined the issue by confining itself to the orders passed by the lower authorities. We are, therefore, of the considered opinion that the matter requires to be considered afresh, duly taking into account the agreement and other documents that are available on record. On that basis, the Tribunal should pronounce on the question whether the

nature of the transaction between the assessee and its clients, levy of tax under Section 5(1)(iii) of the KGST Act is attracted or not. For that purpose, without expressing any opinion on the merits of the case, we set aside the order passed by the Tribunal in T.A.Nos.112/12, 113/12 and 114/12 and remit the matters to the Tribunal for a fresh consideration.

Accordingly, these revision petitions are disposed of setting aside the impugned orders and remitting the appeals to the Tribunal for a fresh consideration in the manner as ordered above.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

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