

BABY VARGHESE
v.
STATE OF KERALA
(CIVIL APPEAL No. 4752 of 2008)

AUGUST 1, 2008

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Kerala General Sales Tax Act, 1963 – s. 5A, First Schedule Entry 83 – Aluminium scrap and old utensils and vessels – Purchase turnover of – Held: Is taxable under Entry 83 since the assessee deals in metal scrap – It purchases old aluminium vessels which are pressed to convert the same as scrap – Order of tribunal that Entry 5 dealing in aluminium household utensils is attracted cannot be upheld – Tribunal erred in construing the relevant ‘Entry’ – However, matter remitted to Assessing Authority for consideration of the question if sales tax has been paid on the article or not.

The question which arose for consideration in this appeal was whether ‘purchase turnover’ of aluminium scrap and old utensils and vessels is taxable at the rate provided under Entry 83 of the First Schedule of the Kerala General Sales Tax Act, 1963.

Disposing of the appeal, the Court

HELD: 1.1 Appellant is a dealer under the Kerala General Sales Tax Act, 1963. It deals in purchase and sale of aluminium household utensils. It entrusts the said utensils to another unit for manufacture of new aluminium vessels on job work basis. [Para 8] [755-D]

1.2 A finding of fact has been arrived at by the Tribunal that the appellant used to purchase old aluminium vessels and scrap which were used for conversion to new aluminium household utensils. Old aluminium vessels are pressed to convert the same as scrap. Thus, the appel-

A lant is a scrap dealer and not a dealer in aluminium ves-
sels within the meaning of Entry 5. The dictionary mean-
ing of “scrap” is ‘a small piece or amount of something
especially one that is left over after the greater part has
B been used or material, especially metal, discarded for re-
processing’. [Para 9] [755-E-F]

1.3 The Entries contained in the First Schedule ap-
pended to the Act are in three parts. Entry 5 deals in alu-
minium household utensils. Entry 6 deals with aluminium
C products and products of aluminium alloys and Entry 83
deals with metal scraps. Indisputably, aluminium metal
scraps would also come within the purview of Entry 83.
As the appellant deals in metal scrap, its case will come
within in the purview of Entry 83. All aluminium products
D do not come within the purview of Entry 5. It deals with
only domestic utensils. For other aluminium products, a
different rate of tax has been prescribed in Entry 6. If there
exists an entry which covers the goods in question, by
necessary implication, the same would be considered to
E have been excluded from another entry. [Para 10] [755-G-
H; 756-A-B]

1.4 Entry 5 is capable of two interpretations. It may
be read in the manner in which the Tribunal did, but it can
also be read as “household utensils made up of alu-
minium or aluminium alloys”. Use of the word “aluminium”
F at the beginning may be superfluous. In any event, the
appellant cannot be said to be dealing with aluminium
household utensils or household utensils made up of alu-
minium and aluminium alloys. Therefore, it was Entry 83
G which is attracted to the facts of the instant case. [Para
10] [756-C-D]

1.5 In the instant case, the tribunal committed a mani-
fest error in construing the relevant ‘Entry’. It failed to take
into consideration the principles governing the interpre-
tation of a taxing statute. On technical grounds, the
H Tribunal’s view cannot be upheld. Entry 5 speaks of uten-

sils and not scraps made out of old utensils. They are two different commodities coming under two different entries. [Para 12] [756-F-G] A

1.6 There is no legal infirmity in the judgment of the High Court. However, in view of the stand taken by the parties that if sales tax has been paid on an article, purchase tax cannot be levied thereupon. However, the same involves determination of pure questions of fact. As the said question of fact has not been gone into by the Assessing Authority, the matter is remitted to the Assessing Authority for consideration of the said question afresh. [Para 13] [756-H; 757-A-B] B C

Berger Paints India Ltd. v. Commissioner of Income Tax, Calcutta 2004 (12) SCC 42 – referred to.

Case Law Reference D

2004 (12) SCC 42 Referred to. Para 11

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 4752 of 2008

From the final Judgment and Order dated 18.8.2006 of the High Court of Kerala at Ernakulam in S.T. Revision No. 451 of 2004 E

V.K. Sidharthan for the Appellant.

P.V. Dinesh for the Respondent. F

The Judgment of the Court was delivered by

S.B. SINHA, J : 1. Leave granted.

2. This appeal is directed against a judgment and order dated 18.08.2006 passed by a Division Bench of the Kerala High Court in S.T.R.V. No. 451 of 2004 allowing a revision application filed by the State of Kerala and thereby restoring the order of assessment of 'purchase turnover' of aluminium scrap and old utensils and vessels at the rate applicable as provided G H

A for under Entry 83 of the First Schedule of the Kerala General Sales Tax Act, 1963 (for short "the Act").

B 3. Appellant herein is a dealer within the meaning of the provisions of the Act. It manufactures aluminium utensils from scraps out of old utensils made of aluminium and aluminium alloys.

The First Schedule appended to the Act contains entries concerning aluminium and household utensils, which read as under:

Sl. No.	Description of Goods	Point of Levy	Rate of tax Per cent
5.	Aluminium household utensils whether made of aluminium and aluminium alloys	At the point of first sale in the State by a dealer who is liable to tax under Section 5	4
6.	Aluminium products (including aluminium extrusion) and products, aluminium alloys not elsewhere mentioned in this schedule	-do-	8
83.	Metal scraps other than those specified in the second schedule	-do-	8%

G 4. Indisputably, prior to its amendment which took place on 23.02.1992, the word "and" occurred in between "aluminium" and "household utensils made of aluminium" in Entry 5 aforementioned.

H The Assessing Authority held that in the instant case Entry 83 was attracted. The Appellate Authority upheld the said view. In a second appeal preferred before the Sales Tax Appellate

Tribunal, however, a different view was taken opining that despite omission of the word "and" occurring in between the words "aluminium" and "household utensils made of aluminium", the same should be read, holding:

"...What the appellant purchased was old aluminium vessels and aluminium scrap and used the same in the manufacture of aluminium household utensils. The rate of tax applicable in respect of the purchase turnover taxable under section 5A is disputed. According to the authorities below old Aluminium vessels and Aluminium scraps will not come under entry 5 of the 1st Schedule, but can be taxed only under entry 83 of the said schedule. We reproduce below the relevant entries which are valid from 1-4-1992.

- | | | |
|--|------|----|
| 5. Aluminium household utensils whether made of aluminium and aluminium alloys | F.S. | 4% |
| 83. Metal scraps other than those specified in the second schedule | F.S. | 8% |

We find much force in the contention of the learned Advocate of the appellant that entry 5 as such viz., "Aluminium household utensils made of aluminium..." does not make any sense. The earlier entry before recasting was "Aluminium and household utensils made of aluminium" also. We are of the view that the intention of the legislature was to retain the old entry as such but an inadvertent omission of the word "and" was occurred while recasting the schedule. However, even in the relevant entry, Aluminium and household utensils made of aluminium are clearly embedded. We find that in the light of the present entry 5, old aluminium vessels and aluminium scrap purchased need not be taxed under entry 83 which takes in "metal scraps not mentioned elsewhere in Schedule II".

5. Revision applications were filed thereagainst by the State of Kerala before the High Court and by reason of the im-

A pugnated judgment, it reversed the decision of the Tribunal, opin-
ing:

B “We are unable to accept this contention for more than
C one reason. In the first place, even if aluminium
D independently comes under Entry 5, aluminium scrap
E cannot be treated as aluminium as such. Probably scrap
aluminium predominantly consists of aluminium but still it
cannot be said to be aluminium pure and simple. It is
common knowledge that scrap is always melted or
otherwise processed to recover the metal after removing
the waste. Therefore, aluminium scrap is used to recover
aluminium after removing the waste. Secondly, the intention
of the Legislature to bring all metal scrap under Entry 83
is very clear from the wording itself which excludes from
its scope only such of the metal scraps which are referred
to in Second Schedule to the KGST Act. Therefore, a
clear reading of Entry 83 makes it clear that all metal
scrap other than iron and steel scrap referred to in Second
Schedule will fall under Entry 83. Since aluminium is a
metal, all items purchased in the form of aluminium scrap
or old aluminium vessels will fall under Entry 83. As already
held, aluminium scrap cannot be treated as aluminium
falling under Entry 5 and so much so, we are unable to
sustain the finding of the Tribunal to the contrary...”

F 6. Mr. Sreekumar, learned counsel appearing on behalf of
the appellant, raised the following contentions:

- G (i) As the Assessing Authority in the earlier years of
assessment had taken the view that Entry 5 is
attracted in terms whereof 4% tax was only to be
levied, the same should have been followed by it.
- (ii) Once utensils have been subjected to sales tax, no
purchase tax can be levied thereon in view of Section
5A of the Act.

H 7. Mr. P.V. Dinesh, learned counsel appearing on behalf

of the State, conceded that if sales tax has been paid on the goods, no purchase tax can be levied thereupon. A

The learned counsel, however, would submit that the question as to whether the aluminium scrap, with which the appellant deals in, has suffered sales tax or not is essentially a question of fact and as the appellant has raised the question for the first time, the Assessing Authority must get an opportunity to deal therewith. It was furthermore submitted that the Tribunal Committed a serious error insofar as it read the word "and" in between aluminium and household utensils made of aluminium. B

The learned counsel would contend that Entry 83 which is a general entry being clear and unambiguous, it was wholly unnecessary for the Tribunal to enter into the question of interpretation of Entry 5 which was a special entry. C

8. Appellant is a dealer under the Act. It deals in purchase and sale of aluminium household utensils. It entrusts the said utensils to another unit for manufacture of new aluminium vessels on job work basis. D

9. A finding of fact has been arrived at by the Tribunal that the appellant used to purchase old aluminium vessels and scrap which were used for conversion to new aluminium household utensils. Old aluminium vessels are pressed to convert the same as scrap. Appellant, thus, is a scrap dealer and not a dealer in aluminium vessels within the meaning of Entry 5. E

The dictionary meaning of "scrap" is 'a small piece or amount of something especially one that is left over after the greater part has been used or material, especially metal, discarded for reprocessing'. F

10. The Entries contained in the First Schedule appended to the Act are in three parts. Entry 5 deals in aluminium household utensils. Entry 6 deals with aluminium products and products of aluminium alloys and Entry 83 deals with metal scraps. Indisputably, aluminium metal scraps would also come within the purview of Entry 83. As the appellant deals in metal scrap, H

- A its case will come within in the purview of Entry 83. All aluminium products do not come within the purview of Entry 5. It deals with only domestic utensils. For other aluminium products, a different rate of tax has been prescribed in Entry 6. If there exists an entry which covers the goods in question, by necessary implication, the same would be considered to have been excluded from another entry.

- C We will assume that Entry 5 is capable of two interpretations. It may be read in the manner in which the Tribunal did, but it can also be read as "household utensils made up of aluminium or aluminium alloys". Use of the word "aluminium" at the beginning may be superfluous. In any event, the appellant cannot be said to be dealing with aluminium household utensils or household utensils made up of aluminium and aluminium alloys. We, therefore, are of the opinion that it was Entry 83 which is attracted to the facts of the present case.

- E 11. Reliance placed by Mr. Sreekumar on *Berger Paints India Ltd. v. Commissioner of Income Tax, Calcutta* [(2004) 12 SCC 42] is misplaced. Therein the Revenue did not challenge the correctness of the law laid down by the High Court. In fact it was accepted. It was in that situation, this Court held that it was not open to the Revenue to challenge the correctness of the said decision in the case of other assesses, without any just cause.

- F 12. In this case, there exists a cause, viz., a wrong reading of the Entry. The Tribunal committed a manifest error in construing the relevant 'Entry'. It failed to take into consideration the principles governing the interpretation of a taxing statute. On technical grounds, the Tribunal's view cannot be upheld. Entry 5 speaks of utensils and not scraps made out of old utensils. They are two different commodities coming under two different entries.

- H 13. We, therefore, are of the opinion that there is no legal infirmity in the judgment of the High Court. However, there cannot be any doubt whatsoever and particularly in view of the stand

taken by the parties that if sales tax has been paid on an article, purchase tax cannot be levied thereupon. However, as argued by Mr. Dinesh, the same involves determination of pure questions of fact. As the said question of fact has not been gone into by the Assessing Authority, the matter is remitted to the Assessing Authority for consideration of the said question afresh. Parties would be at liberty to adduce fresh evidence on the said issue.

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14. The appeal is dismissed with the aforementioned observations and directions. No costs.

N.J.

Appeal disposed of.

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