M/S. SARAF TRADING CORPORATION ETC. ETC. A

v.

STATE OF KERALA

(Civil Appeal nos. 474-481 of 2011)

JANUARY 13, 2011 B

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Central Sales Tax Act, 1956: C

s.5(3) – Sale in the course of export – Exemption from sales tax – Exporter of tea – Purchasing tea from tea planters – Claim for exemption – HELD: Though there is no agreement on record to indicate that the purchase was made for the purpose of export, but, there is a clear finding by the assessing authority that the export documents indicated that the entire exports were effected pursuant to prior contract or prior orders of foreign buyers and, therefore, the claim for exemption was genuine – The appellate authority and the Appellate Tribunal having upheld the said finding of fact, it would not be appropriate to reopen the same – Kerala General Sales Tax Act, 1963. D E

Kerala General Sales Tax Act, 1963:

s.44 – Refund – Exporters of tea – Claim for exemption from sales tax found genuine – Claim for refund – Declined on the ground that refund can only be claimed by the dealer – HELD: All the authorities have clearly recorded a finding that it is only the dealer of the tea on whom the assessment has been made, who can claim refund of excess tax and since the exporter is not the dealer, and the tax collected from him has been remitted by the dealer to the Government, exporter cannot claim the refund – The findings recorded by the authorities below are clearly findings of fact and have also been arrived at on the basis of the mandate of the provisions F G H

of the State Act – Therefore, the decision does not call for any interference – In view of the facts of the case, doctrine of unjust enrichment is not attracted – Central Sales Tax Act, 1956 – Doctrine of unjust enrichment.

The appellant-assessees, engaged in the business of export of tea, purchased tea from the tea planters directly in open auction and thereafter exported the same to foreign countries, and claimed exemption as exporter of the consignments on the ground that the purchase was exempted u/s 5(3) of the Central Sales Tax Act, 1956 (CST Act). The assessing authority, allowed the claim in regard to the exemption. However, the claim for refund was rejected. The appeals filed by the assesses were dismissed by the Deputy Commissioner (Appeals) as also by the Kerala Sales Tax Appellate Tribunal. Their revision petitions were also dismissed by the High Court.

In the instant appeals filed by the assessees, the questions for consideration before the Court were: (i) whether the appellant-assessees would at all be entitled to claim exemption u/s 5(3) of the Central Sales Tax Act, 1956 as, at the time of sale, they could not allegedly show any evidence that it was the penultimate sale and (ii) whether in view of the provisions of s. 44 of the Kerala General Sales Tax Act, 1963, the appellant-assessees would be entitled to refund of the tax, which was paid by them to the seller.

Dismissing the appeals, the Court

HELD:

1.1 In view of sub-s. (3) of s. 5 of the Central Sales Tax Act, 1956, 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. [para 15] [381-C-D]

1.2 It was held by the Constitution Bench of this Court in *Azad Builders'* case* that if it is clear that the local sale or purchase between the parties is inextricably linked with the export of goods, then only a claim u/s 5(3) for exemption under the Sales Tax Act would be justified. [para 17] [383-F-G]

****State of Karnataka Vs. Azad Coach Builders Pvt. Ltd. & Anr* 2010 (12) SCR 895 = 2010(9) SCALE 364 – followed.**

1.3 It is true that in the instant case, there is no agreement available on record to indicate that the purchase was made for the purpose of export. In the absence of the said document, it is not possible to specifically state as to whether it was clear that the sale or purchase between the parties i.e. the dealer and the purchaser was inextricably linked with the export of goods. It is only when a claim is established, the claim u/s 5(3) of the CST Act would be justified. At the time of auction sale when the appellant purchased the tea from the dealer, there is nothing on record to show that a definite stand was taken by the purchaser that the purchase of tea was for the purpose of occasioning an export for which an agreement has been entered into. Since, no such claim was made at that stage, sales tax was realised which was paid to the government by the dealer. However, there is a clear finding recorded by the assessing authority that the export documents were verified by him with the accounts from which it is indicated that the entire exports were effected pursuant to the prior contract or prior orders of the foreign buyers and that the export sales are supported by bills of lading, export invoices and such other valid documents. In the light of the said findings, the assessing authority allowed

A the exemption, clearly holding that the claim for exemption was genuine. The next two authorities, namely, the appellate authority and the Tribunal, agree with the said findings and there does not appear to be any serious challenge to the said findings before the said B two authorities. The High Court also does not appear to have gone into the said issue at all. In that view of the matter, this Court would not reopen the finding of fact which is recorded by the assessing authority. [para 18-20] [382-H; 383-A-E; 384-A-B]

C 2.1 So far as the refund is concerned, the assessing authority, the appellate authority as also the Appellate Tribunal have clearly recorded a finding that when a dealer has paid the tax in excess of what is due from him, it has to be refunded to the dealer in as much as the D dealer is entitled to receive a refund, if tax is paid in excess of what was due from him. Referring to the provisions of Section 44 of the KGST Act, the Deputy Commissioner (Appeals) i.e. appellate authority, also held that it is the seller (the dealer) on whom the burden lies E to prove before the assessing authority that the sale is for fulfilling an agreement or order of the foreign buyer, since s.5(3) means or refers to the foreign buyer and not any agreement with the local party and in the instant case seller was not in a position to discharge his burden and, F therefore, he is not entitled for refund. In view of the said position, all the authorities have held that a question of refund of tax would not arise in the case of the appellant, since no tax had been demanded from the appellant for the tea. Considering the facts and circumstances of the G case, tax was collected from the appellant at the time of purchase of tea in the occasion sale conducted by the tea planters since tea is a commodity which was liable to tax at the time of first sale in the State. The tax which was collected from the appellant by the dealer has been H remitted to the government by the dealer of tea. It further

appears that the appellant claimed for refund of the said amount to be paid to it, despite the fact that it is not a dealer in the eye of law. Section 44 of the KGST Act is very clear and it stipulates that it is only the dealer of tea on whom the assessment has been made and it is only he who can claim for refund of tax and the Court cannot overlook the mandate. In view of the clear and unambiguous position, the appellant cannot claim for refund of tax collected from the seller of tea. When the meaning and the language of a statute is clear and unambiguous, nothing could be added to the language and the words of the statute. [para 19 and 22] [383-F-H; 384-A-F]

Sales Tax Commissioner Vs. Modi Sugar Mills 1961 SCR 189 =**AIR 1961 SC 1047 - relied on.**

2.2. The findings recorded by the authorities below are clearly findings of fact and have also been arrived at on the basis of the mandate of the provisions of the State Act. Therefore, the decision does not call for any interference. [para 26] [385-G-H]

2.3. There is no possibility of taking a proactive stance although it is clear that the State cannot retain the tax which is overpaid, but at the same time such overpaid tax cannot be paid to the assessee/appellants. The principles laid down in the decision in *Mafatlal's case would also not be applicable to the facts of the instant case in view of the provisions of s.44 of the KGST Act, which refers to claim for refund and specifically states that such refund could be made only to a dealer and not to any other person claiming for such refund. [para 25, 26] [385-F-H; 386-A]**

***Mafatlal Industries Ltd. & Ors. Vs. Union of India & Ors.* 1996 (10) Suppl. SCR 585 = (1997) 5 SCC 536 – held inapplicable.**

A **Case Law Reference:**

1996 (10) Suppl. SCR 585	**held inapplicable**	**para 11**
2010 (12) SCR 895	**followed**	**para 16**
B **1961 SCR 189**	**relied on**	**para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 474-481 of 2011.

From the Judgment & Order dated 07.08.2007 of the High C Court of Kerala at Ernakulam in TRC No. 519, 533, 534, 537 of 2001 & 25, 27, 30, 34 of 2002.

S. Ganesh, C.N. Sree Kumar, Anil D. Nair for the Appellant.

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Yasobant Das, R. Sahtish, S. Getha for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted.

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2. The issue that falls for consideration in the present appeals is whether the appellant/assessee would be entitled for refund of the tax which was paid by him to the seller, in view of the provisions of Section 44 of the Kerala General Sales Tax Act, 1963 (for short "the KGST Act") . One additional issue F which was urged at the time of hearing of the appeals and requires consideration by this Court is as to whether the appellant would at all be entitled to claim exemption under Section 5(3) of the Central Sales Tax Act, 1956 (for short "the CST Act"), as at the time of sale, the appellant could not G allegedly show any evidence that it was the penultimate sale.

3. The aforesaid two issues have arisen for consideration in the light of the submissions made on the basic facts of these appeals which are hereinafter being set out:-

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4. The appellants are exporters of tea. The appellants purchased tea from the tea planters directly in open auction and thereafter exported the same to foreign countries. The appellant being the exporter of the aforesaid consignment claimed for exemption on the ground that purchase was exempted under Section 5(3) of the CST Act. The said claim for exemption was found to be genuine by the Assessing Authority, and was allowed in full. The appellant also made a claim for refund of tax collected from them by the seller at the time of purchase of tea. The said claim was rejected by the Assessing authority and it was held that they cannot claim for refund under Section 44 of the KGST Act since they have not paid the tax to the Department but it was the sellers who have paid the tax and therefore under the provisions of Section 44 of the KGST Act, the refund that could be made is to the dealer only and the assessee being not a dealer no such refund could be made to the appellant/assessee.

5. Being aggrieved by the aforesaid order, the appellant filed an appeal before the Deputy Commissioner (Appeals) who considered the contentions of the appellant and upon going through the records found that there is an observation recorded by the assessing authority that the export sales is pursuant to the prior contract or prior order of the foreign buyers and also that export sales are supported by bill of lading, export invoices etc. The appellate authority also recorded the finding that the claim of exemption under Section 5(3) of the CST Act is envisaged for the penultimate sales or purchase preceding the sale or purchase occasioning the export. However with regard to the refund it was noted that the goods purchased are taxable at the sale point and hence the liability to pay tax is on the part of the seller. Accordingly, it was for the Seller to prove that the sales are effected to an exporter in pursuance of prior contract or prior orders of the foreign buyers.

6. It was held by the Appellate Authority that since, in the present case the aforesaid sellers namely the planters who sold

A tea to the appellant and on whom the burden lies to prove before the assessing authority that his sale is for fulfilling an agreement or order of the foreign buyer had not satisfied those conditions and had also not discharged his burden, therefore, there is no question of refund in the present case to the B appellant as they are not entitled to any such refund under the provisions of Section 44 of the KGST Act.

7. The appeal was filed therefrom to the Kerala Sales Tax Appellate Tribunal, which after going through the records referred to the provisions of refund as contained in Section 44 C of the KGST Act, which reads as follows:-

"44. Refunds:- (1) When an assessing authority finds, at the time of final assessment, that the dealer has paid tax in excess of what is due from him, it shall D refund the excess to the dealer.

(2) When the assessing authority receives an order from any appellate or revisional authority to make refund of tax or penalty paid by a dealer it shall effect the refund.

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(3) Notwithstanding anything contained in sub-section (1) and (2), the assessing authority shall have power to adjust the amount due to be refunded under sub-section (1) or sub-section (2) towards the F recovery of any amount due, on the date of adjustment, from the dealer.

(4) In case refund under sub-section (1) or sub-section (2) or adjustment under sub-section (3) is not made within ninety days of the date of final assessment G or, as the case may be, within ninety days of the date of receipt of the order in appeal or revision or the date of expiry of the time for preferring appeal or revision, the dealer shall be entitled to claim interest at the rate of six percent per annum on the

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amount due to him from the date of expiry of the said period up to the date of payment or adjustment."

8. After referring to the said provision, it was held by the Tribunal that in case the dealer has paid the tax in excess of what was due from him it could be refunded to the dealer, but here is a case where not the dealer but the appellant had claimed exemption under Section 5(1) read with Section 5 (3) of the CST Act. The assessing authority accepted the claim and allowed exemption. But so far as the question of refund of tax is concerned, the Tribunal held that there is no question of refund of tax in the case of the appellant since no tax had been demanded from the appellant for all the four years and therefore in those circumstances, there could be no question of refund under Section 44 of the KGST Act to the appellant.

9. In the light of the aforesaid findings, the appellate Tribunal dismissed the appeal as against which a Revision Petition was filed by the appellant before the Kerala High Court which was also dismissed under the impugned judgment and order as against which the present appeals were filed. We have heard the learned counsel appearing for the parties who had taken us through all the orders which gave rise to the aforesaid two issues which fall for our consideration in the present appeals.

10. Learned counsel appearing for the appellant submitted before us that appellant has admittedly paid the tax to the dealer at the time of occasion of sale made to it by the dealer namely the tea planters. It was also submitted by him that department has received the aforesaid tax paid in excess by the appellant and that there is a prohibition on the State to retain the excess tax in lieu of the provisions of Article 265 and 286 of the Constitution of India.

11. It was also submitted by him that in addition to the provisions of Section 44 of the KGST Act, a proactive view has

A to be taken by this Court in the facts and circumstances of the present case by referring to the decision of this Court in the case of *Mafatlal Industries Ltd. & Ors. Vs. Union of India & Ors.* reported in (1997) 5 SCC 536.

B 12. The learned counsel appearing for the State, however, not only refuted the aforesaid submissions but also stated that since there is a specific provision in the State Act for giving refund of the excess amount of tax, if any, paid only to the dealer and not to any other person, there cannot be a pro-active consideration in the facts and circumstances of the present C case as sought to be submitted by the learned counsel appearing for the appellant. He also submitted that aforesaid reference to the decision of *Mafatlal* (supra) is misplaced. The learned counsel for the State went a step further and submitted that the appellant is not entitled to claim any exemption under D Section 5(3) of the CST Act in view of the fact that assessee could not produce any agreement at the time of purchase of the tea in the auction sale indicating that the purchase is made in relation to export.

E 13. In support of the aforesaid contentions, he referred to provision of Section 5(3) of the CST Act which is extracted hereinbefore:-

> Section 5 - When is a sale or purchase of goods said to take place in the course of import or export ;
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> F
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> (1) ***** ****** ******
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> (2) ****** ****** ******
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> G (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 H agreement or order for or in relation to such export.

14. We have considered the aforesaid submissions of the learned counsel appearing for the parties in the light of the records placed before us. Since, the contentions of the learned counsel appearing for the respondent State are with regard to the fact that the appellant cannot claim exemption in absence of proof of an agreement in support of the claim for exemption under Section 5(3) and the same goes to the very root of the claim made, we deem it proper to take the aforesaid stand at the first stage.

15. Sub-section (3) of Section 5 has already been extracted hereinbefore. According to the said provision, 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.

16. In the case of *State of Karnataka Vs. Azad Coach Builders Pvt. Ltd. & Anr.,* reported in 2010(9) SCALE 364, the Constitution Bench of this Court took note of the aforesaid sub-section (3) and after noticing the said provision laid down the principles which emerged therefrom as follows:-

> 23. When we analyze 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:
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> - 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.
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> - The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or

A 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 B 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 C 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 D the export' mean the factors, which were immediate course 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 E 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.

17. It was held by the Constitution Bench that there has to F be an inextricable link between local sales or purchase and if it is clear that the local sales or purchase between the parties is inextricably linked with the export of goods, then only a claim under Section 5(3) for exemption under the Sales Tax Act would be justified. The principle which was laid down in the said G decision is required to be applied to the facts of the present case in view of the submissions made by the counsel appearing for the respondent State and refuted by the counsel appearing for the appellant.

H 18. It is true that in the present case, there is no agreement

available on record to indicate that the aforesaid purchase was made for the purpose of export. In the absence of the said document, it is not possible for us to specifically state as to whether it was clear that the sale or purchase between the parties i.e. the dealer and the purchaser was inextricably linked with the export of goods. It is only when a claim is established, the claim under Section 5(3) of the Central Sales Tax would be justified. At the time of auction sale when the appellant purchased the tea from the dealer, there is nothing on record to show that a definite stand was taken by the purchaser that the aforesaid purchase of tea is for the purpose of occasioning an export for which an agreement has been entered into. Since, no such claim was made at that stage, so therefore sales tax was realised which was paid to the government by the dealer. Despite the said fact, there is a clear finding recorded by the assessing authority himself that the export documents were verified by him with the accounts from which it is indicated that the entire exports were effected pursuant to the prior contract or prior orders of the foreign buyers and that the export sales are supported by bills of lading, export invoices and such other valid documents.

19. In the light of the said findings, the assessing Authority clearly held that the claim for exemption was genuine and the same has to be allowed in full. But so far as refund is concerned, the assessing Authority held that the claim for refund cannot be allowed since the dealer has paid the tax and therefore, refund cannot be granted to the assessee/appellant who is not the dealer. Referring to the provisions of Section 44 of the KGST Act, the Deputy Commissioner (Appeals) i.e. appellate authority also held that it is the seller (the dealer) on whom the burden lies to prove before the assessing authority that the sale is for fulfilling an agreement or order of the foreign buyer, since Section 5(3) means or refers to the foreign buyer and not any agreement with the local party and in the present case seller was not in a position to discharge his burden and therefore, he is not entitled for refund.

A 20. It is established from the records that after the aforesaid findings of the assessing authority accepting the claim and allowing the exemption, the next two authorities namely the appellate authority and the Tribunal agree with the said findings and that there does not appear to be any serious challenge to B the said findings before the said two authorities. The High Court also does not appear to have gone into the said issue at all. In that view of the matter, we would not like to reopen the finding of fact which is recorded by the assessing authority.

C 21. We now proceed to address the first issue which is in fact the main issue arising for consideration in these appeals i.e. as to whether the appellants are entitled for refund of tax collected from them at the time of purchase of tea in view of the provisions relating to refund as contained in Section 44 of the KGST Act.

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22. The Assessing Authority, the Appellate Authority as also the Appellate Tribunal have clearly recorded a finding that when a dealer has paid the tax in excess of what is due from him, it has to be refunded. The said excess tax is only to be refunded E to the dealer inasmuch as dealer is entitled to receive a refund, if tax is paid in excess of what was due from him. In view of the said position, all the aforesaid authorities have held that a question of refund of tax would not arise in the case of the appellant, since no tax had been demanded from the appellant F for the tea of all the four years.

23. Considering the facts and circumstances of the present case, we find that tax was collected from the appellant at the time of purchase of tea in the occasion sale conducted by the tea planters since tea is a commodity which was liable to tax G at the time of first sale in the State. The aforesaid tax which was collected from the appellant by the dealer has been remitted to the government by the dealer of tea.

24. It further appears that the appellant claimed for refund H of the said amount to be paid to it, despite the fact that it is not

a dealer in the eye of law. Section 44 of the KGST Act is very clear and it stipulates that it is only the dealer of tea on whom the assessment has been made and it is only he who can claim for refund of tax. In view of the clear and unambiguous position, the appellant cannot claim for refund of tax collected from the seller of tea. It is clearly provided in the principles of Interpretation of Statutes that when the meaning and the language of a statute is clear and unambiguous, nothing could be added to the language and the words of the statute.

This Court in the case of *Sales Tax Commissioner Vs. Modi Sugar Mills* reported in AIR 1961 SC 1047 observed as follows:-

> 10. .....In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions'. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed : it cannot imply anything which is not expressed it cannot import provisions in the statutes so as to supply any assumed deficiency.

25. Therefore, we cannot overlook the mandate of the provisions of the KGST Act which clearly rules that it is only the dealer of tea on whom an assessment has been made, can claim for refund of tax and no one else. There is no possibility of taking a proactive stance although it is clear that the State cannot retain the tax which is overpaid, but at the same time such overpaid tax cannot be paid to the assessee/appellant here.

26. The aforesaid findings which are recorded are clearly findings of fact and have also been arrived at on the basis of the mandate of the provisions of the State Act. Therefore, in our considered opinion, the decision does not call for any interference at our end. The principles laid down in the decision

A in *Mafatlal* (supra) would also not be applicable to the facts of the present case in view of the provisions of Section 44 of the KGST Act, which clearly refers to claim for refund. The said principle is not applicable in view of the fact that the statute involved specifically states that such refund could be made only
B to a dealer and not to any other person claiming for such refund. On the other hand, the decision of *Mafatlal* (supra) was rendered in the context of Section 11B of the Central Excise and Salt Act, 1944 where the expression is "any person". Therefore, ratio of the decision of *Mafatlal* (supra) would not
C be applicable to the facts in hand.

27. Considering the facts and circumstances of the present case, we find no merit in these appeals which are dismissed but without costs.

R.P. Appeals dismissed.