

(2004) 11 KL CK 0068

High Court Of Kerala

Case No: STR No. 144 of 2004

Yesbee Carbotic Pvt. Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: Nov. 4, 2004**Citation:** (2005) 1 KLT 388**Hon'ble Judges:** S. Sankarasubban, J; A.K. Basheer, J**Bench:** Division Bench**Advocate:** V.V. Ashokan and S. Amina, for the Appellant; Georgekutty Mathew, Government Pleader, for the Respondent**Final Decision:** Allowed

Judgement

S. Sankarasubban, J.

This revision is filed by the assessee. Assessment year relates to 1997-98. The assessee used to purchase Carbon Dioxide in gaseous form from F.A.C.T. after suffering tax thereon. The assessee effects sales of liquefied Carbon Dioxide in cylinders and hence, what is purchased and sold is Carbon Dioxide and therefore, the sale of Carbon Dioxide in the hands of the assessee is the second sale in exigible to tax. The levy of tax of Carbon Dioxide under Entry 61 of the 1st Schedule to the Kerala General Sales Tax Act is at the point of first sale in the State. The contention of the petitioner was not accepted by the Authorities below including the Appellate Tribunal. It is in that circumstances that the petitioner has approached this Court.

2. Learned counsel for the petitioner brought to our notice that there is no manufacture involving change of gaseous Carbon Dioxide into liquid Carbon Dioxide. According to him, the petitioner obtained Carbon Dioxide in gaseous form from the F.A.C.T. through pipeline. The petitioner purchased Carbon Dioxide in bulk in gaseous form after suffering tax thereon. The assessee effects Sales of liquefied Carbon Dioxide in cylinders. What is purchased and sold is Carbon Dioxide. The question for consideration is whether the gaseous Carbon Dioxide is different from liquid Carbon Dioxide. According to the petitioner what they purchased is Carbon

Dioxide in gaseous form from F.A.C.T, Thereafter, the Carbon Dioxide is purified and then it is liquefied and collected in gas cylinders. Thereafter purified liquid form of Carbon Dioxide is sold to various other persons. The case is that both are same.

3. In *Supersonic Industrial Complex. Muvattupuzha v. D.C. (III Ernakulam)* (2002) 10 KTR 2003 this Court held thus:

"In this context we may notice that a Division Bench of this Court in *Commissioner of Income Tax v. Kanam Latex Industries (P) Ltd.* 1996 KLJ (Tax cases) 210 has held that centrifuged latex is commercially a different product from raw rubber latex (field latex). Therein their Lordships referred to the various decisions of the Supreme Court and followed the decision in [Empire Industries Limited and Others Vs. Union of India and Others](#), and noted that if after undergoing process and then emerges as a commercially different commodity with its own price structure, custom and other commercial incidents it would be partaking the characteristics of manufacture, including incidental or ancillary processes in the direction of the final product, it may notice that the manufacture of centrifuged latex from field latex is done with sophisticated machinery installed at great cost and the emerging product on manufacture has entirely different commercial identity and its own price structure thus clearly establishing that field latex when converted into centrifuged latex undergoes a manufacturing process".

The Supreme Court in *Rajasthan Roller Flour Mills Association's case* (1993) 91 STC 408 was concerned with the question as to whether flour, maida and suji derived from wheat are "wheat" within the meaning of Section 14(i)(iii) of the Central Sales Tax Act, 1956. The Supreme Court after considering the various decisions of that Court and of other Courts held that flour, maida and suji derived from wheat are not wheat within the meaning of Section 14(i)(iii) of the Central Sales Tax Act, 1956, as they are different goods from wheat.

In *Excel Rubber Industries'* case (1998) 6 KTR 289 this Court has considered the question as to whether foam beds and cushions produced by cutting, sizing or foam rubber sheets and covering by cloth would constitute a different merchandise product. The Court held that the foamed rubber sheets purchased by the assessee and the bed or mattress made out of it and brought to sale by the assessee are different goods in commercial parlance, that the foamed rubber sheets can be used for many purposes, that once such use is making of bed or mattress, that mattress cannot be made by a mere covering of the foamed rubber sheet with cloth, that admittedly the foamed rubber sheets had to be cut and shaped and then covered by the cloth to make mattress and that after such process in which the rubber sheet are consumed, a different product in commercial parlance or common parlance, namely the mattress or the bed, is being sold by the assessee. In *State of Gujarat v. Kosan Gas Company* 87 STC 236 the Gujarat High Court held thus: "Even if after some process has been adopted, the commodity or article remains the same essentially and commercially, then it cannot be said that any manufacturing activity

was carried out on the article in question". In *State of Gujarat v. Asian Aerosol* 92 STC 539 a Division Bench of the Gujarat High Court held as follows: "The test for determining whether there has been a manufacture is whether the commodity had undergone such vital changes by processing that it lost its character and became a different commodity. If goods to which some labour is applied, remained essentially the same commercial article, it cannot be said that the final product is the result of manufacture". In *State of Maharashtra v. Shiv Datt & Sons* 84 STC 497 it was held as follows: "The definition of manufacture" in Section 2(17) should not be given a wide interpretation so as to include any process with reference to the goods whatever....." According to the petitioner, the process involved in the present case is that Carbon Dioxide from the factory of F.A.C.T. reaches to the Factory of the assessee through pipe line. Then the processing in the assessee's words are as follows: "We buy Carbon Dioxide from F.A.C.T. Ltd. Copy of the invoices from F.A.C.T, Ltd., which is enclosed here with will confirm this. We remove impurities in the gas and sell it after bottling of in cylinders. For the purpose of filling in cylinders gas is liquefied".

4. After hearing both sides, we are of the view that the petitioner is bound to succeed. What is sold by the petitioner is Carbon Dioxide. But it is in a different form. What is obtained by the assessee is Carbon Dioxide in gas form and convert into liquid form and it is filled in cylinders. After cooling it, they obtain liquid form. There is no case that what is sold is not Carbon Dioxide.

5. In the above view of the matter, we are of the view that the Authorities were not correct in assessing the petitioner to tax with regard to the sale of Carbon Dioxide. The assessment orders to the above effect are set aside and the revision is allowed.