

(1993) 11 KL CK 0038

High Court Of Kerala

Case No: T.R.C. No. 138 of 1993

G. Rajendra Babu and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: Nov. 30, 1993

Hon'ble Judges: K.S. Paripoornan, J; K.P. Balanarayana Marar, J

Bench: Division Bench

Advocate: S.A. Nagendran and K.B. Subhagamani, for the Appellant;

Final Decision: Dismissed

Judgement

K.S. Paripoornan, J.

The revision-Petitioner is an Assessee under the Kerala General Sales Tax Act. It is conducting the business of a foreign liquor bar attached to a hotel. The Respondent is the Revenue. We are concerned with the assessment year 1985-86. In this revision, the common order passed by the Sales Tax Appellate Tribunal dated 3rd February 1992 in T.A. Nos. 289 and 396 of 1989 is assailed. The Assessee is doing business in cooked food and liquor, it reported a total turnover of Rs. 39,41,403 for the year 1985-86. The entire turnover was claimed as exemption. For the defects pointed out in the preassessment notice, namely, stock variations and sales suppressions detected on the inspection on 7th February 1986, the assessing authority rejected the returns and the book results. In the best judgment made, he added a sum of Rs. 9,81,750 towards the sales suppression and estimated the addition on the turnover of liquor, empty bottles, gunnies, etc., and determined the taxable turnover at Rs. 11,24,500. In appeal, the appellate Assistant Commissioner sustained the rejection of accounts. He ordered a modification by reducing the addition of liquor to 3.5 per cent of the conceded turnover and also deleted the estimated addition made on soda and soft drinks. Modification was also ordered in the case of ice and pepper. Dissatisfied with the order passed by the Appellate Assistant Commissioner, the Assessee filed T.A. No. 289 of 1989 before the Sales Tax Appellate Tribunal. Against the modification granted by the Appellate Assistant

Commissioner, the Revenue filed T.A. No. 396 of 1989 before the Tribunal. Both the appeals were considered together and a common order was passed by the Tribunal, dated 3rd February 1992. Both the appeals were dismissed. The Assessee has come up in revision against the common order passed by the Tribunal, whereby the Assessee's appeal was dismissed and the modification in the quantum of estimate fixed by the Appellate Assistant Commissioner was sustained by the Sales Tax Appellate Tribunal. It is evident from paragraph 2 of the order of the Tribunal, that the Assessee objected solely to the addition sustained on liquor. Before us also, the grievance was confined to the addition made on liquor.

2. We heard counsel for the revision-Petitioner Mr. S.A. Nagendran. The plea was that liquor is taxable only at the first sale point and since the sales by the revision-Petitioner are second sales within the State addition sustained on liquor due to shortage found on inspection is not sustainable. There is no case that there was any unaccounted purchase of liquor. Reliance was placed on a Bench decision of this Court in *Chacko v. State of Kerala* 1991 K.L.J. 665.

3. We are of the view that the plea of the revision-Petitioner is without substance. Admittedly, there was an inspection of the business premises of the Assessee on 7th February 1986. Shortage was found in a substantial measure in the stock of Brandy, Whisky, Rum, Gin and Beer. Besides the above, verification of the records recovered at the time of inspection, revealed a sales suppression of Rs. 1129/50 on 2nd February 1986. The above suppression and variations in stock and failure to maintain correct and complete accounts, were admitted by the Assessee and the offence was compounded on payment of Rs. 6,732. No satisfactory explanation was offered for the defects pointed out in the pre-assessment notice. This resulted in the assessing authority implementing the proposals made in the pre-assessment notice. The addition was reduced by the Appellate Assistant Commissioner to 3.50 per cent of the conceded turnover, which worked out Rs. 1,19,450 only as against Rs. 9,81,750 added by the assessing authority. Before the Sales Tax Appellate Tribunal the plea of the Assessee was that the suppressions detected is by way of shortages on tax suffered liquor purchased within the State and the addition of taxable turnover on that basis is illegal. The Tribunal adverted to the above plea and also the decision of this Court in *Chacko's case* 1991 K.L.J. 665 and held thus:

...In this connection it is to be observed that it is not the shortage alone that is considered for the estimated addition made by the assessing authority. Apart from the shortages on liquor detected, suppressed sales from records recovered from the business place is also detected. The above suppressions detected and failure to maintain correct and complete accounts are admitted by the Assessee in his compounding application and offence compounded on payment of Rs. 6,732. Thus it is well proved that no reliance can be placed on the books of accounts maintained by the Assessee for the purpose of assessment and this necessarily warrants best judgment assessment making estimated additions also to the conceded turnover to

over up the probable omissions. It is true that in the case of Kuruvila Chacko v. State of Kerala reported in K.L.J. 1991 (Tax Cases) 665, the Honourable High Court of Kerala held that no additions on taxable turnover of arrack is sustainable on the basis of shortages detected on tax suffered purchases in the State. In that case no sales suppressions from secret records was detected. But in the present case before us sales suppressions of liquor was detected. The Assessee has not establish the unaccounted sales thus detected relate to tax suffered purchases. The Honoruable High Court of Kerala in a subsequent decision on more or less identical facts as available in the present case, has sustained the 2 per cent estimated addition on the turnover of arrack in the case of K.P. Indra Balan v. State of Kerala, in T.R.C. No. 45/91. The relevant portion of this judgment is usefully extracted below.

"It is conceded that there were two inspections of the business premises of the Assessee on 11th June 1987, and 16th November 1987, which disclosed shortage of arrack. The Assessee being the second seller of arrack, the addition towards probable suppression and denying exemption for such second sales, was unjustified. We see no force in this plea. Admittedly; there were two inspections of the business premises of the Assessee, during the relevant year. The first inspection was on 11th June 1987. A shortage in the stock of arrack, to the tune of 110 litres, was disclosed, at that time. The second inspection on 16th November 1987 revealed a shortage of 8970 litres of arrack. The Assessee himself compounded the offence of non-maintenance of correct and complete books of accounts, in the sum of Rs. 3,500. The Assessee admitted that he is not maintaining correct and complete accounts. It is evident therefrom that no reliance can be placed on the books of accounts and the reported turnover. It has also come out that the Assessee undervalued the price of arrack and he fixed the sale price at Rs. 40 whereas Anr. dealer in Adoor conceded a sale value of Rs. 55 per litre during the same year. No explanation was offered for selling arrack at a price lower than his purchase cost and thereby incurring a gross loss of Rs. 8,27,702.40. After advertng to the above aspects, the Appellate Tribunal held that the shortage of huge quantities of arrack during both the inspections warranted rejection of books of accounts and the reported turnover and in the absence of cogent explanation for selling arrack at a price lower than this purchase cost, the addition of 2 per cent sustained by the Appellate Assistant Commissioner to the reported turnover was justified. The Appellate Tribunal held that though the Appellant is only a second seller in arrack in the State, in so far as sale suppressions have been made out, the burden of proof was on the Assessee to prove that the turnover of arrack representing the estimated addition is only second sales. No material was placed on the score. The Appellate Tribunal sustained the 2 per cent addition made by the Appellate Assistant Commissioner, as also the denial of exemption on the ground that no proof was afforded to show that the turnover of arrack representing the added turnover is only second sales.

We are of the view that the Appellate Tribunal was justified in concurring with the Appellate Assistant Commissioner and in sustaining the addition of 2 per cent. The Assessee failed to prove that the estimated addition represented only second sales. The books of accounts and the return were rightly rejected. We see no reason to interfere with the decision of the Appellate Tribunal in sustaining the addition of 2 per cent and in denying the relief pleaded by the Assessee that the sales are only second sales. Following the above decisions we have to hold that the rejection of accounts and estimated addition is warranted on liquor section also in the case of the Assessee before us. So we do not find force in the contentions raised on behalf of the Assessee that the addition sustained in first appeal on liquor is to be deleted. No other contentions are pressed on behalf of the Assessee.

4. The main thrust of the argument before us was that the shortages found on liquor in the business related to tax suffered purchases effected in the State and as such no further relief can be imposed on the turnover added on liquor. We are of the view that this argument over-looks the crucial and distinguishing factor in this case, namely, that at the time of inspection on 7th February 1986, sales suppressions to the extent of Rs. 1,129.50 on 2nd February 1986 also came to light. The sales suppression has been admitted in the compounding proceedings. The Appellate Tribunal distinguished Chacko's case 1991 K.L.J. 665 where there was no sales suppression from secret records was detected. In this case, sales suppression in liquor was detected. In such a case, where sales suppressions have been made out, the burden of proof is on the Assessee to prove that the turnover of arrack representing the estimated addition is only second sales. No material was placed on that score. We are of the view that the facts in the present case are distinguishable. The decision in Chacko's case 1991 K.L.J. (Tax Cases) 665 cannot be applied to a case, where admittedly, sales suppressions from secret books was detected and the Assessee was not able to establish that the unaccounted sales thus detected related to tax suffered purchases. The Sales Tax Appellate Tribunal was justified in distinguishing Chacko's case 1991 K.L.J. (Tax Cases) 665 and in applying the ratio laid down in the later Bench decision in T.R.C. No. 45 of 1991. It is based on the above later Bench decision of this Court in T.R.C. No. 45/91, the Appellate Tribunal concluded that the Assessee failed to prove that the estimated addition represented only second sales and the books of accounts and the return were rightly rejected. The Appellate Tribunal has given very cogent reasons for rejecting the returns and in sustaining the additions sustained in first appeal by the first appellate authority.

5. We are of the view that the order of the Appellate Tribunal does not suffer from any error of law. There is no merit in this Tax Revision Case. It is dismissed.