

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NOS.941-945 OF 2004

C.T. KOCHOUSEPH

Appellant (s)

VERSUS

STATE OF KERALA & ANR.

Respondent(s)

(With appln(s) for permission to place addl. documents on record and office report)

With Civil Appeal Nos.1937-1939 of 2008
(With prayer for interim relief and office report)

Civil Appeal No.4745 of 2007

Civil Appeal No.4746 of 2007

Civil Appeal No.6055 of 2008
(With prayer for interim relief and office report)

Civil Appeal Nos.938-939 of 2009
(With office report)

Date: 27/10/2009 These Appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.H. KAPADIA
HON'BLE DR. JUSTICE B.S. CHAUHAN

For Appellant(s) Mr. C.S. Rajan, Sr. Adv.
Mr. M.P. Vinod, Adv.
Mr. Ajay K. Jain, Adv.

In CA 6055/2008: Mr. C.N. Sree Kumar, Adv.
Mr. P.R. Nayak, Adv.

For Respondent(s) Mr. Ramesh Babu M.R., Adv. (N/P)

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Mr. T.L.V. Iyer, Sr. Adv.
Mr. G. Prakash, Adv.
Ms. Beena Prakash, Adv.

UPON hearing counsel the Court made the following
O R D E R

The Registry is directed to place the present batch of civil appeals before the Hon'ble the Chief Justice of India for referring the matter to the larger Bench of this Court.

We may also add that, after the decision in Peekay Re-rolling Mills (P) Ltd. [supra], one more civil appeal in the case of M/s. Palakkad Steels (P) Ltd. vs. State of Kerala [Civil Appeal No.4375 of 2009] is pending before this Court. We direct

the Registry to also tag that appeal for reference to the larger Bench of this Court along with the present batch of civil appeals.

[T.I. Rajput]
A.R.-cum-P.S.

[Madhu Saxena]
Court Master

[Signed order is placed on the file]
IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.941-945 OF 2004

C.T. Kochouseph

...Appellant(s)

Versus

State of Kerala & Anr. Etc.

...Respondent(s)

With Civil Appeal Nos.1937-1939/2008,
4746/2007, 6055/2008 and 938-939/2009

4745/2007,

O R D E R

In this batch of civil appeal, an interesting question of law on interpretation of Section 5A of the Kerala General Sales Tax Act, 1963 [for short, "the Act"] arises for determination.

The lead matter is Civil Appeal Nos.941-945 of 2004 [C.T. Kochouseph vs. State of Kerala & Anr. Etc.]. In this lead matter, the question of law is, whether the appellant-assessee, who has purchased voltage stabilizers from exempted registered dealers [S.S.I. Units/Charitable Institutions] within the State of Kerala and thereafter despatched the goods outside the State by way of stock transfer, is liable to tax under Section 5A of the Act? Section 5A was inserted by Act 14 of 1970 with effect from 1st April, 1970, as a measure to check evasion of tax and not to tax exempted sales.

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We quote hereinbelow Section 5A, as it stood at the relevant time:

"5A. Levy of purchase tax:-- (1) Every dealer who, in the course of his business, purchases from a registered dealer or from any other person any goods, the sale or purchase of which is liable to tax under this Act, in circumstances in which no tax is payable under sub-sections (1), (2), (3), (4) or (5) of Section 5 and either,--

[a] consumes such goods in the manufacture of other goods for sale or otherwise, or

[b] uses or disposes of such goods in any manner other than by way of sale in the State;
or

[c] despatches them to any place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce; shall whatever be the quantum of the turnover relating to such purchase for a year, pay tax on the taxable turnover relating to such purchase for the year at the rates mentioned in Section 5..."

Before coming to the judgements, Section 5A of the Act needs to be analyzed. Section 5 of the Act falls in Chapter III. It deals with levy of tax on sale or purchase of goods. Section 5(1), inter alia, states that every dealer whose total turnover per annum is not less than Rupees two lakhs shall pay tax on his taxable turnover of that year at rates specified in the First and Second Schedule to the Act. Under Section 10 of the Act, power is given to the Government to grant exemption and reduction in rate of tax. It is not in dispute that, in

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the present case, appropriate notification has been issued under Section 10 under which exemption has been granted to S.S.I. Units/Charitable Institutions. During the relevant Assessment Years, assessee herein purchased voltage stabilizers from S.S.I. Units/Charitable Institutions [exempted registered dealers]. Briefly, it is the case of the assessee that once a transaction is exempted under Section 10 of the Act, then the purchase of the said items was not taxable under Section 5A of the Act as exemption under Section 10 would exclude operation of the said Section 5A also, i.e., to say, the entire Act would not apply. This is the broad submission of the assessee herein.

According to the Kerala Sales Tax Appellate Tribunal [for short, "the Tribunal"], in the present case, the turnover of the goods purchased from Charitable Institutions by the assessee, which goods are despatched outside the State by way of stock transfer, was not liable to purchase tax under Section 5A of the Act. The Tribunal decided the matter in favour of the assessee by placing reliance on the decision of the Kerala High Court in the case of T.S. Govindarajulu Naidu vs. State of Kerala reported in [1979] 43 S.T.C. 233, and subsequently approved by this Court in the case of State of Kerala vs. T.S. Govindarajulu Naidu, reported in 90 S.T.C. 35.

We have analyzed Section 5A of the Act. In our view, Section 5 is the charging section. Under Section 5A, what is, inter alia, stated is that every dealer who, in the course of his business purchases from a registered

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dealer or from any other person any goods, the sale or purchase of which is liable to tax under this Act, in circumstances in which no tax is payable under sub-sections (1), (2), (3), (4) and (5) of Section 5 and who either consumes such goods in the manufacture of other goods for sale or who uses or disposes of goods in any manner other than by way of sale in the State or who despatches such goods to any place outside the State, except as a direct result of sale or purchase in the course of inter-State trade or commerce shall pay tax on the taxable turnover relating to such purchase for the year at the rates mentioned in Section 5.

If one carefully analyse Section 5A of the Act, it becomes clear that there is a clear dichotomy between liability to tax [taxability] on the one hand and "payability" on the other. The significance of Section 5A, prima facie, appears to be that if the State has lost

revenue/tax which otherwise it would have recovered had the purchase taken place from a registered non-exempted dealer, then Section 5A enables the State to recover such loss from the assessee herein. In such a case, Section 5A would stand attracted, subject to the other conditions being fulfilled. This is where the difference between "payability" and "leviability" comes into existence. The goods in question were undoubtedly liable to tax. However, since exemption notification under Section 10 of the Act came into the field, though liable to tax, such goods were exempted from payment of tax. In our view, therefore, there is a clear demarcation between these two

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concepts of "leviability/taxability" on the one hand vis-a-vis "payability" on the other. Our view is also fortified to this extent by the reasoning of the judgement of this Court in the case of State of Tamil Nadu vs. M.K. Kandaswamy & Ors. reported in [1975] 36 S.T.C. 191. In that case, a three-Judge Bench of this Court was required to decide interpretation and scope of Section 7A of the Madras General Sales Tax Act, 1959 [for short, "Madras Act"], which section was in pari materia with Section 5A of the Act. While interpreting Section 7A of the Madras Act, this Court observed that the main object of Section 7A of the Madras Act is to plug leakage and prevent evasion of tax. It further stated that, in interpretation of such a provision, a construction which would defeat the purpose of the Act should be eschewed. It further observed that the phraseology used in Section 7A of the Madras Act, though somewhat involved, is fairly plain when it comes to giving meaning of the Section. The Court further observed that the language of Section 7A of the Madras Act [which is akin to Section 5A of the Act] indicates the meaning of the word "taxability/liability" is to be read in the context of the expression "taxable goods". If one reads the judgement, it clearly indicates what we have said in the earlier paragraphs, namely, that the concept of "taxability/leviability" is different and distinct from the concept of "payability". That is why when the goods, which are otherwise liable to tax, are exempted by virtue of notification from payability under Section 10 of the Act, Section 5A of the Act has been

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enacted to levy tax on certain transactions on which otherwise the State loses its revenue. This distinction has not been kept in mind in the decision of a two-Judge Bench of this Court in the case of Peekay Re-rolling Mills (P) Ltd. vs. Assistant Commissioner & Anr. reported in 2007 (4) S.C.C.30. In that judgement, it has been held that the expression "levy" would include 'collection' or 'payment' as well and not merely authorisation of the levy. With respect to our learned brothers, we do not agree that the word 'levy' in the context of Section 5 and Section 5A of the Act would include 'collection' or 'payment' of tax.

In the circumstances, on account of difference of opinion, we direct the Registry to place the present batch of civil appeals before the Hon'ble the Chief Justice of India for referring the matter to the larger Bench of this Court.

We may also add that, after the decision in Peekay Re-rolling Mills (P) Ltd. [supra], one more civil appeal in the case of M/s. Palakkad Steels (P) Ltd. vs. State of Kerala [Civil Appeal No.4375 of 2009] is pending before this Court. We direct the Registry to also tag that appeal for reference to the larger Bench of this Court along with the present batch of civil appeals.

.....J.
[S.H. KAPADIA]

.....J.
[DR. B.S. CHAUHAN]

New Delhi,
October 27, 2009.