State Of Kerala & Ors vs M/S Kurian Abraham Pvt. Ltd. & Anr on 8 February, 2008

Bench: S. H. Kapadia, B. Sudershan Reddy

CASE NO.:
Appeal (civil) 7965-7966 of 2004

PETITIONER:
State of Kerala & Ors

RESPONDENT:
M/s Kurian Abraham Pvt. Ltd. & Anr

DATE OF JUDGMENT: 08/02/2008

BENCH:
S. H. Kapadia & B. Sudershan Reddy

JUDGMENT:

J U D G M E N T CIVIL APPEAL NOS. 7965-7966 OF 2004 KAPADIA, J.

M/s Kurian Abraham Pvt. Ltd.-assessee is engaged in the business of buying rubber, processing the same and selling the processed rubber. Assessee purchases field latex (raw-material) in Kerala, but, since its processing factories are in Tamil Nadu, it transports field latex to Tamil Nadu for processing into centrifuged latex and returns it back into Kerala. Thereafter, the centrifuged rubber is sold by the assessee either locally in Kerala or inter-State.

2. In respect of its sales turnover, respondent is an assessee under Kerala General Sales Tax Act, 1963 ("1963 Act") as well as under the Central Sales Tax Act, 1956 ("1956 Act").

3. For the assessment year 1997-98, with respect to centrifuged latex sold locally, the assessee furnished Form No. 25, declaration from the concerned buyers, and claimed exemption from payment of tax on the purchase Turnover of field latex (raw-rubber). With respect to inter-State sale of centrifuged latex, the assessee paid the tax under the 1963 Act on the purchase of field latex and claimed exemption in respect of Central Sales Tax ("CST") under Notification SRO 1731/93 read with SRO 215/97. The returns filed by the assessee were accepted by the AO vide Order dated 14.5.2001 under the 1963 Act and vide assessment order dated 31.5.2001 under the 1956 Act. Similar returns were filed by the assessee for 1998-99 onwards.

4. At this stage, it may be stated that returns filed by the assessee were accepted by the Department on the basis of Circular No. 16/98 dated 28.5.1998 (for short "the said circular") issued by the Board of Revenue under Section 3(1A)(c). Under the said Circular, field and centrifuged latex were treated as one and the same commodity in view of Entry 110 of the First Schedule to the 1963 Act.

5. At this stage, it may be noted that, during the interregnum, in the case of Padinjarekara Agencies Ltd. v. Assistant Commissioner reported in 1996 (2) KLT 641, a learned Single Judge of the Kerala High Court took the view that centrifuged latex is a commercially different product from field latex.

6. It needs to be clarified that the judgment of the Kerala High Court in Padinjarekara case (supra) related to assessment years 1983-84 to 1986-87 during which time Entries 38 and 39 were in force whereas in the present case, we are concerned with the assessment years 1997-98 and 1998-99 when Entry 110 was in force. That, the structure of Entries 38 and 39 which existed in the past was materially different from the structure of Entry 110.

7. Be that as it may, in view of the judgment of the High Court in Padinjarekara case (supra) notices were issued by the Department under Section 19 of the 1963 Act proposing to reopen KGST and CST completed assessments for 1997-98 on the ground that purchase turnover of field latex and sales turnover of centrifuged latex had escaped assessments. Accordingly, the Department proposed to assess the entire purchase turnover of field latex in the hands of the assessee under Entry 110(a)(i) on the ground that the centrifuged latex obtained by processing field latex is a different commodity and, accordingly, the assessee was the last purchaser of field latex within Kerala. Similarly, with regard to inter-State sales of centrifuged latex, the Department alleged that the benefit of exemption taken by the assessee under the above two exemption Notifications was not admissible on the ground that the field latex purchased in Kerala and the centrifuged latex sold inter-State were two different commodities and, accordingly, the KGST paid by the assessee on the field latex was not sufficient to claim exemption for CST on the sale of centrifuged latex. The Department also reopened the assessments on the ground that the assessee had taken the field latex out of Kerala to its factory in Tamil Nadu and had brought it back as centrifuged latex and, therefore, the assessee was liable to sales tax on the sales turnover of centrifuged latex under Entry 110(a)(ii) on the ground that the assessee had sold centrifuged latex brought from outside the State of Kerala. In other words, the assessee was sought to be reassessed both for purchase turnover of field latex and for sales turnover of centrifuged latex, both under the 1963 Act and under the 1956 Act. At this stage, it may be noted that, till today the said Circular No. 16/98 issued by the Board of Revenue has remained in force. It has not been withdrawn till today.

8. Aggrieved by reopening of assessments, respondent-assessee herein moved the High Court under Article 226 of the Constitution for quashing the orders of reassessments inter alia on the ground that they were contrary to the said circular No. 16/98 issued by the Board of Revenue (Taxes). By the impugned judgment, the writ petition filed by the assessee stood allowed, hence, these civil appeals are filed by the Department.

9. We quote Section 3(1A) of the Kerala General Sales Tax Act, 1963, which reads as follows:

> 3. Sales tax authorities (1A) The Board of Revenue shall have superintendence over all officers and persons employed in the execution of this Act and Board of Revenue may-
>
> (a) call for returns from such officers and persons;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such officers and persons;

(c) issue such orders, instructions and directions to such officers and persons as it may deem fit, for the proper administration of this Act."

10. Entries 38 and 39 of the First Schedule of the Kerala General Sales Tax Act, 1963, as they then stood, are as follows:

"THE FIRST SCHEDULE Goods in respect of which single point tax is leviable under sub-section (1) or sub-section (2) of section 5 Sl.

No. Description of goods Point of Levy Rate of tax (%) Rubber Rubber excluding synthetic rubber At the point of last purchase in the State by a dealer who is liable to tax under section 5 Rubber products other than those specifically mentioned in this Schedule At the point of first sale in the State by a dealer who is liable to tax under section 5 8"

11. Entry 110 of the First Schedule of Kerala General Sales Tax Act, 1963 reads as follows:

"SCHEDULE I GOODS IN RESPECT OF WHICH SINGLE POINT TAX IS LEVIABLE UNDER SUB-SECTION (1) OR SUB-SECTION (2) OF SECTION 5 Sl.

No. Description of goods Point of Levy Rate of tax (per cent) Rubber, that is to say :-

(a) raw rubber, latex, dry ribbed sheet of all RMA Grades, trees, lace, earth scrap, ammoniated latex, preserved latex, latex concentrate, centrifugal latex, dry crepe rubber, dry block rubber, crumb rubber, skimmed rubber and all other qualities and grades of latex.

(i) purchased within the State At the point of last purchase in the State by a dealer who is liable to tax under section 5

(ii) brought from outside the State At the point of first sale in the State by a dealer who is liable to tax under section 5

(b) Reclaimed rubber, all grades and qualities do (c) Synthetic rubber do 10"

12. Circular No. 16/98 dated 28.5.1998 issued by the Board of Revenue reads as follows:

Dated: 28.5.1998 Sub: KGST Act 1963 Conversion of field latex into Centrifuged Latex Impact of the decision of Hon'ble High Court in Padinjarekara Agencies Limited Vs. Asst. Commissioner (Assmt) clarification issued.

A doubt has been raised as to the rate of tax and point of levy to be adopted in respect of Centrifuged Latex in view of the Judgement of the Kerala High Court in Padinjarekkara Agencies limited Vs. Asst. Commissioner (Assessment) Kottayam (OP No. 2016/1987-M).

2. In Padinjarekkara Agencies Limited Vs. Assistant Commissioner (Assessment), Kottayam (Judgement dated 24.07.1995 in OP No. 2016/87/M) (1997 5 KTR 26) the Hon'ble High Court had held that a unit engaged in the processing of centrifuged latex is eligible for the concessional rate contemplated under Section 5(7) of the KGST Act, as it stood at the relevant time in respect of the purchase of drum and is eligible to issue declaration in Form 18 as "centrifuged latex"

would come under the term "finished product" used in section 5(7) of the KGST Act. In the O.P. therefore the Court was not concerned with the levy of tax on "centrifuged latex" and also interpretation of the entries in the first schedule. In the case of assessment the assessing authority has to take into account the entries in the schedule and decide the entry in which an item can be properly classified. During the years 83-84 to 86-87, with which the Hon'ble Court was concerned in the above O.P, the entries relating to rubber and rubber product in the first schedule to the KGST Act were as follows:

"38 Rubber excluding synthetic rubber At the point of last purchase in the State by a dealer who is liable to tax under Section 5.

39. Rubber products other than those specifically mentioned in this Schedule At the point of first sale in the State by a dealer who is liable to tax under Section 5"

The scope and ambit of entry 38 was not clarified in the statute. So judicial interpretation may have to be relied on. In the case of assessments relating to the period upto 86-87, to which period the judgment mentioned above also related the judgment in O.P. 2816/87 can be relied upon for interpreting the scope of the term rubber or rubber product falling under entry 38 & 39 respectively. The Court had held that "centrifuged latex" would be a "finished product". So "centrifuged latex" will fall under entry 39 "rubber products other than those specifically mentioned in this schedule" and the appropriate rate may have to be applied i.e., a dealer engaged in the processing of centrifuged latex will have to pay tax on field latex purchased within the State and also pay tax on centrifuged latex sold within the State or inter state as goods falling under entry 39. This position would continue till 31.03.1988 (Even though with effect from 01.07.1987 the first schedule was substituted and the Serial No. relating to the entry rubber was changed as 161, the entry remained the same namely "rubber excluding synthetic rubber").

3. But from 1.04.1988 entry 161 was substituted as follows:

"161. Rubber, that is to say:

(a) Raw rubber latex, dry rubber sheet of all R M A grades, tree lace, earth scrap, ammoniated latex, preserved latex, concentrate, centrifuged latex, dry crape rubber, dry block rubber, crumb rubber, skimmed rubber, and At the point of last purchase in the State by a dealer also is liable to tax under Section 5.

(b) Reclaimed rubber, all grades and qualities.

At the point of sale within the State by a dealer, a dealer who is liable to tax under Section 5.

So rubber latex and centrifuged latex are treated as one and the same commodity for the purpose of taxation. So with effect from 01.04.1988, the judgment in Padinjarekkara Agencies case mentioned earlier (5 KTR 26) cannot have any application for deciding whether centrifuged latex is a commodity commercially different from latex, both being treated as a single commodity for the purpose of taxation. So with effect from 01.04.1988, if a dealer purchased field latex converted it into centrifuged latex and sold centrifuged latex within the State to a registered dealer, he could claim exemption from tax if the buyer had issued the declaration in form No. 25. If on the other hand the processed latex (centrifuged latex) is sold inter state, the dealer may have to pay tax on purchase of field latex, he being the last purchaser within the State and also pay Central Sales Tax on the inter state sales of centrifuged latex. But from 01.04.1997 if a tax is paid on field latex under the KGST Act no tax will be payable on centrifuged latex sold inter state.

4. As per notification SRO 585/80 a reduction in the rate of tax payable on the purchase of rubber by small scale rubber Industrial units from 5% to 3% was granted provided the rubber was used in the manufacture of rubber products within the State.

5. In the light of the position of law discussed above for the period from 01.07.1980, i.e., the date of taking effect of notification SRO 585/80, to 31.03.1988, this concession will be available, since "centrifuged latex" has to be treated as a finished product in the light of the judgment.

6. But from 01.04.1988, since field latex and centrifuged latex are one and the same commodity, by the change of law, the decision mentioned above will not have any application and by operation of law no new products emerges when field latex is converted into "centrifuged latex". So notification SRO 585/90 will not have application in the case of such SSI Units from 01.04.1988. From 09.11.1990, however, a specific exclusion clause has also been added to notification 641/81 specifically excluding even "compounded rubber" from the term "finished rubber products".

7. As per notification SRO 1003/91 exemption was granted, inter alia, in respect of the tax payable by Small Scale Industrial Units on the purchase of rubber for use in the manufacture of rubber goods subject to the condition that tax is levied on the products manufactured out of such rubber. Here again, since during 1991-92 the entry relating to rubber, namely entry 161, takes within its ambit field latex and centrifuged latex, no new commodity emerges in the conversion of field latex into centrifuged latex. Such Industrial units will not therefore be eligible for exemption under SRO 1003/91 and SRO 1727/93 in respect of the purchase of field latex for conversion on centrifuged latex."

13. Notification S.R.O. No. 946/2007 dated 13.11.2007 reads as follows:

> "S.R.O.No.946/2007.?In exercise of the powers conferred by section 10 of the Kerala General Sales Tax Act, 1963 (Act 15 of 1963), read with sub-section (5) of Section 98 of the Kerala Value Added Tax Act, 2003 (30 of 2004), the Government of Kerala, having considered it necessary in the public interest so to do hereby, rescind the notification issued as per G.O. (P) No.43/2005/TD. Dated 31st March, 2005 and published as S.R.O. No.316/2005 in the Kerala Gazette Extraordinary No.676 dated 31st March, 2005, and exempt manufacturers and subsequent sellers of Centrifuged latex and Crumb rubber from payment of tax payable under the Kerala General Sales Tax Act, 1963 on the sales or purchase turnover of Centrifuged latex and Crumb rubber on condition that purchase tax has been levied and collected on the purchase turnover of field latex, used for the manufacture of Centrifuged latex and Crumb rubber, under Kerala General Salex Tax Act, 1963.

Tax if any, collected shall be paid over to Government and tax if any, already paid shall not be refunded. This notification shall be deemed to have been in force during the period from 10th October, 2001 to 31st March, 2004."

14. At this stage it may be stated that Entry 161 was followed by Entry

110.

15. The basic contention raised on behalf of the State (appellant herein) was that under section 3(1) the Board of Revenue ("the Board") was required to exercise all the powers conferred or imposed upon it by the Act. Under section 3(1A), the Board had power of superintendents over all officers and persons employed in the execution of the said Act and under that sub-section the Board was empowered to issue orders, instructions and directions to such officers, as it may deem fit, for the proper administration of the Act. Placing reliance on section 3(1A), Mr. Venkataramani, learned senior counsel appearing for the State, submitted that the said circular No. 16/98 issued by the Board was without authority as the Board had exercised its authority under the said sub-section without the existence of a condition precedent, namely, that when the legislature had earmarked each item in Entry 110 as distinct commodity, it was not open to the Board to treat field latex and centrifuged latex as the same commodity, namely, rubber, thus, according to the learned counsel, this amounts to legislation by the Board. According to the learned counsel, by equating field latex with centrifuged latex, the impugned circular violates the very legislative intent of introducing Entry 110 w.e.f. 1.4.1988 and thereby obliterating the difference between the law as it stood pre-April, 1988 and post 1988. According to the learned counsel, on a bare reading of Section 3(1A), it is clear that the said Board was only authorized to issue administrative circulars. That, prior to 1.4.1988, raw rubber excluding synthetic rubber attracted KGST at the rate of 5% at the point of last purchase in the State by a dealer liable to tax under Section 5 whereas under Entry 110, field latex is a separate taxable commodity vis-a-vis centrifuged latex. According to the learned counsel, each item of Entry 110 is a separate commodity which is exigible to KGST at the point of last purchase in the State by a dealer liable to tax under Section 5 at 10%. According to the learned counsel, by equating field latex

with centrifuged latex, the former escapes duty. According to the learned counsel, the power to grant exemption from payment of duty was not conferred on the Board. The power to grant exemption was a matter of policy. It was for the State to grant or not to grant such exemption. In the circumstances, it was urged that the power of the Board was executive in nature. According to the learned counsel, Section 3(1A) did not confer on the Board the power to issue Orders/Notifications which may partake the character of legislative exercise. According to the learned counsel, the said section did not empower the Board to encroach upon the domain reserved for the Government under the Act. Further, according to the learned counsel, the Board had no power to construe/interpret entries or to lay down the scope and extent of each entry. According to the learned counsel, the scope of Section 3(1A) cannot be equated to Section 37B of the Central Excise Act, 1944. As the words used in Section 3(1A) are distinct and separate from the words used in Section 37B of the Central Excise Act. Learned counsel submitted that circulars such as the one herein do not bind the Court or even Tribunal in the matter of interpretation/classification. In short, the case of the State Government was that the Board had exceeded its authority under Section 3(1A) of taking over interpretation of Entry 110, which function could only be exercised by the quasi-judicial authority under the Act and that the said circular constituted an interference in the assessment proceedings before the assessing officers.

16. Learned counsel for the State also relied upon Notification dated 13.11.2007 issued by the Government of Kerala (Tax Department). The said Notification has been issued under Section 10 of the 1963 Act read with Section 98 of the Kerala Value Added Tax Act, 2003 granting exemption to manufacturers and subsequent sellers of centrifuged latex from payment of tax payable under the said Act on the sales or purchase turnover on the condition that purchase tax has been levied and collected on the purchase turnover of field latex, used for the manufacture of centrifuged latex. This circular is relied upon to show that the power is conferred on the Government to grant or not to grant exemption under Section 10 of the 1963 Act. That, such power was not conferred on the Board. According to the learned counsel, the effect of the circular is to grant exemption from payment of tax on the sale or purchase turnover of centrifuged latex, which could not have been done by the Board vide the above circular.

17. We find no merit in the above contentions. At the outset, it may be stated that in the case of field latex there is 60% water and 40% is the rubber content. On the other hand, centrifuged latex produced from field latex reverses the ratio whereby the rubber content is increased to 60% and the water content is reduced to 40%. Basically, field latex is raw rubber whereas centrifuged latex is a product. This is the rationale behind giving or setting- off/deduction under Notification dated 13.11.2007.

18. Tax administration is a complex subject. It consists of several aspects. The Government needs to strike a balance in the imposition of tax between collection of revenue on one hand and business-friendly approach on the other hand. Today, Governments have realized that in matters of tax collection, difficulties faced by the business have got to be taken into account. Exemption, undoubtedly, is a matter of policy. Interpretation of an Entry is undoubtedly a quasi-judicial function under the tax laws. Imposition of taxes consists of liability, quantification of liability and collection of taxes. Policy decisions have to be taken by the Government. However, the Government

has to work through its senior officers in the matter of difficulties which the business may face, particularly in matters of tax administration. That is where the role of the Board of Revenue comes into play. The said Board takes administrative decisions, which includes the authority to grant Administrative Reliefs. This is the underlying reason for empowering the Board to issue orders, instructions and directions to the officers under it. In the present case, we are not concerned with deciding the scope and extent of each item in Entry 110. We are essentially concerned in this case with the nature of the powers exercised by the Board/Commissioners under Section 3(1A). Take the case of centrifuged latex. It is a product made from field latex (raw-rubber). Even for the sake of argument and even assuming that centrifuged latex and field latex are two different items of taxation under the 1963 Act, as contended on behalf of the State, double taxation avoidance comes within the domain of the Board of Revenue. It was open to the Board to grant administrative relief vide Circular No. 16/98 if the Board in its expertise was of the opinion that treatment of field latex and centrifuged latex as separate and distinct items could result in double taxation. Therefore, the Board was entitled to give administrative relief to the business. In fact, what we have stated is borne out by Notification dated 13.11.2007 issued by the State Government. We are informed that in November, 2007, the Board of Revenue (Taxes) did not exist. However, the point to be noted that even the Notification dated 13.11.2007 indicates that there was a possibility of double taxation on centrifuged latex produced from field latex and, therefore, ultimately the Government had to step in and grant exemption under Section 10 of the 1963 Act. In this case, we are not concerned with the exemption. Power to grant exemption is certainly with the State Government. The point to be noted is that such exemption was not there during the assessment years 1997-98 and 1998-99. Therefore, the Board consisting of senior officers were aware about the propensity of double taxation. In such circumstances, it was not open to the State to contend before the High Court that the said circular No. 16/98 was not legal.

19. One more aspect needs to be mentioned. Provisions of Section 3(1A) are similar to the provisions of Section 119(1) of the Income-tax Act, 1961 ("1961 Act") inasmuch as both the sections have used the expression "for the proper administration of this Act". According to the Law of Income-tax by Kanga and Palkivala, the Board is entrusted with the power to give effect to the provisions of the Act and to provide "fair and just administration" in the matter of imposition and collection of tax. This is where it becomes the incumbent duty of the Board to grant administrative relief in appropriate cases. In such exercise, incidentally the Board has to consider the effect of the items enumerated in the Entry. Therefore, it is not open to the State Government to contend that the Board in this case had entered into an area which is earmarked for the legislature/executive. In our view, the said circular grants administrative relief to the business. It was entitled to do so. Therefore, it cannot be said that the Board had acted beyond its authority in issuing the said circular. One more reason needs to be stated. Whenever such binding circulars are issued by the Board granting administrative relief(s) business arranges its affairs relying on such circulars. Therefore, as long as the circular remains in force, it is not open to the subordinate officers to contend that the circular is erroneous and not binding on them.

20. In the case of Union of India and anr. V. Azadi Bachao Andolan and anr. Reported in (2004) 10 SCC 1 a circular was issued by CBDT under Section 119 of the Income-tax Act, 1961. It was challenged inter alia on the ground that it was ultra vires the provisions of Section 19(1). The

argument was rejected by this Court in the following words:

> "47. It was contended successfully before the High Court that the circular is ultra vires the provisions of Section 119. Sub-section (1) of Section 119 is deliberately worded in a general manner so that CBDT is enabled to issue appropriate orders, instructions or directions to the subordinate authorities "as it may deem fit for the proper administration of this Act". As long as the circular emanates from CBDT and contains orders, instructions or directions pertaining to proper administration of the Act, it is relatable to the source of power under Section 119 irrespective of its nomenclature. Apart from sub-section (1), sub-section (2) of Section 119 also enables CBDT 'for the purpose of proper and efficient management of the work of assessment and collection of revenue, to issue appropriate orders, general or special, in respect of any class of income or class of cases, setting forth directions or instructions (not being prejudicial to the assessees) as to the guidelines, principles or procedures to be followed by other Income Tax Authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties'.
>
> In our view, the High Court was not justified in reading the circular as not complying with the provisions of Section 119. The circular falls well within the parameters of the powers exercisable by CBDT under Section 119 of the Act."

21. Lastly, the binding effect of the said circular No. 16/98 needs to be kept in mind. As stated above, the said circular was issued by the Board by exercising statutory powers vested in it under Section 3(1A). As stated above, Section 3(1A) provides for an enabling power of the Board which was recognized as an Authority under the 1963 Act. The said power was to be exercised in special cases. As stated above, granting of administrative reliefs by the Board came within its authority. As stated above, the said circular was issued for just and fair administration of the 1963 Act. As stated above, Section 3(1A) is similar to Section 119(1) of the 1961 Act. The circulars of this nature are issued by the Board consisting of highest senior officers in the Revenue Department. These circulars are to be respected by the officers working under the supervision of the Board. These circulars are binding on all the authorities administering the tax department. The power of the Board to issue such circular is traceable to Section 3(1A)(c) of the Act. The said circular is statutory in nature. Therefore, it is binding on the Department though not on the courts and the assessees. In the present case, as stated above, completed assessments were sought to be reopened by the AO on the ground that the said circular No. 16/98 was not binding. Such an approach is unsustainable in the eyes of law. If the State Government was of the view that such circulars are illegal or that they are ultra vires Section 3(1A), which it is not, it was open to the State to nullify/withdraw the said circular under Section 60 of the 1963 Act. Till today, the circular continue to remain in force. Till today, it has not been withdrawn. In the circumstances, it is not open to the officers administering the law working under the Board of Revenue to say that the said circular is not binding on them. If such a contention was to be accepted, it would lead to chaos and indiscipline in the administration of tax laws.

22. In the case of Steel Authority of India v. Collector of Customs, Bombay reported in 2000 (115) ELT 42 (SC) a similar situation arose. It was submitted on behalf of the revenue in that case that the

Trade Notice had been issued only by Bombay Customs and, therefore, it was not binding on other Customs. This argument was repelled by the Division Bench of this Court by stating that the Trade Notice issued by one Customs House must bind all Customs Authorities and, if it is erroneous, it should be first withdrawn or amended. In the present case also, it is not open to the assessing officers to reopen the completed assessments on the ground that said circular No. 16/98 was erroneous. Till today, the said circular has neither been withdrawn nor amended.

23. For the aforestated reasons, we find no infirmity in the impugned judgment of the High Court and, accordingly, the State's civil appeals stand dismissed with no order as to costs.