

(2010) 02 KAR CK 0065

In the Karnataka High Court

Case No : Sales Tax Revision Petition No. 80 of 2009 and Sales Tax Revision
Petition No. 10 of 2010

Abhay Solvents Pvt. Ltd.

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 10-02-2010

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 12 A (1A), 23 (1), 9 (ii)

Citation : (2010) 4 KCCR 2578 : (2011) 38 VST 426

Hon'ble Judges : N. Ananda, J; D.V. Shylendra Kumar, J

Bench : Division Bench

Advocate : G. Rabinathan and M. Thirumalesh, for the Appellant; Geetha Menon, AGA for R1 to R5, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—These two Sales Tax Revision Petitions, u/s 23(1) of the Karnataka Sales Tax Act, 1957 (herein after referred to as "the Act"), relate to the justification of the levy of penalty for two assessment periods, namely, 01.04.2000 to 31.03.2001 and also from 01.04.2001 to 31.03.2002.

2. Notices had been issued to the respondents on the admission. The respondents are served and represented by Smt. Geetha Menon, learned Additional Government Advocate.

3. For the purpose of the record, we have admitted these Revision Petitions and taken up the Revision Petitions for disposal itself, with the consent of learned Counsel appearing for the petitioner and the respondent State and the Commissioner of Income Tax of the State of Karnataka.

4. The questions of law, which are sought for our examination, are indicated in the Memorandum of Revision Petition, which reads as under:

(i) Whether in the facts and circumstances of the case of the petitioner where the

assessing authority who passed the original assessment orders under CST Act, 1956 for the years 2000-01 and 2001-02 made speaking orders that inter-State sales of de-oiled rice bran obtained out of KST paid rice bran were eligible for exemption from tax and accordingly exempted the inter-State sales from levy of tax and also as per provisions of Section 8(2-A) of CST Act, 1956, the inter-State sales were eligible for exemption from tax, the Karnataka Appellate Tribunal was right and justified in having held that non-payment of tax by the petitioner on the inter-State sales along with the returns filed was deliberate to evade payment of tax and that therefore the orders passed by the authorities below levying penalty were in accordance with law and justifiable?

(ii) Whether in the facts and circumstances of the case of the petitioner and judgment of Hon'ble Supreme Court of India in the case of State of Madras v. M/s. S.G. Jayaraj Nadar and Sons (1971) 28 STC 700 that no penalty is leviable on the sales found from the books of account and brought to tax and where the Karnataka Appellate Tribunal admitted the fact that the petitioner accounted for inter-State sales of de-oiled rice bran in the books of accounts and also declared the sales in the returns filed, the Tribunal was right and justified in still having held that non-payment of tax by the petitioner along with the returns filed involved element of deliberateness to evade payment of tax and that therefore the authorities below were justified in having passed orders levying penalty?

5. While the first question posed for our examination is the one which is related to the facts of the case, it is not necessarily indicated to be as the direct result of the order passed by the Appellate Tribunal, which had only affirmed the order passed by the first appellate authority, Joint Commissioner of Commercial Taxes (Appeals), but in turn had modified an order of penalty levied by the assessing authority on reassessment, which was at 100% of the tax liability, but came to be reduced by the first appellate authority in the appeal by the petitioner to the extent of granting relief upto 30% and retaining the penalty to the extent of 70%.

6. While we are not very much concerned with the reduction or retention of the penalty at full 100%, the question is as to whether the circumstances justify a levy of penalty on the petitioner in terms of the provisions of Section 12A(1-A) of the Act read with Section 9(ii) of the Act, which reads as under:

12-A. Assessment of escaped turnover.

(1)

[(1-A) In making an assessment under Sub-section (1) the assessing authority may, if it is satisfied that the escape from assessment is due to willful nondisclosure of assessable turnover by the dealer, direct the dealer to pay, in addition to the tax assessed under Sub-section (1), a penalty not exceeding one and a half times the tax so assessed:

Provided that no penalty under this subsection shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such

imposition.

7. The assessee, a dealer as a manufacturer of rice bran oil and also de-oiled rice bran, was also selling the residue of the de-oiled rice bran, after extraction of the oil from the rice bran, Assessee is a registered dealer under the provisions of the Act. In respect of the two years under consideration, assessee had claimed that certain amount of de-oiled rice bran had been transferred to its branch offices outside the State.

8. The turn-over of the assessee also included the interstate sale of de-oiled rice bran and in respect of this part of the turn-over, it is the version of the assessee that, the assessee had claimed the transaction being exempted from levy of central sales tax for the reason that the de-oiled rice bran is to be treated at par with rice bran in terms of the ruling given by this Court and further, that rice bran being goods which is subjected to single point levy under the Karnataka Sales Tax Act, a second sale of the rice bran or the de-oiled rice bran within the State of Karnataka being not leviable or not attracting any further sales tax liability, if such goods, which otherwise would not attract the levy of sales tax within the State if it should have been sold within the State of Karnataka, is sold in the course of interstate trade that again cannot be subjected to tax under the Central Sales Tax Act, in view of the provisions of Section 8(2-A) of the Central Sales Tax Act, as in terms of this provision, if a goods is exempted from levy of tax within the State from which the goods are purchased, a like benefit is available under the provisions of Central Sales Tax Act also and with the second sale of de-oiled rice bran, being not subjected to any tax, amounting to an exemption as it is subjected to taxes at only one point when it is sold within the State; that such a benefit should automatically be extended to the goods and the dealer dealing with the sale of goods, even if it is sold, resulting in a interstate transactions, such interstate sale also enjoying the benefit of exemption and therefore the assessee with the bonafide belief sought an exemption while disclosing the turn-over relating to such an interstate sales and nevertheless not paid any taxes as is otherwise leviable under the provisions of the Central Sales Tax Act and such claim of the assessee having been originally allowed by the assessing authority, but altered on reassessment in respect of the two years and while reassessing, the assessing authority having levied the penalty, that has become a bone of contention and with the intention of assessee being not to suppress any part of the turnover and with the assessee having exactly indicated that there was some interstate sales turnover, but bonafide claiming it as exempted in terms of Section 8(2-A) of the Central Sales Tax Act, such a situation never attracts the provisions of Section 12A(1-A) of the Karnataka Sales Tax Act and it is therefore, contended that the levy of penalty is unsustainable in law and not substantiated; that the first appellate authority though to some extent has granted relief in reducing the percentage of penalty as also the Tribunal, but they have all committed error in invoking or relying upon the provisions of Section 12A(1-A) of the Karnataka Sales Tax Act to justify the penalty, when the facts and circumstances do not warrant such a penalty in

terms of this provisions of law.

9. Mr. G. Rabinathan, learned Counsel for the petitioner would also submit that the judgment of the Supreme Court in the case of State of Madras v. M/s. S.G. Jayaraj Nadar and Sons (1971) 289 STC 700 clearly lays down the law that no penalty is leviable on the sales found from the books of accounts and brought to tax and this judgment is clearly attracted and the second question of law sought for answer is the question directly arising for examination on the ratio laid down by the Supreme Court in the above referred Case; that the Revision Petition of the petitioner should be allowed, the order of penalty is to be set aside on applying the said law to the present set of facts, etc.

10. Appearing on behalf of the respondent--State, submission of Smt. Geetha Menon, learned Additional Government Advocate, is that the assessee cannot claim any bonafide conduct; that the fact of the matter is that the assessee did not pay tax on the interstate sales turnover; that the so called claim towards exemption is a non-existent one; that there is no exemption granted in respect of an interstate sale of de-oiled rice bran; that the whole issue became alive only on an inspection of the premises of the assessee on 23.11.2005 and on unearthing the information from certain books of accounts there; that the assessee does not have bonafides to claim that there was true disclosures or that there was no willful non-disclosure and in such circumstances, even on reassessment when found justification to levy penalty and that penalty has been affirmed by two authorities, namely the first appellate authority and the Tribunals; that there is no occasion or justification to interfere with the impugned order in this Revision Petition and the Revision Petition should be dismissed.

11. Learned Additional Government Advocate also submits that the exemption as is referred to in terms of Section 8(2-A) of the Central Sales Tax Act is only an express exemption and not an implied exemption as is sought to be claimed or projected on behalf of the petitioner, because of the factum of de-oiled rice bran being one and the same with rice bran and the rice bran having suffered tax once in the State of Karnataka, a second sale not attracting a levy of further tax is not the same or comparable to a situation where it is a transaction effected in the course of an interstate sales transaction.

12. Submission is that a single point levy does not mean that there is an exemption granted in respect of sales of very goods at subsequent sales, etc, but it is only the scheme of levy of taxes itself at one point and not more.

13. We have bestowed our consideration to the submissions made at the Bar and perused the orders.

14. The simple question is as to whether the situation warranted or justified a levy of penalty in terms of 12-A (1-A) of the Act and of course depends on the language of the Section 12A(1-A) of the Act.

15. Sri G. Rabinathan, learned Counsel for the petitioner, has laid emphasis to

the factum of willful escapement of turnover from assessment which can be due to willful nondisclosure and that alone attract levy of penalty; that in the instant case, the assessee had indicated interstate sales turn-over and obviously there is no willful non-disclosure, but if the assessee entertained bonafide belief that it was exempted though no tax had been paid, but later that too having been gone back by a subsequent assessing authority in a reassessment order and if the assessee having not paid tax and except this, having now fallen in line with the view as taken by the assessing authority in the reassessment order, no penalty is warranted, etc.

16. While, the language does indicate that a penalty is justified only in a situation where there is willful nondisclosure by the assessee leading to escapement of tax, question is as to whether the present situation is one such or otherwise and a question of this nature is not necessarily answered by the ruling in the judgment of the Supreme Court reported in the case of M/s. S.G. Jayaraj Nadar and Sons (supra).

17. In fact, even in the present case as is indicated in the question, there are cases where there was not only disclosure, but payment of taxes. In the present case, it cannot even be said that there is a disclosure by a formal declaration of the same, whether in respect of the very orders that the assessee had claimed or some part as interstate sale transaction as merely stocks transfer and that was also disallowed. But, more importantly, the assessee, assuming that it had claimed that the turnover was exempted from levy of taxes, a mere claim of that nature does not bail out the assessee on the aspect of bonafides. Merely, by claiming that tax liability is not there, because of some nonexistent exemption, which the assessee imagines to suit it convenience and comes up with such a claim is not the same as an existing exemption which the assessee bonafide believed that he was entitled to and had put-forth a claim on such premise and the assessing officer in turn had accepted the same. Such is definitely not the position in the present. A convenient assumption of exemption on the part of an assessee not paying taxes due, cannot partake the place of a bonafide belief and a claim, to relieve the assessee from any consequences in the form of being mulcted with a statutory penalty.

18. The mere fact that the assessing officer initially towed the line of the assessee in not bringing to tax the interstate sales turnover in itself is not a circumstance to warrant or even to infer a bonafide conduct on the part of the assessee, with regard to the disclosure of the tax liability of the turnover. We notice that in terms of the language of Section 88(2-A) of the Central Sales Tax Act, the provisions under Central Sales Tax Act enables a dealer effecting an interstate sales transaction to claim a like benefit as is available in so far as the exemptions are concerned from the levy of taxes under the respective State Sales Tax enactments. If under the State Act there is a total exemption in respect of the interstate sales also and an exemption partially granted, say for example upto 50%, a like exemption in respect of sales transaction of every

goods in the course of interstate sales is available.

19. An exemption in terms of Section 8(2-A) of the Act will be available, only when under the State Act there is an exemption and express and precise. If there is no such exemption granted under the State Act inferring an exemption under the Central Sales Tax Act, by implication or by an analogy does not arise. In tax laws an exemption should always be express and by a legislative Act. Plenary or delegated but not by either an executive order or even by a Judicial process of inference by resort to any theory of interpretation of statutes.

20. An exemption under a State enactment is not by implication or inference, but by a specific exemption in terms of a Notification issued u/s 8A of the Act and not otherwise. In the instant case, there is no dispute that there is no such Notification issued u/s 8A of the Act, under the State Act.

21. An exemption is granted to avoid a liability, which is otherwise a tax liability under the enactment. An exemption in respect of a non-liability is neither an exemption nor is necessary.

22. A second point sale, being not subject to levy of taxes under the State Act, is a part of the scheme of levy and does not partake the character of an exemption in terms of Section 8A of the Act. We are of the clear view that a second sale being not subjected to levy of taxes within the State Act, does not translate into an exemption in favour of a sales tax transaction of the very goods on the premise that a second sales is exempted within the State Act.

23. Apart from this legal position, particularly, in so far as the penalty is concerned, what is important is the conduct of the assessee and in so far as conduct is concerned, the bonafide are also relevant and attracted. An assessee claiming a nonexisting exemption when there is no express exemption granted in respect of the particular goods in terms of Section 8A of the Act, cannot be characterised as an assessee acting with any bonafides, as in the first instance, there is no exemption at all under the State enactment.

24. It is for this reason that we are rejecting the contentions urged by Mr. G. Rabinathan, learned Counsel for the petitioner that a second sale in respect of de-oiled rice bran is exempted from levy of sales tax under the State enactment and therefore we are answering the questions against the assessee-petitioner and in favour of the Revenue to affirm the order passed by the lower authorities. It is the case of the assessee that the first appellate authority granted some provisional relief, which is left undisturbed, otherwise these Revision Petitions are dismissed.