

(2002) 10 KL CK 0022
In the High Court Of Kerala
Case No : W.A. No. 1332 of 1999

Appollo Tyres Ltd.

APPELLANT

Vs

Assistant Commissioner

RESPONDENT

Date of Decision : 25-10-2002

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 45(1), 45A, 5(3), 5(7)

Citation : (2004) 138 STC 249

Hon'ble Judges : K. Balakrishnan Nair, J;G. Sivarajan, J

Bench : Division Bench

Advocate : M. Pathrose Mathai and Saji Varghese, for the Appellant;
Georgekutty Mathew, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K. Balakrishnan Nair, J.—The point that arises for decision in this Appeal is the validity of the penalty imposed on the appellant Comp''any for the alleged violation of Sections 5(3) and (7) of the Kerala General Sales Tax Act. The brief facts necessary for the disposal of the case are the following:

2. The transactions in question took place in the year 1982-83. The appellant, a manufacturer of automobile tyres and tubes, was purchasing raw-materials like carbon black and other chemicals from outside the State paying 4% tax under the Central Sales Tax Act on the strength of declarations furnished in Form "C". While so, Section 5 of the KGST Act was amended introducing Sub-section (3A) with effect from 14.10.1982. The sai''d amendment enabled the appellant to purchase the aforementioned raw-materials locally on payment of 4% tax subject to certain conditions. The appellant was to give a declaration under Form No. 18 of the KGST Rules and it has to sell the products manufactured using the said raw materials, so as to attract sales tax under the KGST Act or the CST Act. In other words, the products manufactured using raw-materials purchased paying 4% tax on the strength of Form 18 declaration shall not be transferred on consignment or branch transfer basis outside the State. Such transfer not being

a sale will not be exigible to tax. The appellant Company has several branches outside the State and, therefore, was transferring finished products to those Branches according to the market trend without paying sales tax. The Company chose to give declarations under Form 18 and purchased raw-materials paying only 4% tax between December, 1982 and March, 1983. During the relevant accounting year, the appellant effected the following transactions:

Sales within Kerala : Rs. 123.33 lakhs Interstate sales : Rs. 247.97 lakhs
Transfer to branches outside Kerala : Rs. 1697.89 lakhs

3. From the above figures, it can be seen that substantial part of the products was transferred out of the State to the appellant's Branches without paying any tax. Thus, the appellant violated the conditions contained in Sections 5(3) and (7) and also the solemn declaration given by it in Form No. 18. Therefore, proceedings for imposition of penalty u/s 45A were initiated against the appellant. The original authority passed Ext. P1 order dated 8.5.1987 imposing a penalty of Rs. 11,86,150/- being twice the tax evaded by contravening the provisions of Sections 5(3) and (7) of the KGST Act. The first revisional authority by Ext. P2 dated 28.10.1987 affirmed Ext. P1. The appellant moved the Board of Revenue by filing Ext. P3 application for revision followed by Ext. P4 supplementary application, which were rejected by Ext. P5 order dated 25.11.1991. The appellant challenged Exts. P1, P2 and P5 in the Original Petition. The learned single Judge dismissed the Original Petition by the Judgment under appeal.

4. We heard both sides. The main contentions urged by the appellant before us are the following:

The appellant being a purchasing dealer is not liable to pay any tax. It is the obligation of the selling dealer to pay the tax. So, since the appellant is not liable to pay tax, there is no question of any evasion of tax or violation of the provisions of the Act or Rules by it. Therefore, the proceeding initiated against the appellant u/s 45A is without jurisdiction. It is also pointed out that Section 5(3)(ii) fastening the liability on the purchasing dealer to pay tax to the Government, if he fails to make use of the purchased raw-materials for the purpose for which declaration under Form No. 18 was given, was introduced only in 1993. Since the said provision was introduced only on 29.7.1993 with prospective effect, a purchasing dealer did not have any obligation to pay tax during the financial year 1982-83. So, the appellant reiterates, in the absence of any liability, there cannot be any evasion and consequential penal proceedings. It is also pointed out that the appellant was purchasing goods from outside the State under "C" Form paying only 4% tax. Goods were purchased from within the State only for two months. The alleged irregularity, if any, is only accidental. In other words, there was no contumacious conduct from the part of the appellant exposing it to the penalty u/s 45A. Therefore, it is submitted, in any view of the matter, the imposition of the maximum penalty under the said Section is arbitrary and unjust. Therefore, it is submitted, even assuming the

appellant was liable to tax, the imposition of penalty was unwarranted on -the facts of the case.

5. Learned Government Pleader, on the other hand, would point out that the appellant is a corporate giant. It knew very well that substantial part of the produced goods was being transferred to other States on branch transfer basis and, therefore, it could not honour the declaration under Form No. 18. So, knowing fully well that it cannot stick to the conditions in the declaration, the Company gave the declaration and evaded paying tax to the selling dealer which resulted in payment of tax by the seller to the Government at a lower rate.

6. The learned single Judge has dealt with elaborately all the contentions urged on behalf of the appellant and dismissed the Original Petition. The point to be decided is whether the learned single Judge went wrong in doing so. It is true that a purchasing dealer is not liable to pay any tax to Government under Sections 5(3) and (7) as it stood then. But, the fact remains that as a result of the wrong declaration given by the appellant which it definitely knew that it could not honour, substantial amount of tax was lost to the Government. It is pointed out that in the absence of any declaration under Form No. 18, the rate of tax payable by the purchasing dealer to the selling dealer was 10% which in turn would have been paid to the State by the latter. Now, it is a settled position in law that if the purchasing dealer violates the conditions of the declaration in Form No. 18, the selling dealer is not liable to pay any tax evaded. Evidently, tax due to the Government was lost. But, the appellant would submit that, that is not sufficient to proceed u/s 45A. According to it, evasion of tax by the appellant is necessary. Since the appellant was not liable to pay any tax to the Government in this transaction, it is submitted, there is no evasion of tax and, therefore, the jurisdictional precondition to initiate action u/s 45A is lacking. The relevant portion of Section 45A(1) reads as follows:

"45A. Imposition of penalty by officers and authorities:

(1) If the assessing authority or the Appellate Assistant Commissioner is satisfied that any person,

(a)

(b)

(c)

(d)

(e)

(f) after purchasing any goods in respect of which he has made a declaration under proviso to Sub-section (3) of Section 5, has failed to make use of the goods for the declared purpose; or

(g) has acted in contravention of any of the provisions of this Act or any rule

made thereunder, for the contravention of which no express provision for payment of penalty or for punishment is made by this Act;

such authority or Officer may direct that such person shall pay, by way of penalty, an amount not exceeding twice the amount of sales tax or other amount evaded or sought to be evaded where it is practicable to quantify the evasion"

A reading of the above provision would show that if a person who purchased goods after giving declaration under the Proviso to Sub-section (3) of Section 5 has failed to make use of the goods for the declared purpose, penalty can be imposed on him u/s 45 A(1)(f). The appellant will definitely be covered by the said provision. Further, the case on hand will be covered by Section 45A(1)(g) also. By giving a wrong declaration in Form 18 or by acting in violation of the said declaration, the appellant has infringed the provisions of the Act and Rules. For this reason also, it is liable to penalty. The learned counsel's contention that since the appellant was not liable to pay any tax to the Government, it could not be accused of tax evasion, is plainly untenable. The word "evasion" is nowhere defined in the Act. So, we must go by the dictionary meaning. "Evasion" means the act or process of finding a way of not doing something that is legally or morally required to be done. Going by this meaning of the word "evasion", the appellant has definitely evaded paying tax. Section 45A does not say that the evasion by a person responsible to the Government for payment of tax alone will be culpable under that provision. There is nothing in the said Section excluding the evasion by a person like the appellant. It is said, the language is an imperfect medium to convey one's thoughts. But, the language employed by the legislature in the case at hand is in no way ambiguous and therefore, the contention of the appellant in this regard is rejected.

7. This above view taken by us is supported by a Division Bench decision of this Court in *M.R.F. Ltd. v. Assistant Commissioner of Sales Tax* 1999 (2) KLT 605. In the said decision, it was held as follows:

"It is not disputed that petitioner has filed declaration in Form 18 for obtaining the benefit of concessional sales tax. Only because of the declaration filed by the petitioner, the selling dealer had collected 4% sales tax which resulted in non-collection of tax in full. In other words, but for the declaration, full sales tax would have been payable by the petitioner for the packing materials purchased and wrong declaration made by the petitioner resulted in loss of revenue. u/s 45A any person can be imposed with penalty. It need not be on the selling dealer alone or dealer who is liable to pay tax directly to the Government. In view of the wrong declaration only 4% tax (concessional rate) was collected and paid and there is loss to the Revenue. Whether the selling dealer is liable to pay penalty etc. was considered by a Division Bench of this Court in *Deputy Commissioner of Sales Tax v. Bharat Refineries Ltd.* (1978) 42 STC 225. Following the Supreme Court decision in *Polestar Electronic (Pvt.) Ltd. v. Addl. Commissioner, Sales Tax* (1978) 4 STC 409 SC this Court held that as a result of the purchasing dealer's

declaration if lesser tax is collected by the selling dealer no penalty can be imposed on the selling dealer. This Court held as follows:

"..... When once the declaration in the prescribed statutory form is obtained from the purchasing dealer and furnished to the authorities, the selling dealer satisfies the requirements of the statute and he is entitled to claim the concessional rate of one per cent, irrespective of the correctness of the declaration or the manner in which the declarant subsequently acts. Form 18 shows that the declarant need not even specify the goods he intends to manufacture or the nature of the use. The selling dealer is entitled to act on the meagre particulars furnished, and there is no legislative intention to put him on an impossible enquiry as to the correctness of the declaration. The taxing event is the sale to the purchasing dealer. If the purchaser misrepresents or subsequently misbehaves, the "legislative wrath" falls upon him, as Section 46(2) (d) of the Act provides for his imprisonment and for fine....."

In view of the above decision the first contention of the petitioner that purchasing dealer cannot be imposed with penalty even though lesser tax was paid only on the basis of his declaration, cannot be accepted merely because liability to pay tax to the Government is on the selling dealer".

8. The next contention of the appellant is that even assuming there is evasion of tax, there is no mens-rea and therefore, it is not liable to be subjected to penalty. It is trite law that the proceeding to impose penalty is quasi-criminal and the contumacious conduct of the person evading tax is necessary to impose penalty under the Act. In other words, the mere commission of the offence need not automatically be visited by a penalty. But, the Board of Revenue has dealt with this aspect in detail and the relevant portion of the order of the Board of Revenue has been quoted by the learned Single Judge. We find that the competent authority has adverted to all the relevant aspects and has found that this is a fit case for invoking the provisions of Section 45A. The learned Counsel for me appellant tried to submit that the alleged violation was committed only for a short period and therefore, it was not liable to any penalty. The length of time during which the offence is committed is not very relevant. The appellant very well knew that substantial part of its products was being transferred on branch transfer basis to other States without suffering any tax and, therefore, it could not honour the commitment given by it in Form 18. So, the conscious act from the part of the appellant in giving the declaration and paying the tax at a lesser rate should normally be visited by penal consequences in the light of the statutory scheme.

9. The learned counsel for the appellant would finally submit that in any view of the matter the maximum penalty was unwarranted on the facts of the case. But, we find that the view taken by the Board of Revenue is certainly a plausible view. This Court, under Art. 226 of the Constitution of India, cannot substitute its decision for that of the competent authority. The learned Author H.W.R. Wade, in his "Administrative Law" deals with this aspect in the following words:-

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly .merely according to its own opinion. When a Divisional Court yielded to that temptation by invalidating a Secretary of State's decision to postpone publication of a report by company inspectors. The House of Lords held that the judgments "illustrate the danger of Judges wrongly though unconsciously substituting their own views for the views of the decision-maker who alone is charged and authorised by Parliament to exercise a discretion." "

The above statement of law has been quoted by the Apex Court in *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*, . Further, even if we had a difference of opinion with the views taken by the Board of Revenue, we are not justified in interfering with its decision. Lord Hailsham, L.C. has said that two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable (*In re W. (An Infant)* - 1971 A.C. 682). Our Apex Court has, in *U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others*, at paragraph 11) in similar words, reiterated the said principle. Therefore, this Court is not justified in interfering with the decision taken by the Board of Revenue in its discretion regarding the quantum of the penalty.

10. The learned Single Judge has also rightly adverted to the aspect regarding the quantum of penalty and held that there is nothing wrong with the decision of the Board of Revenue in this regard warranting interference under Article 226 of the Constitution of India. The limits of the power of an Appellate Court are well settled. Unless it is shown that the learned Single Judge clearly went wrong in declining to interfere with the decision of the Board of Revenue regarding penalty, we are not justified in interfering with it. Lord Goff, C.J. in *Stepney Borough Council v. Joffe and Others* (1949 (1) All. ER 256) stated:

"It is constantly said (although I am not sure that it is always sufficiently remembered) that the function of a court of appeal is to exercise its powers where it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right."

Our Apex Court in *Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others*, has held:

"And an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The difference is real, though fine."

This Court has reiterated this principle in *Neelakanta Kartha v. Registrar, Kerala Agril. University* 1978 KLT 408 *Mayadevi v. Rajan* 1985 KLT 376 and *Kerala Trading Corporation v. State of Kerala* 1989 (1) KLT 353.

11. For all the above reasons, the Writ Appeal fails and the same is accordingly dismissed.