
(2005) 01 KL CK 0055
In the High Court Of Kerala
Case No : O.P. No. 13349 of 1996 (L)

Babu Sebastian

APPELLANT

Vs

Additional Sales Tax Officer and Others

RESPONDENT

Date of Decision : 06-01-2005

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 19, 19(1), 19(2), 45A, 45A(1)

Citation : (2005) 141 STC 434

Hon'ble Judges : P.R. Raman, J

Bench : Single Bench

Advocate : V.P. Sukumar, for the Appellant; S. Soman, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P.R. Raman, J.—Petitioner is an assessee under the Kerala General Sales Tax Act, 1963 for the assessment years 1991-92 and 1992-93. Originally the assessments were completed based on the return filed by the assessee. Final assessment for the year 1991-92 was thus completed as per office proceedings No. 25131716/91-92 dated December 4, 1992. Likewise for the year 1992-93 final assessment was completed as per proceedings No. 25131716/92-93 dated April 20, 1994. Later on the Intelligence Officer, Sales Tax, Thrissur detected certain unaccounted purchase made by the dealer during the year 1992-93. For the assessment year 1991-92 also he detected certain inter-State purchase which were not accounted in the books of accounts maintained by the petitioner. The assessee admitted the facts before the Intelligence Officer and compounded the offence for the year 1991-92 as evidenced by exhibit P1 proceedings of the Intelligence Officer dated January 31, 1995. Likewise for the assessment year 1992-93 also the offence was compounded as evidenced by exhibit P2 proceedings of the Intelligence Officer dated December 31, 1994. The operative portion of the orders exhibits P1 and P2 would clearly show that it is the offence of non-maintenance of true and complete accounts committed by the dealer,

which was compounded departmentally in lieu of prosecution and a sum of Rs. 48,874 towards compounding fee for the year 1991-92 and maximum amount of Rs. 1,00,000 towards compounding fee for the year 1992-93 were paid by the assessee. Thereafter by exhibit P3 proceedings dated June 30, 1995 original assessment was revised on finding that a portion of the turnover of the business had escaped assessment. Likewise by exhibit P4 dated June 30, 1995 revised assessment orders were passed for the year 1992-93 invoking Section 19(1) of the KGST Act. There is no dispute that the assessee had paid the balance tax due as per the revised assessment orders exhibits P3 and P4. Later, by exhibits P5 and P6 notices under date June 3, 1996 the Sales Tax Officer proposed to impose penalty of Rs. 1,03,458 u/s 45A(1)(d) read with Section 19(2) of the Act relating to the year 1991-92. Likewise an amount of Rs. 4,01,025 was proposed to be levied as penalty for the assessment year 1992-93. The assessee requested time for filing objection as he has strong objection against the proposed penalty proceedings. He also referred to the fact that he had already paid huge amounts towards compounding fee. However further time for filing objection was not granted and proceedings were finalised as per exhibits P7 and P8 orders. As per exhibit P7 an amount of Rs. 1,03,458 was imposed by way of penalty for wilful non-disclosure of taxable turnover for the year 1991-92 in exercise of power u/s 45A(1)(d) of the KGST Act as provided u/s 19(2) of the Act. Likewise as per exhibit P8 an amount of Rs. 4,01,025 was imposed by way of penalty for wilful non-disclosure of taxable turnover for the year 1992-93 under the said Act. Aggrieved thereby the petitioner has preferred this original petition seeking to quash exhibits P7 and P8 orders.

2. One of the contentions raised by the petitioner impugning exhibits P7 and P8 is that since no penalty was imposed on the petitioner while making an assessment u/s 19(1) of the Act, as evidenced by exhibits P3 and P4, the officer has no jurisdiction to levy a penalty by separate order. The imposition of penalty, unless it is made in the course of the assessment, is opposed to Section 19(2) of the KGST Act. It is also contended that the notices proposing to impose penalty as per exhibits P5 and P6 were dated June 3, 1996, after the revised orders of assessment, exhibits P3 and P4 were passed u/s 19 of the Act. It is further contended that proceedings were initiated after a period of one year of completion of the revised orders of assessment u/s 19 of the Act. Yet another contention raised by the learned counsel for the petitioner is that the penalty proceeding being a quasi-judicial proceeding the assessing authority has to apply his mind and take an independent decision uninfluenced by any orders of the superior officer and in the present case the order was issued under threat and pressure of the superior officer and he referred to the averments made in paragraph 5 of the original petition to support his contention. The learned counsel for the petitioner also contended that after the offence was compounded u/s 47 of the KGST Act, no penalty could be imposed and it is an accepted practice in the Sales Tax Department that no penalty is imposed in a case where the assessee admitted the offence and compounded the same after remitting the

prescribed compounding fee.

3. The learned Government Pleader, Sri Soman on the other hand contended that the offence compounded is "non-maintenance of true and correct accounts" as is evidenced by the orders, exhibits P1 and P2. Whereas the penalty now imposed is for a different offence, i.e., for "wilful non-disclosure of the taxable turnover". As such the offence compounded was a different offence and in no way absolve his liability to be proceeded with u/s 19(2) of the Act. It is also his contention that there is nothing to indicate in Section 19(2) of the Act that the penalty should also be imposed simultaneously with the order of revised assessment passed u/s 19(1) of the Act. However, he was unable to make any submission as to whether the officer had passed an order as dictated by the superiors in the absence of any counter-affidavit filed in the case.

4. Heard both sides and perused the orders.

5. I shall now consider the first contention as to whether the compounding of the offence as evidenced by exhibits P1 and P2 would in any way affect the jurisdiction of the authority to impose penalty u/s 19(2) of the Act. On a reading of exhibits P1 and P2 it could be seen that the offence compounded was for non-maintenance of true and complete accounts. On the other hand, exhibits P7 and P8 orders would clearly show that the penalty imposed was for wilful non-disclosure of taxable turnover. As such the offences are different for which separate penalties are provided. Thus the order passed for that reason cannot be said to be without jurisdiction.

6. The next contention advanced is that as per Section 19(2) of the KGST Act the assessing authority may impose penalty in addition to the tax assessed, but that should be done in making an assessment under Sub-section (1) and not separately. Section 19(1) and (2) of the Act for the purpose of convenience is quoted hereunder :

"Assessment of escaped turnover.--(1) Where for any reason the whole or any part of the turnover of business of a dealer has escaped assessment to tax in any year or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable or any deduction has been wrongly made therefrom, the assessing authority may, at any time within (five years) from the expiry of the year to which the tax relates, proceed to determine to the best of its judgment the turnover which has escaped assessment to tax or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable or the deduction that has been wrongly made and assess the tax payable on such turnover after issuing a notice on the dealer and after making such enquiry as it may consider necessary :

Provided that before making an assessment under this Sub-section the dealer shall be given a reasonable opportunity of being heard.

Provided further that the time-limit mentioned in this Sub-section shall not apply

where the turnover which escaped assessment relates to any business done by such dealer as benamidar or through a benami or where it relates to a dealer, who being liable to get himself registered under this Act and the Rules made thereunder has failed to do so.

(2) In making an assessment under Sub-section (1), the assessing authority may, if it is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer to pay, in addition to the tax assessed under Sub-section (1) a penalty as provided in Section 45A :

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

Explanation.--Notwithstanding anything contained in the Indian Evidence Act, 1872, the burden of proving that the escape from assessment was not due to wilful non-disclosure of assessable turnover by the dealer shall be on the dealer."

7. On a combined reading of Sub-sections (1) and (2) of Section 19 of the Act, it can be seen that at the time of reassessment u/s 19(1) of the escaped turnover, the assessing authority may impose penalty in addition to the tax that may be assessed. The words "making an assessment under Sub-section (1)" make it abundantly clear that it is in the course of such assessment made u/s 19(1) that the officer has to apply his mind and decide whether a penalty is to be imposed in addition to the tax and if he is so satisfied, he may impose penalty in addition to the tax as provided in Section 45A. In other words Section 45A is referred to only for the purpose of quantification of the amount of penalty imposed and the power to impose penalty is conferred on the officer by Sub-section (2) of Section 19 of the Act itself and is independent of the power to impose penalty for the various acts or omission for which penalty could be imposed u/s 45A of the Act. Admittedly, in this case, assessments were already made u/s 19(1) as per exhibits P3 and P4 orders on June 30, 1995. The assessment orders exhibits P3 and P4 also do not show that the officer had reserved his power to impose any penalty later and there is no indication in the order to that effect. It was only later by exhibits P5 and P6 that notices were issued proposing to impose penalty u/s 19(2) of the Act, as a result of an afterthought as dictated by the superior officer.

8. A division Bench of this Court in State of Kerala Vs. Jayan Medical Store, in a similar situation which arose for consideration held that Sub-section (2) requires that the imposition of penalty must be "in making the assessment under Sub-section (1)". After examining the facts, it was found that the assessment was completed by the appellate order on April 26, 1974 and by the revised order of the Sales Tax Officer pursuant thereto on September 19, 1974. Notice imposing penalty was issued on November 14, 1974, after the termination of the assessment proceedings. In the above circumstances, it was held that the proceedings for imposition of penalty were not "in making an assessment" as

required by Sub-section (2) of Section 19 of the Act.

9. In this case also the original assessments for the years 1991-92 and 1992-93 were completed on November 4, 1992 and April 20, 1995 respectively. In the case of assessment relating to the year 1991-92 the four years period prescribed would expire by 1996 March, but for the year 1992-93 it would expire only in 1997 March. Exhibits P5 and P6 notices proposing to impose penalty were issued on June 3, 1996. Therefore, the notice of penalty for the year 1991-92 was issued only after the expiry of the four years period, but in the case of the assessment year 1992-93 the notice issued is within the period of four years. Therefore, penalty imposed as per exhibit P7 is beyond the four years period prescribed by Section 19(1) read with Section 19(2) of the Act. But both exhibits P7 and P8 were not passed in "making an assessment" as required by law. While imposing a penalty under Sub-section (2) of Section 19, two conditions are postulated : (1) That the assessing authority must be satisfied that the escapement from assessment was due to wilful disclosure of assessable turnover by the dealer. (2) It is in the course of making the assessment that such satisfaction is formed to impose penalty in addition to the tax assessed after affording him an opportunity of being heard. But in the present case it was not in the contemplation of the officer at the time of passing the revised order of assessment to impose penalty and it is only later as a result of the influence exerted on him that by a separate order he imposed the penalty. On a reading of Section 19(2) it could be seen that it is only in the process of making an assessment that the authority may, if satisfied, impose penalty in addition to the tax assessed. In other words, once an assessment order is completed u/s 19(1) of the Act and left no indication in the said order that the officer proposes to impose penalty by a separate order it must be held that the officer was not satisfied that it is a fit case to impose any penalty while making the assessment u/s 19(1) of the Act. A contrary view however expressed in *Hema V. Kumar v. Additional Sales Tax Officer-II* [1993] 89 STC 154 (Ker) : (1993) 1 KLT 374 is not in conformity with the view expressed by the division Bench in the decision in *State of Kerala Vs. Jayan Medical Store*, .

10. This Court in *Hema V. Kumar*'s case [1993] 89 STC 154 SC : (1993) 1 KLT 374 distinguished the decision of the division Bench of this Court in *Jayan Medical Store*'s case [1980] 45 STC 156 holding that the case decided by the division Bench was purely on the facts and circumstances of that case. The case considered by the division Bench in *Jayan Medical Store*'s case [1980] 45 STC 156 SC was also a case where it was after termination of the assessment proceedings u/s 19(1) that penalty was sought to be imposed by separate proceedings. Thus facts are similar to the present case. The division Bench held in paragraph 4 as follows :

"... Sub-section 2 requires that the imposition of penalty must be "in making the assessment under Sub-section (1)". From the point of view of this requirement, if we examine the facts disclosed, we find that the assessment had been

completed by the appellate order dated 26th April, 1974, and, certainly, by the revised order of the Sales Tax Officer in pursuance of the said order, on 19th September, 1974. The notice for imposition of the penalty was issued only on 14th November, 1974, after the termination of the assessment proceedings. It cannot be said, in the circumstances, that the proceedings for imposition of the penalty were "in making an assessment" as required by Sub-section (2) of Section 19 of the Act...."

11. The above dictum laid down by the division Bench of this Court would clearly show that the proceedings for imposition of penalty should be "in making an assessment" as required by Sub-section (2) of Section 19 of the Act. In the present case I have already observed that it was after termination of the reassessment proceedings that by separate proceedings penalty is sought to be imposed, which in the light of the decision of the division Bench cannot be said to be a proceeding for imposition of penalty "in making the assessment" as required by Sub-section (2) of Section 19 of the Act. Following the division Bench decision I hold that the order imposing penalty by an independent proceeding after termination of the reassessment proceedings, is contrary to Section 19(2) of the Act and hence without jurisdiction.

12. It is also to be noticed that the petitioner has specifically made averments in paragraph 5 of the original petition that the petitioner on enquiry came to know that the penalty was imposed on him by the first respondent at the instance of the second respondent who was the administrative superior of the first respondent and in spite of the insistence of the second respondent, the first respondent initially refused to initiate penalty proceeding stating that in cases where the dealer compounds offence by admitting the offence and remitting compounding fee penalty is not usually imposed and it would be unjustified, but the second respondent submitted a report to the Board of Revenue about the same and it was in the above circumstances that the first respondent was forced to initiate penalty proceedings against the petitioner. He has also averred that these informations are available in file No. R2-400(9)/96 of the office of the second respondent as well as in the assessment file of the first respondent. This averment is not controverted by filing any counter-affidavit. It is now settled that a penalty proceeding is quasi-judicial in nature and the officer imposing penalty has to exercise his powers independently uninfluenced by the dictates of the superiors as otherwise it will not be his decision or satisfaction required to be made. Sub-section (2) of Section 19 makes it clear that the assessing authority has to be satisfied that the "escaped assessment" is due to wilful non-disclosure of assessable turnover. Then alone he can impose penalty in addition to the tax assessed under Sub-section (1) as provided for in Section 45A. Therefore, it is the satisfaction of the authority concerned about the fact of escapement as a result of any wilful non-disclosure which clothes him jurisdiction to levy penalty. Thus when he has already passed a revised order of assessment in exercise of powers u/s 19(1) without imposing any penalty and thereafter when he was compelled to initiate proceedings by any act of superior, it cannot be said that

such penalty imposed is an independent exercise of the power conferred on the assessing officer or based on his satisfaction.

13. In *Orient Paper Mills Ltd. Vs. Union of India (UOI)*, it was held by the apex Court that the assessing authorities exercise quasi-judicial functions and they have a duty cast on them to act in a judicial and independent manner. If their judgment is controlled by the directions given by the Collector it cannot be said to be their independent judgment in any sense of the word. An appeal then to the Collector becomes an empty formality. In *Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen*, the apex Court held that an order passed by the officer who was merely voicing the opinion of the superior without any conviction of his own, was hardly a satisfactory way of dealing with the matter. It was clear that he did not exercise his own judgment in the matter and faithfully followed the instructions by the superiors. The whole procedure was violative of the principle of natural justice.

14. For the foregoing reasons, I find that the orders imposing penalty, exhibits P7 and P8, are without jurisdiction and are liable to be set aside and accordingly they are quashed.

Original petition is allowed.