(2003) 11 KL CK 0014

In the High Court Of Kerala

Case No : W.A. No. 684 of 2003

Bagsvig APPELLANT

Vs

Asst. Commissioner RESPONDENT

Date of Decision : 21-11-2003

Acts Referred:
Kerala General Sales Tax Act, 1963 — Section 45A

Citation : (2004) 2 ILR (Ker) 358 : (2004) 1 KLT 609

Hon'ble Judges : K. Thankappan, J;J.B. Koshy, J

Bench : Division Bench

Advocate : P. Ramanarayanan and Jacob Thomas, for the Appellant; E. Soman, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Koshy, J.—Appellant/petitioner is an assessee under the Kerala General Sales Tax Act. Petitioner filed return on 2.5.83 for the year 1983-84. When the accounts were called for and checked, the assessing authority found that a sizable amount was left out and that was pointed out to the assessee. Pursuant to the directions of the assessing authority, the petitioner filed a revised return on 10.5.85. By Ext. P4 the assessing authority imposed a penalty as he has filed incorrect and incomplete returns with an intention of evading payment of tax, after issuing notice u/s 45A of the Act and calling for his objections. Penalty of Rs. 80,875/- for the year 1982-83 and Rs. 2,16,790/- for the year 1983-84 were imposed. The Board of Revenue reduced the penalty by half for the two years. It is contended that there is no mens rea and therefore, no penalty can be imposed. It is further contended that since there is no best judgment assessment and petitioner was assessed on the basis of the revised return filed by him, no penalty is leviable. Petitioner, in support of that contention, relied on decision of the Supreme Court in State of Madras v. Jayaraj Nadar & Sons (1971) 28 STC 700. In that case, the Supreme Court held that penalty can be levied u/s 12(3) of the Madras General Sales Tax Act, 1959 on the ground that the dealer has submitted an incomplete or incorrect return only if the assessment had to be made to the best of his judgment by the assessing authority. Supreme Court in that case also found that the monthly return was filed with some bona fide mistakes. But there was no mistake in the final return and penalty was not leviable as the mistake was bona fide as well as to the fact that no best of judgment assessment was made by the assessing officer. Further, it is noted that penalty was levied in that case u/s 12(2) of the Madras General Sales Tax Act corresponding to Section 19(2) of the Kerala General Sales Tax Act.

2. The above decision was followed by the decision of the Madras High Court in Egberts India (P) Ltd. v. The State of Madras (1973) 31 STC 569. Learned counsel for the appellant also pointed out a Single Bench decision of this Court in Kollanur Agencies v. Asst. Commissioner (Assessment), Sales Tax Office, Special Circle, Trichur and Ors. 1990 (2) KLT 117 : (1991) 80 STC 177 where it is stated that penalty cannot be levied u/s 45A(1)(d) of the Kerala General Sales Tax Act when there is no best judgment assessment. We note that, the above judgment of the learned Single Judge was held to be not correct by a Division Bench of this Court in T.K. Balan v. State of Kerala and Ors. (1999) 7 KTR 437 (Ker). The Division Bench held that in order to impose a penalty under Sub-section (2) of Section 19, the assessing authority should have passed an assessment order to the best of its judgment when whole or any part of the turnover of the business of a dealer escaped from assessments and that is the basis of the decision reported in (1971) 28 STC 700. But when the penalty proceedings were initiated u/s 45A, passing of a best judgment assessment is not a condition for imposing penalty for submission of incorrect or untrue return. This Court held as follows:

"But the absence of best judgment assessment will not come to the rescue of the appellant in this case, since the penalty was imposed u/s 47A. To that extent, with great respect, we are unable to agree with the learned Single Judge who held in (1991) 80 STC 177 (supra) that the dictum laid down by the Supreme Court in (1971) 28 STC 700 (supra) could be applied in the matter of imposition of penalty u/s 45 A also".

3. In this case, the petitioner even though aware that the turnover ought to have been included, intentionally suppressed the turnover. Even after the party received the payment, it was not informed. Only when the assessing authority pointed out the mistakes he filed a revised return and penalty was not imposed u/s 19(2) of the Kerala General Sales Tax Act. Section 19(2) provides for imposition of penalty when escape from assessment due to wilful non-disclosure of assessable turnover is found out and the assessing authority makes best judgment assessment. Best judgment assessment is a condition precedent to impose penalty only when penalty is imposed u/s 19(2).

4. Section 45A(1)(d) provides as follows:

45A. Imposition of penalty by officers and authorities:- (1) Notwithstanding anything contained in Section 46 if the assessing authority or the appellate

Assistant Commissioner is satisfied that any person............................ ....

(d) has submitted an untrue or incorrect return or"

Here, admittedly the petitioner has at the first instance submitted untrue and incorrect return. He suppressed the turnover intentionally. There is clear mens rea. Only when the assessing officer pointed out the mistakes, he filed a revised return. For imposing penalty u/s 45A(1)(d) of the Kerala General Sales Tax Act, a best judgment assessment need not be a condition and the decision reported in 1990(2) KLT 117 : (1991) 80 STC 177 is thus overruled. The penalty was rightly imposed and reasonable reduction was also given by the revisional authority. Learned Single Judge has correctly decided the matter. We see no ground to interfere with the impugned judgment.

The appeal is dismissed accordingly.