

(1998) 06 KL CK 0029
In the High Court Of Kerala
Case No : O.P. No. 22434 of 1997-U

Beauty Umbrella Mart

APPELLANT

Vs

Intelligence Officer, Special Squad, Inter-State Investigation
Cell and Others

RESPONDENT

Date of Decision : 26-06-1998

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 22, 45A, 45A(1), 46A, 46A(1)

Citation : (1998) 111 STC 774

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Advocate : K.B. Mohamed Kutty, for the Appellant; V.M. Kurian, Government
Pleader, for the Respondent

Judgement

G. Sivarajan, J.—The matter arises under the Kerala General Sales Tax Act, 1963. The question involved in this original petition is regarding the legality of the penalty order, exhibit P3, passed by the first respondent u/s 45A of the Kerala General Sales Tax Act, 1963 as confirmed in second revision as per exhibit P5 order passed by the second respondent.

2. The petitioner is a dealer in stationery items, watches, clocks, umbrellas, rain coats, etc., and an assessee on the files of the Sales Tax Officer, IIIrd Circle, Thiruvananthapuram. A copy of the sale bill No. 86, dated March 7, 1986 issued by the petitioner in favour of the Controller of Examinations, University of Kerala, Thiruvananthapuram, gathered by the Inter-State Investigation Cell, Trivandrum of the Sales Tax Department led to the proceedings against the petitioner u/s 45A of the Act. As per the said bill, the petitioner supplied the following items of goods to the University of Kerala :

1. Jute twine 5,000 balls Rs. 9,562.50
2. White cover 5 lakhs Rs. 56,160.00
3. Colour cover 14 lakhs Rs. 1,50,416.00

Total Rs. 2,16,138.50

The petitioner had collected sales tax in respect of all the three items. Based on the said bill, the first respondent verified the form 9 return filed by the petitioner for March, 1986 and it was found that the petitioner has shown only a sum of Rs. 56,160 as taxable sale for the month of March while the total taxable sale in the above bill was Rs. 2,16,138.50. It was noted from the said sale bill that the petitioner had collected a sum of Rs. 20,309.45 by way of sales tax and additional sales tax. The first respondent then called for the books of accounts for the year 1985-86 including the kurippu book, sale bills for March, 1986 and copies of supply bills from Sl. Nos. 1 to 86 for verification. It is the case of the first respondent that though notices for the said purpose were issued on October 24, 1991, November 6, 1991, December 4, 1991, December 10, 1991 and December 19, 1991, the petitioner had produced only the day book for 1985-86 for verification. The place of business of the petitioner was inspected by the Intelligence Officer, Central Intelligence Squad on August 19, 1985 and December 17, 1985 when the petitioner had produced only kurippu book for verification on both the occasions. It is stated that the day book now produced before the first respondent was not available at the time of inspection and that the sale amount is shown as non-taxable sales in the day book. It is also stated that the sale bill dated March 7, 1986 issued to the university is also entirely different from the usual sale bills issued by the petitioner to other customers during that period and therefore, it was necessary to verify those records to ascertain the full quantum of transactions effected by the petitioner. It is stated that despite a series of letters, the petitioner has not cared to produce these records for verification and that this is a deliberate attempt on the part of the petitioner to defeat the process of verification and thereby prolonged the payment of sales tax and additional sales tax collected from the University of Kerala. According to the first respondent, this is an offence punishable u/s 45A of the Act. It is also stated that the said lapse on the part of the petitioner by filing untrue return and evaded payment of the tax amounts collected during 1985-86 calls for imposition of penalty u/s 45A of the Act. Pointing out the above facts, the first respondent issued a notice dated January 14, 1992 (exhibit P1) proposing to impose a penalty of Rs. 30,028 being the maximum penalty provided u/s 45A of the Act and the petitioner was asked to show cause against the same.

3. The petitioner filed a reply dated January 28, 1992 (exhibit P2). It is stated therein that the petitioner had no intention to defeat the process of verification of any of their transactions as alleged in the notice. The petitioner further stated that they had produced all the books of accounts and other records available with them relating to the year 1985-86 for verification on several occasions and the first respondent has verified the same. It is also stated that the day book for the year is still retained by the first respondent. It is further stated that the entire sales effected to the University of Kerala as per bill dated March 7, 1986 have been duly accounted in their day book and ledger for the year 1985-86 and the

turnover has been correctly included in the return filed for the month of March, 1986. It is stated that the sales of items 1 and 2 are recorded as such and sale under item 3 is included in the total non-taxable turnover of Rs. 1,72,333.84 in the ledger at page 154. The petitioner further mentioned that out of the three items, jute twine and white cover were purchased from outside the State and colour cover was purchased from a registered dealer within the State. It is stated that they have wrongly collected sales tax on the entire sales under the impression that colour cover were also purchased from outside the State. It is further stated that subsequent to the sale, they noticed that the turnover involved in the sale of colour cover amounting to Rs. 1,50,416 is exempt from tax at their hands and so they included the amount in exempted turnover both in the accounts and in the return. It is also stated that the tax collected on the sale of jute twine and white cover was duly remitted to Government along with the tax due on other sales in the month of March, 1986. It is stated that the question of refund of the tax wrongly collected on the sale of colour cover was in correspondence with the University of Kerala and finally they had refunded a sum of Rs. 14,440 to the university as per D.D. No. 029686 dated January 23, 1992 of the Karnataka Bank Ltd., Thiruvananthapuram. The petitioner pleaded that they have not committed any offence punishable u/s 45A of the Act and requested to drop the proceedings. The first respondent passed exhibit P3 order dated March 29, 1992 imposing a penalty of Rs. 30,028 as proposed. The revision petition filed against the said order was dismissed by the Deputy Commissioner of Sales Tax, Trivandrum as per order S.T.R.T. No. 38/92 dated April 22, 1995. The second revision filed against the said order was also dismissed by the Board of Revenue by exhibit P5 order dated September 24, 1997.

4. According to the petitioner, exhibit P3 penalty order and exhibit P5 revisional order are clearly illegal and unsustainable for the reason that none of the authorities were able to establish evasion of tax which is the basic requirement for the application of Section 45A. It is also stated that there is no reason to impose penalty on technical grounds as the petitioner had not violated any of the statutory requirements. It is stated that the petitioner had produced all the books including the day book and that the excess tax collected was refunded in accordance with law. It is their further case that since the sale in question is not exigible to tax and since the excess collection wrongly made by the petitioner was refunded and accepted by the University of Kerala, there is no question of imposition of penalty u/s 45A of the Act especially in view of the provisions of the proviso to Section 46A.

5. A statement is filed on behalf of the first respondent. It is stated therein that on verification of the monthly return in form No. 9 filed by the dealer for the month of March, 1986 it was found that only an amount of Rs. 56,160 was shown as taxable sales in the return in form No. 9 while the total taxable sales as per the sale bill dated March 7, 1986 was Rs. 2,16,138.50 and the dealer had collected an amount of Rs. 20,309.45 towards sales tax and additional sales tax

in that bill. It is further stated that despite various notices already mentioned, the dealer has not produced the day book for 1985-86 and that on the dates of inspection conducted on August 19, 1985 and December 17, 1985 also the dealer has produced only kurippu book for verification. The day book produced later with the entries of the above sale amount as non-taxable sales, it is stated, was only a newly cooked up one and it was only an afterthought of the dealer. It is also stated that the dealer has not cared to produce the relevant records such as sale bills required for verification. The sale bill, it is stated, was issued by the dealer with a deliberate attempt to defeat the process of verification and thereby prolonged the payment of sales tax and additional sales tax collected from the University of Kerala which is an offence punishable u/s 45A of the Act. The contention of the petitioner that they had produced all the books of accounts and records for the year 1985-86 for verification was denied. It is stated that the books of accounts made available for inspection before the inspecting officers on August 19, 1985 and December 17, 1985 are mainly kurippu books signed by them. The averment of the petitioner that the entire sales effected to the University of Kerala as per bill dated March 7, 1986 have been duly accounted in their day book and ledger for 1985-86 and the turnover was correctly included in the monthly return for March, 1986 was stated to be incorrect and untrue. It is also stated that the original kurippu book which was signed by the inspecting officers was not made available for verification and so it is possible that the particular sales effected by the dealer through a distinct series of supply bills might not have taken into the original kurippu book. Regarding the refund of Rs. 14,440 wrongly collected from the university, it is stated that if the petitioner was aware of the wrong collection during March, 1985 itself before filing return, it should have been refunded to the university then itself and that the amount was refunded only after receipt of notice u/s 45A. It is further stated that in the return for March, 1986 the dealer declared sales of bags, caps, tape, cotton, gunny, twine, etc., only at 5 per cent taxable sales whereas jute ball taxable at 5 per cent sold as per the supply bill have not found a place in the return.

6. I have heard the learned counsel appearing for the petitioner and the learned Government Pleader appearing for the respondents. The learned counsel appearing for the petitioner submitted that the alleged offence committed by the petitioner is the collection of sales tax on the turnover of goods supplied to the University of Kerala as per sale bill dated March 7, 1986 and the non-remittance of the same to the department. The learned counsel submitted that if there is a collection of tax attracting the provisions of Section 22 of the Act, Section 46A of the Act provides for imposition of penalty and for forfeiture of the tax illegally collected. Learned counsel further submitted that if the tax illegally collected is returned to the purchaser, the proviso to Section 46A states that no penalty for forfeiture shall be ordered under the said section. The learned counsel submitted that since the petitioner had already refunded the amount to the University of Kerala evidenced by exhibit P4 communication there is no question of imposition of penalty or forfeiture of the amount u/s 46A of the Act in view of the proviso to

Sub-section (1) thereof. The learned counsel further submitted that since there is no liability to pay sales tax on the turnover of colour cover amounting to Rs. 1,50,416 covered by the sale bill dated March 7, 1986 the petitioner was not obliged to include the said amount in the taxable turnover of the petitioner for the month of March, 1986 in spite of the collection of sales tax on the said amount and that the failure to include the same in the taxable turnover is of no consequence. He also submitted that the offence, if at all, is only technical or venial. The learned counsel submitted that none of the respondents have got a case that the sales turnover of colour cover by the petitioner is exigible to tax at the hands of the petitioner or that the petitioner has not refunded the "tax collected from the university. The learned counsel accordingly submitted that there is no violation of any of the provisions of Section 45A of the Act warranting imposition of penalty under the said section.

7. The learned Government Pleader appearing for the respondents submitted that the petitioner by using separate sets of bill had collected tax even on non-taxable sales and had appropriated the same without being making it over to the Government. The learned Government Pleader further submitted that in spite of the defect being noticed at the time of entering in the day book and also in filing the return, the petitioner did not remit the tax collected from the university in the bill dated March 7, 1986 to the Government nor refunded it to the university. The learned Government Pleader also submitted that though various notices were issued to the petitioner to produce the sale bills and other connected documents, the petitioner did not produce any of those documents before the authorities and that the attempt of the petitioner was only to protract the proceedings and to get away from the liability to remit the illegal collection to the Government. The learned Government Pleader further submitted that the petitioner had wilfully declined to comply with the directions issued in the various notices attracting the provisions of Section 45A of the Act. He also submitted that the petitioner had remitted the tax illegally collected from the university only after the issuance of notice u/s 45A of the Act as is evident from exhibit P4 itself, i.e., after a period of about 7 years. The learned Government Pleader further submitted that the intention of the petitioner was very clear and but for the detection by the Inter-State Investigation Cell the petitioner would have appropriated the tax illegally collected from the university. The learned Government Pleader accordingly submitted that respondents Nos. 1 and 2 were perfectly justified in imposing and sustaining the maximum penalty.

8. I have considered the matter. Admittedly the petitioner had collected tax on the entire bill amount of Rs. 2,16,138.50 covered by the sale bill dated March 7, 1986 and the tax collected was Rs. 20,309.45. It is also an admitted fact that a sum of Rs. 14,440 was refunded to the University of Kerala on January 23, 1992 as per the D.D. mentioned in exhibit P4 communication. As already stated, the only reason for initiating proceedings u/s 45A of the Act is the verification of the return filed by the petitioner for the month of March, 1986 with reference to the sale bill dated March 7, 1986 issued by the petitioner in favour of the University

of Kerala and the detection of the fact that the amount covered by the said bill has not been included in the taxable turnover in the return filed for the month of March, 1986. The petitioner had stated that a sum of Rs. 1,50,416 being the sale price of colour cover included as item No. 3 in the sale bill dated March 7, 1986 is non-taxable goods since it was purchased from a local dealer inside the State. The petitioner had also stated that tax was collected from the University of Kerala on the said amount also by mistake on the assumption that the said goods were purchased by the petitioner from outside the State and that when the defect was noticed, the sale price of colour cover was included in the non-taxable turnover both in the accounts and in the return. u/s 22(1) of the Kerala General Sales Tax Act, a registered dealer is permitted to collect the tax payable by him on the sale of any goods from the person to whom he sells the goods and pay over the same to the Government in the manner prescribed. This is subject to the provisions of Sub-section (2). Under Sub-section (2), no registered dealer shall collect any sum purporting to be by way of tax on the sale of any goods in respect of which he is not liable to pay tax or at a rate exceeding the rate at which he is liable to pay tax. In the instant case, since the purchase of colour cover was made from within the State and since colour cover is taxable only at the point of first sale in the State the petitioner is not liable to pay the tax. Hence, when the petitioner collected tax from the University of Kerala on their sales the provisions of Sub-section (2) of Section 22 are attracted. u/s 46A(1) of the Act, if any person collects any sum by way of tax or purporting to be by way of tax in contravention of Sub-section (2) or Sub-section (3) of Section 22, he shall be liable to pay penalty not exceeding five thousand rupees and any sum collected by the person by way of tax or purporting to be by way of tax in contravention of Sub-section (2) or Sub-section (3) of Section 22 shall be liable to be forfeited to the Government by an order issued by the assessing authority after giving such person an opportunity to show cause why penalty or forfeiture shall not be ordered. The proviso to Section 46A(1) states that no penalty or forfeiture shall be ordered under this sub-section if the assessing authority is satisfied that the sum so collected has been returned to the person from whom it was collected. As already stated, the petitioner had refunded a sum of Rs. 14,440 being the tax on the sales turnover of colour cover to the University of Kerala immediately after the notice u/s 45A and before the imposition of penalty. In such circumstances, the proviso to Section 46A(1) is attracted and no penalty is warranted.

9. Now coming to Section 45A(1) of the Act, it reads as follows :

"45 A. Imposition of penalty by officers and authorities.--(1) If the assessing authority or the Appellate Assistant Commissioner is satisfied that any person,--

(a) being a person required to register himself as dealer under this Act, did not get himself registered ; or

(b) has failed to keep true and complete accounts ; or

(c) has failed to submit any return as required by the provisions of this Act or the Rules made thereunder ; or

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

(e) has failed to comply with all or any of the terms of any notice or summons issued to him by or under the provisions of this Act or the Rules made thereunder ; or

(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 Rules 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 or an amount not exceeding five thousand rupees in any other case.

Explanation I.--The burden of proving that any person is not liable to the penalty under this section shall be on such person.

Explanation II.--For the purposes of this sub-section the expression "assessing authority" includes any officer not below the rank of Sales Tax Officer specified by the Government in this behalf by notification in the Gazette."

The case of the first respondent, as could be seen from exhibit P1 notice, is that the petitioner had submitted untrue and incorrect return falling under Clause (d) above. The question as to whether the petitioner has submitted an untrue or incorrect return will depend upon the question as to whether tax is exigible on the sales turnover of colour cover. As already stated, the respondents have no case that the petitioner is liable to pay tax on the sales turnover of colour cover. The petitioner had shown the sales turnover of colour cover in the non-taxable turnover both in the accounts and in the return. In such circumstances, it cannot be said that the return filed by the petitioner for the month of March, 1986 is untrue or incorrect. Regarding the collection of tax attracting the provisions of Sub-section (2) of Section 22, it is an offence falling under Clause (g) above, but it says that penalty u/s 45A can be imposed if no express provision for payment of penalty or for punishment is made in this Act for such contravention. Since Section 46A is an express provision for imposition of penalty in respect of the contravention of Section 22(2), Clause (g) is also not attracted. But the fact remains that the petitioner, in spite of several notices issued by the first respondent, did not produce the sale bills and connected documents other than the day book for verification by the first respondent which resulted in protraction of the proceedings and in delaying the refund of the amount to the university. The petitioner had the advantage of retaining the illegal collection for about a

period of seven years on account of the protracted proceedings. The non-compliance with the various notices attracts the provisions of Clause (e) mentioned above. Considering the fact that the petitioner had not produced the sale bills and connected documents except the day book in spite of several notices, the non-compliance of each notice attracts the provisions of Section 45A of the Act. In this case, since no tax is exigible on the sales turnover of colour cover, being second sales in the State, it cannot be said that there is any evasion of tax or attempted evasion of tax and hence there is no question of quantifying the tax sought to be evaded. In such circumstances, the maximum penalty that can be imposed for wilful non-compliance with the terms of any notice is only Rs. 5,000. As already stated, the non-compliance of each notice without valid reasons is an offence attracting the provisions of Section 45A of the Act. Taking into account all the circumstances of the case, I modify exhibit P3 penalty order as affirmed by exhibit P5 revision order and direct that the ends of justice will be met by imposing a penalty of Rs. 10,000. It is stated by the petitioner that during the pendency of the first revision the petitioner had remitted a sum of Rs. 10,000 against the demand under exhibit P3 penalty order. The first respondent will verify the said fact and adjust the said amount if it has already been remitted against the penalty amount.

10. The original petition is disposed of as above. In the circumstances of the case, there will be no order as to costs.

Order on C.M.P. No. 40266 of 1997 in O.P. No. 22434 of 1997 dismissed.