

(1997) 06 KL CK 0007
In the High Court Of Kerala
Case No : O.P. No. 3308/94 R

Devis, K.P.

APPELLANT

Vs

Assistant Commissioner (Assessment), Sales Tax and Another

RESPONDENT

Date of Decision : 06-06-1997

Acts Referred:

Income Tax Act, 1961 — Section 271(1)
Kerala General Sales Tax Act, 1963 — Section 17, 43, 45A, 45A(1), 45A(3)
Kerala General Sales Tax Rules, 1963 — Rule 21(7)

Citation : (1997) 06 KL CK 0007

Hon'ble Judges : P.A. Mohammed, J

Bench : Single Bench

Advocate : K.C. Balagangadharan and S. Soman, for the Appellant; P.K. Santhamma, Government Pleader, for the Respondent

Judgement

P.A. Mohammed, J.—The Petitioner is the proprietor of a hotel by name "Hotel Victory International", Kunnampulam. He is a registered dealer under the provisions of the Kerala General Sales Tax Act, 1963 (for short "the Act"). He is purchasing liquor from within the State and since he being a second seller there is no liability to pay sales tax. Since the Petitioner being a second seller he claimed exemption on the entire sales of liquor for the year 1988-89. His case is that he had bona fide believed that he was not liable to pay sales tax on the stock held on 31st March 1988. The books of account of the Assessee was called for by the assessing authority. After perusing the account books the first Respondent initiated proceedings u/s 45A of the Act proposing to levy penalty evidenced by Ext. P-1. In Ext. P-1 the allegation of the first Respondent was that the stock held on 31st March 1988 had been clearly sold out during the year 1988-89 itself and that taxes due on the above sales had not been paid so far as required u/s 17 of the Act, read with Rule 21(7) of the Kerala General Sales Tax Rules, 1963. The above proposal was objected by the Petitioner as per Ext.P-2. According to the Petitioner, he has not declared the taxable turnover on the bona fide belief that he was not liable to do so in view of the fact that writ petitions

challenging the Amendment Act 17 of 1988 were pending before this Court. In support of his contention, the decision of the Supreme Court in *The Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax* (1980) 45 S.T.C. 197 was cited. He also pointed out that the maximum penalty cannot be levied under any circumstance and in support thereof the decision of a Division Bench of this Court in *St. Michael's Oil Mills v. State of Kerala* (1988) 68 S.T.C. 360 was also cited. However, the first Respondent passed Ext. P-3. order levying penalty of Rs. 1,25,000 for the grounds alleged in Ext. P-1. As against the said order the Petitioner filed a revision before the Deputy Commissioner of Agricultural Income Tax and Sales Tax, Palakkad, the second Respondent herein. The second Respondent by Ext. P-5 order reduced the penalty payable by the Petitioner to Rs. 72,236.00 on the ground that it was not a case for levying the maximum penalty prescribed under the Act. Being dissatisfied with the said order the Petitioner filed further revision before the Board of Revenue as per Ext. P-6. It was disposed of by the Board of Revenue as per Ext. P-8 Order dated 4th November 1993 confirming the Order passed by the second Respondent. The said Order is under challenge in this Writ Petition.

2. Heard learned Counsel for the Petitioner and the Government Pleader for the Respondents.

3. As pointed out above, levy of penalty in the present case is made u/s 45A of the Act. Section 45A authorises the assessing authority or the Appellate Assistant Commissioner if any person violates any one of the requirements contained in Clauses (a) to (g) thereof, to levy penalty and direct such person to 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. The allegation in the present case falls under Clause (d) of Section 45A which provides the submission of untrue or incorrect return. In this context it is apt to examine the nature of the proceeding u/s 45A; whether it is civil, criminal or quasi-criminal. The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest. Under the sales tax law an order imposing penalty is the result of a quasi-criminal proceeding. In view of the penal provision contained in Section 45A the proceeding thereunder is necessarily a quasi-criminal proceeding.

4. Explanation (I) to Section 45A mandates that the burden of proving that any person is not liable to the penalty under the section shall be on such person. In view of this provision the Government Pleader contends that the burden is on the dealer to prove that he is not liable to pay penalty. The obligation of the dealer u/s 17 is to file a correct and complete return and in case the return submitted is found to be untrue and incorrect, he is liable for penalty u/s 45A. The dealer has to discharge the burden that the return submitted by him is correct and complete. He points out that it is not the mere default that is made the

foundation for liability to penalty but it is the contumacious or other objectionable conduct of the dealer in fulfilling his obligation mentioned under the statute. In support of this submission counsel places reliance on the decisions of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . In this context I am not unaware of the situation that the Supreme Court in Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah, observed:

"The rule, regarding burden of proof enunciated in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, is no longer valid." This is because of the Explanation to Sub-section(1) of Section 271 of the Income Tax Act added by the Finance Act, 1964. See also the decisions of the Supreme Court in Commissioner of Income Tax v. Mussadilal Ram Bharose (1987) 65 ITR 14 and Commissioner of Income Tax, Madras Vs. K.R. Sadayappan, .

5. In Hindustan Steel's case, supra, a case coming under Sales Tax Act, the Supreme Court observed:

An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty, will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

(emphasis supplied)

However, the above principle laid down by the Supreme Court can be applied in the background of Explanation (I) to Section 45A. The validity of this provision came up for decision before a Division Bench of this Court in P.D. Sudhi v. Intelligence Officer (1992) 85 S.T.C 337. While upholding the validity of the said provision the Division Bench observed as below:

We hasten to state that though under explanation I, the burden of proving that a person has not evaded or sought, to evade any sales tax or other amount, is on such person, it is really a situation where a person is asked to prove the negative. The burden is akin to that in a civil case, where the adjudication is made on preponderance of probabilities. The person on whom the burden is so cast, need not lead any positive material to discharge the burden nor to the truth. He may rely on, any material or proof by the department to the contrary, he could raise probabilities in his favour or point out circumstances which could create doubts, the benefit of which can be given to him. Since the person is

required to prove a negative fact, the matter should be evaluated only on preponderance of probabilities.

The Supreme Court in Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah, , supra observed:

Even after the amendment of 1964, the penalty proceedings, it is evident, continue to be penal proceedings. Similarly, the question whether the Assessee has concealed the particulars of his income or has furnished inaccurate particulars of his income continues to remain a question of fact. Where the explanation has made a difference is while deciding the said question of fact the presumption created by it has to be applied which has the effect of shifting the burden of proof. The entire material on record has to be considered keeping in mind the said presumption and a finding recorded.

The dealer may rely on all materials on record and he need not lead any positive material to discharge the burden nor to the truth. In this context what is required is whether there was any contumacious conduct on the part of the dealer while submitting the return. His case is that the bona fide believed that he was not liable to pay tax since he was a second seller and that the validity of the levy itself was under challenge in large number of writ petitions. This plea ought to have been examined by the Board of Revenue on the preponderance of probabilities as laid down by the Division Bench of this Court in Sudhi's case (1992) 85 S.T.C. 337. In this context it is apt to refer to the following observation of the Supreme Court in Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah,

But if the Assessee establishes, that his failure to return the correct income was not on account of any fraud or any gross or wilful neglect on his part, it is evident, no penalty can be levied.

It is pointed out that the Board of Revenue while confirming the order of the Deputy Commissioner has not considered the matter on the basis of preponderance of probabilities and in the absence of such a course in the examination of evidence Ext. P-8 order is liable to be declared illegal.

6. In Sudhi's case (1992) 85 S.T.C. 337 the Division Bench said:

We are of the view, that the said statutory provision is only in the realm of evidence and not a rule of substantive law. The burden of proof is shifted to the shoulders of the Assessee, since it is a matter within his own knowledge and the evidence as to which is in his own power to produce.

In this context the counsel for the dealer submits whatever material available within the knowledge of the dealer has been sufficiently stated in Ext. P-2. It is further pointed out that the question of levy of tax itself was uncertain. Therefore the question is whether the Petitioner had any mens rea or whether he had committed any deliberate and wilful omission in submitting the returns. It is admitted in the counter-affidavit that as soon as the assessment was made, the

dealer had paid the entire tax. In Ext. P-2 the Petitioner has placed reliance on the decision of the Supreme Court in Cement Marketing Co.'s case 45 S.T.C. 197. He has stated that he had not declared any turnover as taxable on the bona fide belief that he was not liable to pay tax in the said turnover. The Supreme Court in the above decision observed:

A return cannot be said to be "false" within the meaning of Section 43 unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the Assessee and there is no reasonable explanation forthcoming from the Assessee for such want of care, the Court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the Assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty.

This aspect was emphasised by this Court in M.M. Nagalinga Nadar Sons v. State of Kerala 1993 K.L.J. (Tax Cases) 567. The Board of Revenue has not properly adverted to this aspect of the question raised by the Petitioner in this case.

7. The third point raised by the counsel is that the Board of Revenue has failed to consider the quantum of penalty applying doctrine of proportionality or "Wednesbury" principle. This Court in Nagalinga Nadar's case 1993 K.L.J. (Tax Cases) 567, *supra*, observed:

The doctrine of "proportionality" or "Wednesbury" principle is to be applied in fixing the quantum of penalty in a particular case. It is time and again said that the penalty should not be levied only because it is lawful to do so. In case maximum is prescribed it shall be levied according to the proportion of the magnitude of the offence and other connected circumstances.

The contention of the counsel in view of the decisions referred to above appears to be sound. The Board of Revenue on this point observed that the Deputy Commissioner had applied his mind and reduced the quantum of penalty to Rs. 72,330. What is required is independent application of mind by the Board of Revenue while dealing with the question of quantum of penalty. The Board is bound to examine the entire material and to evaluate the gravity of the offence. The mere adoption of the views expressed by the lower authorities sounds mechanical.

8. Sub-section (5) of Section 45A is as follows:

The Board of Revenue may, either suo motu or on application call for and examine the record of any order passed under Sub-section (1) or Sub-section (3) and make such order as it thinks fit.

The width and amplitude of the power under the above provision shall be kept in mind by the Board of Revenue while dealing with an application filed by the Assessee or while taking suo motu by it. The Board of Revenue is authorised

under the above provision to call for and examine the record any order passed by the original: authority under Sub-section (1) and the first revisional authority under Sub-section (3). After so examining the records, it has power to make such order as it thinks fit". In other words, the Board of Revenue can exercise the power according to its discretion. However, such discretion shall be exercised reasonably and not mechanically or arbitrarily. Thus if the Board of Revenue is satisfied in a given set of facts it can cancel or vary the penalty imposed by the lower authorities.

9. I am convinced that Ext. P-8 order is vitiated for the reasons stated above. Hence Ext. P-8 order is set aside. Consequently I direct the Board of Revenue to consider the entire question of levy of penalty u/s 45-A in view of the observations made above afresh after affording a reasonable opportunity of being heard to the Petitioner. The Writ Petition is disposed of as above.