
(2014) 05 KL CK 0025
In the High Court Of Kerala
Case No : W.A. No. 2251 of 2012

Haleel Rahiman

APPELLANT

Vs

Commercial Tax Officer

RESPONDENT

Date of Decision : 22-05-2014

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 19(2)
Kerala Value Added Tax Act, 2003 — Section 25(1), 25(3), 67

Citation : (2014) 2 KLT 930 : (2014) 75 VST 474

Hon'ble Judges : K.M. Joseph, J;C.K. Abdul Rehim, J

Bench : Division Bench

Advocate : Harisankar V. Menon, Meera V. Menon and Mahesh V. Menon,
Advocate for the Appellant; Bobby John Pulikkaparambil, Government Pleader,
Advocate for the Respondent

Judgement

C.K. Abdul Rehim, J.—Appeal is against the judgment dismissing the Writ Petition filed by the petitioner. Challenge was against Exts. P1 and P1(a) composite pre assessment notices issued proposing assessment under S. 25(1) and levy of penalty under S. 25(3) read with S. 67 of the Kerala Value Added Tax Act (K.V.A.T. Act), for the years 2010-2011 and 2011-2012 respectively. On failure of the appellant to respond to the said notices, Exts. P3 and P3 (a) orders of assessment were issued confirming the proposal, completing the assessment and imposing penalty. Exts. P3 and P3(a) orders were also challenged in the Writ Petition. While dismissing the Writ Petition, the learned Judge recorded that the appellant wanted to avail statutory remedy of appeal against Exts. P3 and P3(a). Hence it was directed that if the petitioner files appeals against those orders within 10 days of the judgment, that will be entertained ignoring the delay involved.

2. Before the Single Judge it was contended that the power to impose penalty under S. 25(3) read with S. 67 can be exercised only on completion of the assessment and only if the assessing authority is satisfied that the escape of turn over was due to wilful non-disclosure by the assessee. According to the

appellant, it is possible only on completion of the assessment. The simultaneous proposal made under Exts. P1 and P1(a) are not sustainable, is the contention. Learned Judge rejected the contention observing that the assessing authority had prima facie come to the conclusion that there has been wilful non disclosure. In such case the Act does not contain any bar in issuing either a composite notice or a composite order, is the finding. It is aggrieved by the said finding this appeal is preferred.

3. An illustration of S. 25(3) would be beneficial, which is extracted below;

(3) 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 67.

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

Explanation.--For the purposes of this section, 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.

Learned counsel placed much reliance on a Division Bench decision of this court in State of Kerala Vs. Jayan Medical Store, . Interpreting the provisions in S. 19(2) of the Kerala General Sales Tax Act, which is in para materia, it was observed that, sub-section (2) requires that the imposition of penalty must be " in making the assessment under sub-section (1). On the facts of the said case it was observed that the assessment was completed only by the appellate authority and by virtue of consequential revised order issued by the assessing authority. The notice for imposition of penalty was issued only after termination of the process of assessment. It is held that in such circumstances the proceedings for imposition of penalty cannot be said as " in making an assessment" as required under S. 19(2). The principle underlying is that, imposition of penalty should have proximity with the process of making the assessment. In the case at hand it is composite notices and composite orders issued. Hence, on the facts there cannot be raised a contention that the proceedings for imposition of penalty was not initiated "in making the assessment".

4. A learned Judge of this court in a later decision in Hema V. Kumar Vs. Additional Sales Tax Officer-II and Others while referring to Jayan Medical Stores case (cited supra) observed that, the case decided by the Division Bench was purely on the facts and circumstances and hence any notice for imposition of penalty issued within a reasonable time of finalising the assessment was held as valid.

5. Learned counsel had also pointed out a Full Bench decision of the High Court of Andhra Pradesh in Mahaveer Bangles Vs. Commercial Tax Officer, Tarapet, Vijayawada, . While interpreting S. 14(2) of the Andhra Pradesh General Sales

Tax Act it is held that there is no legal bar to have simultaneous levy of penalty. But conclusion of penalty proceedings after the assessment is preferable. The expression "when" in S. 14(2) of the Act has to be given the meaning "in the circumstances in which" or "upon". It has no reference to the exact point of time. The legislature employed this expression in a comprehensive sense so as to take in the idea of, simultaneity as well as an action that closely follows. Viewed in this light, sub-section (2) of S. 14 has to be interpreted to mean that the direction to pay penalty has to be given after the assessment is made, and not necessarily at the point of time the assessment is made, is the finding.

6. Crucial aspect needs consideration is as to whether penalty under S. 25(3) read with S. 67 of the KVAT Act can be imposed only after completion of the assessment under S. 25(1). The provision says that it can be imposed if the assessing authority is satisfied that the escape from assessment was due to wilful non-disclosure of the assessable turn over by the dealer. The satisfaction can be arrived either on completion of assessment or during the course of assessment as revealed from the materials which are made use of for finalising the best judgment assessment. Under such circumstance it cannot be said that there is any bar against proposing or finalising imposition of penalty, simultaneously with the completion of assessment, in case the authority becomes satisfied from the materials that there was wilful non-disclosure of the assessable turn over. The contention that only after finalisation of the assessment the assessing authority can arrive at a conclusion regarding wilful non-disclosure of assessable turn over, cannot be accepted. None of the legal precedents cited by the petitioner will persuade this court to accept such a contention. Therefore we find no reason to interfere with the judgment impugned.

7. In the result the Writ Appeal fails and the same is hereby dismissed. However it is noticed that the learned judge was inclined to permit the petitioner to file appeal against Exts. P3 and P3(a) orders within 10 days of the judgment. The said time limit prescribed will remain further extended for a period of 10 days from today.