
(1993) 01 KL CK 0057
In the High Court Of Kerala
Case No : O.P. No. 1115 of 1992

Hema V. Kumar

APPELLANT

Vs

Additional Sales Tax Officer-II and Others

RESPONDENT

Date of Decision : 06-01-1993

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 19, 19(1), 19(2), 22, 28(B)

Citation : (1993) 01 KL CK 0057

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

Bench : Single Bench

Advocate : G. Sivarajan, for the Appellant; T. Karunakaran Nambiar, Sp.
Government Pleader, for the Respondent

Judgement

P.A. Mohammed, J.—The writ Petitioner is a dealer in cement registered under the provisions of the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the Act"). The subject matter of the writ petition is the levy of penalty u/s 45A read with Section 19(2) of the Act.

2. The assessment year in question is 1987-88. The regular assessment for the said year was completed as per the assessment order dated 2nd November 1988 fixing the total and taxable turnover of Rs. 47,90,607.50 and Rs. 40,97,790 respectively. Subsequently the first Respondent Addl. Sales Tax Officer issued a notice u/s 19 of the Act proposing to revise the assessment order for the year 1987-88 prefixing the taxable turnover at Rs. 62,40,337.50.

3. Ext. P-1 dated 22nd May 1989 is the revised assessment order u/s 19 as per which the escaped turnover is found to be Rs. 21,42,550. The total tax involved in the escaped turnover is Rs. 2,57,106.

4. Subsequently the first Respondent issued Ext. P-2 notice proposing to levy penalty u/s 45A read with Sub-section (2) of Section 19 of the Act. The Petitioner thereupon filed objection evidenced by Ext. P-3. After the enquiry the first Respondent passed an order levying a penalty of Rs. 2,80,000. Ext. P-4 was that

order against which a revision was filed before the Deputy Commissioner. While upholding the levy of penalty, the second Respondent, reduced the penalty to Rs. 2,50,000 as per Ext. P-5 order. The Board of Revenue in the further revision confirmed Ext. P-5 order and upheld the levy. Ext. P-10 order passed by the Board of Revenue is challenged in this writ petition.

5. The main question to be decided is whether the levy of penalty u/s 45A read with Section 19(2) is justified in this case. In order to decide this, it is necessary to examine the nature of the default involved. During the assessment year the Assessee had purchased from outside the State 132,600 bags of cement by issuing C forms. This was evident from Form VI register maintained under the rules. However, the Assessee had disclosed only 96,800 bags and showed the closing stock of 33,635 bags. Thus the Assessee had actually sold 98,965 bags as against the conceded sale of 63,165 bags. That means the sale, of 35,800 bags within the State was suppressed. Thus the escaped turnover was found to be Rs. 21,42,550 in respect of which the Assessee had collected sales tax at the rate of 10 per cent and additional sales tax at the rate of 20 per cent. The Petitioner had thus collected Rs. 2,57,106 during the assessment year 1987-88 but it was not paid over to the Government as required under the provisions of the Act and the Rules. It was only when proceedings u/s 19 were initiated as per the notice dated 15th May 1989, the Assessee paid the above said collected tax and till that date it was unauthorisedly retained with her. As per the rules the collected tax for a particular month shall be paid over to the Government before the 20th of the succeeding month during the relevant period. Thus the Petitioner had become not only a defaulter of payment of tax, but the violator of the provisions contained in Section 22 of the Act.

6. The regular assessment for the year 1987-88 was reopened u/s 19 as per Ext. P-1 order on the ground that the turnover of Rs. 21,42,550 representing the sale value of 35,800 bags of cement purchased interstate as revealed from Form VI register maintained under the Rules was escaped assessment. In other words the said turnover was not shown in the returns filed by the Assessee during the relevant period. No appeal was filed against the said order though the appeal is allowed under the provisions of the Act. The entire tax due thereunder was remitted. No dispute was raised in respect of the tax levied. Thus Ext. P-1 order has become final and conclusive. The consequence is that the fact that the Assessee has submitted untrue and incorrect returns during the assessment year 1987-88 is proved and thus liable to penalty u/s 45A(1)(d) of the Act.

7. Sub-section (2) of Section 19 of the Act reads as follows:

(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 willful 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.

The above provision authorises the assessing authority to direct the dealer to pay penalty as provided in, Section 45A in case it is satisfied that the escape from assessment is due to willful non-disclosure of assessable turnover by the dealer "in mailing an assessment" under Sub-section (1) of Section 19. Such penalty will be in addition to the tax assessed under Sub-section (1). No doubt the satisfaction contemplated in Sub-section (2) shall be in the course of making the assessment. That does not mean the assessing authority shall issue notice proposing action to levy penalty on the date of passing the escaped assessment order itself or to direct the dealer to pay the penalty along with the tax assessed under Sub-section (1). It does not prescribe a period within which the notice shall be issued or the penalty shall be paid. Therefore it follows that the said notice shall be issued within a reasonable period by the assessing authority after passing the order under Sub-section (2). Needless to state that such reasonable period depends on facts and circumstances of each case. No hard and fast rule can be laid down in this regard.

8. The Division Bench of this Court in *State of Kerala Vs. Jayan Medical Store*, did not lay down that the notice to levy penalty under Sub-section (2) should be issued along with the order of revised assessment under Sub-section (1) as contended by the counsel for the Assessee. The Division Bench in the facts of that case observed: "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". The relevant facts of that case before the Division Bench were this: The revised order u/s 19(1) was passed on 4th March 1972. As against the said order there was an appeal and pursuant to the appellate order dated 26th April 1974 a revised order was passed on 19th September 1974. The notice for imposition of penalty was issued on 14th November 1974. Thus the case was decided by the Division Bench purely on the facts and in the circumstances of that case.

9. In the present case the original assessment order was made on 2nd November 1988 and Ext. P-1 revised order u/s 19 on 22nd May 1989. The notice for imposition of penalty was issued on 27th June 1989. After considering the objections Ext. P-4 order was passed on 17th July 1989. Therefore it is difficult for this Court to say that Ext. P-4 order was passed not in making the assessment under Sub-section (1) or it was passed not within a reasonable period after the order under Sub-section (2).

10. As evident from Ext. P-4 the penalty has been levied in the present case for violation of Clause (d) of Sub-section (1) of Section 45A read with Sub-section (2) of Section 19. The violation of Clause (d) of Sub-section (1) of Section 45A is already discussed and found proved. What is then required to be proved is that there is "willful non-disclosure of assessable turnover" causing escapement. It was the Assessee who had issued C forms for the purchase of cement from outside the State. Out of 132,600 bags so purchased 98,965 bags were sold

during the assessment year. But the Assessee did not reveal the entire sale in respect of which the sales tax at the point, of first sale was collected. The Assessee had disclosed only 63,165 bags as sold during the year. The turnover involved in the suppression is Rs. 21,41,500. This is nothing but willful non-disclosure of assessable turnover which is proved by the documents maintained by the Assessee in respect of the year in question. Further as per the Explanation to Sub-section (2) the burden to prove otherwise is on the dealer. No attempt has been made by the dealer to discharge the said burden. On the other hand, the escapement due to willful non disclosure of assessable turnover was found proved and concluded against the Assessee by the reason of Ext. P-1 order which had become final.

11. The Supreme Court in a case involving Section 12(2) of the Madras General Sales Tax Act, 1959 held in *The State of Madras Vs. S.G. Jayaraj Nadar and Sons*, that the assessment in that case cannot be regarded as based on best of judgment and hence penalty cannot be levied. That was a case where the provisions of the Act authorised the levy of penalty only when it makes an assessment under best of judgment and such an assessment cannot be made in that case since the assessing authority has included the turnover disclosed in the turnover returned by the Assessee. The assessment on best of judgment and consequent levy of penalty were challenged. This case was followed by this Court in *Kollarmr Agencies v. Asst. Commissioner (Assmt.)*, Spl. Circle, Trichur (1991) 80 S.T.C. 177 where the Assessee had failed to show in the relevant monthly return the taxable turnover relating to sale to a Government company and showed the amount in the trading account for the said period. The penalty u/s 45A was therefore levied. The Assessee gave explanation that the failure to show the said turnover in the monthly return was for the reason that the payment was made in the subsequent months. In that Situation this Court said that the assessing authority ought to have accepted the explanation and dropped the proceedings for levy of penalty u/s 45A of the Act. In that case there was no separate proceedings for assessment or re-assessment since it only related to monthly returns. The above two decisions relied on by the Petitioner would not apply to the facts of the present case where there was escaped assessment u/s 19 against the Assessee. It was not further challenged in the appeal provided under the Act. It was also not prayed in the present original petition to quash the said order. I do not find any reason at all to upset the order of escaped assessment as per Ext. P-1. That being so, the above decisions will not be of any assistance to the Petitioner.

12. The next point is with regard to the correctness of the quantum of penalty levied in the case. Counsel for the Petitioner has brought to my notice a decision of the Division Bench of this Court where the quantum of levy of penalty u/s 28(B) of the Act is involved. That is the case in *St. Michael's Oil Mills Vs. State of Kerala*, This case was also considered in a later Division Bench decision arising u/s 45A of the Act, namely, *P.D. Sudhi v. Intelligence Officer* (1992) 85 S.T.C. 337. The Division Bench after analysing the whole question held:

Besides, the levy of penalty will be irrational or unreasonable and will militate against the "Wednesbury" principle. The doctrine of "proportionality" forms part of the rule that the orders should be reasonable or rational.

13. It is an admitted case that the penalty leviable u/s 19(2) of the Act shall be at the rate prescribed u/s 45A; that is to say, an amount not exceeding twice the amount of sales tax or other amount evaded or sought to be evaded in the present case. As per Ext. P-4 the penalty levied is Rs. 2,80,000 whereas the tax evaded is Rs. 2,57,550. The Deputy Commissioner has independently evaluated the question and for the reasons recorded the penalty amount was reduced to Rs. 2,50,000. The Board of Revenue did not interfere in the quantum obviously for the reason "first revisional authority has applied his mind to the facts of the case and given due relief". After anxiously considering all the aspects, this Court finds it difficult to interfere in the quantum. The penalty levied is reasonable and rational. This is a case where the Assessee had collected tax during the assessment year and it was paid long after the expiry of the assessment year. It was also found that the escapement was due to willful non-disclosure of assessable turnover. In that background the quantum of penalty fixed by the authorities below is only to be confirmed. No other points remain to be considered. The Original "Petition is dismissed. No costs.