

(2011) 07 KL CK 0175
In the High Court Of Kerala
Case No : ST. Rev. No. 94 of 2010

Hotel President

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 01-07-2011

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 45A, 7

Citation : (2012) 48 VST 511

Hon'ble Judges : P.S. Gopinathan, J; C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : E.P. Govindan, Smt. G. Deepa and P. Viswambharan, for the Appellant; Mohammed Rafiq, Government Pleader, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—This is a revision filed by the petitioner challenging the order of the Sales Tax Appellate Tribunal restoring penalty imposed on the petitioner u/s 45A of the Kerala General Sales Tax Act, 1963 for evasion of tax. The petitioner is a bar attached hotel which was engaged in retail sale of liquor in the bar. During the course of shop inspection conducted on March 25, 2008, i.e., during the financial year 2007-08, the Inspecting Officers recovered 24 numbers of sale bills. On verifying the sales accounts with the sale bills seized, the Intelligence Officer noticed that the petitioner is accounting gross profit at 28.91 per cent and turnover tax is paid on such turnover, whereas the actual gross profit on the sale by the petitioner as is evident from the seized bills is 77.78 per cent. In view of the suppression of taxable turnover and short-payment of tax made by the petitioner, penalty proceedings was initiated which led to levy of penalty of Rs. 13,72,770 for the year. When the petitioner filed appeal before the first appellate authority, the appellate authority confirmed the penalty in principle, but as against actual gross profit taken by the officer for estimating evasion of tax, he directed 50 per cent to be taken as gross profit for the purpose of refixing evaded tax and levying penalty thereon. When the assessee and the Department challenged the first appellate authority's order before the Tribunal, the Tribunal allowed departmental appeal and rejected the assessee's

appeal thereby restoring the penalty originally levied by the assessing officer. It is against this order of the Tribunal the petitioner has filed this revision case. We have heard counsel for the petitioner and the Government Pleader for the State. The Learned Counsel for the petitioner has relied on the judgment of the Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*, , another decision in *Commissioner of Sales Tax, U.P. v. Sanjiv Fabrics and Hari Oil & General Mills v. Commissioner of Sales Tax, U.P.* [2010] 35 VST 1 (SC); [2011] 19 KTR 1 (SC) and a Division Bench judgment of this Court in *P.D. Sudhi v. Intelligence Officer* [1992] 85 STC 337 (Ker) and contended that the Department has not established a case of evasion of tax justifying penalty. The Government Pleader on the other hand contended that the Department has concrete evidence through recovery of 24 original sale bills issued by the petitioner wherein the actual price charged is shown wherefrom the Department worked out the gross profit at 77.78 per cent as against 28.91 per cent recorded by the assessee in the accounts based on which tax was paid. The petitioner has no case that the recovery is not genuine and the bills recovered by the Department from the bar hotel do not relate to the sales. The petitioner does not also deny the contents of the bills, namely, the items billed and the price charged per unit. There is no difficulty to find out the exact gross profit received on every item of liquor sold because liquor is fully purchased by the petitioner from the Government Company and the purchase price is undisputed. When the actual margin charged by the petitioner is found to be 77.78 per cent, the Department verified the accounts and found that the petitioner has suppressed two third of the trade margins by accounting gross profit at 28.91 per cent. We asked the counsel whether with the margin accounted by the petitioner the business itself is viable because the petitioner has to pay Rs. 22 lakhs annually towards licence fee alone. We have seen several cases of bar hotels contesting gross profit additions made by the assessing officers in the estimation of turnover. In fact, every hotel is supposed to have the price list of the items sold and if Department collects the price list, the same alone will disclose the actual trade margin/gross profit charged by hotels. In our view, when accounts are unreliable and sale bills of actual sales also are not recovered, Department can for estimation of turnover rely on price list exhibited in the hotel or the compounding provision contained in section 7 providing for collection of turnover tax on 130-140 per cent of purchase price. In this case the Department has estimated gross profit for the year during which suppression was practised based on the gross profit actually charged by the petitioner in the bills which is much less than the margin provided in the above provision of the Act for payment of turnover tax on liquor at compounded rate. We do not know what more evidence is required than the actual sales bills to make addition of the same percentage of gross profit to the purchase turnover to find out the actual sales turnover on which turnover tax is payable by the petitioner. We find that the conclusion drawn by the Tribunal are purely on findings of fact based on evidence and we do not find any justification to interfere with the same. However, what we notice is that the Tribunal has not considered whether it is a fit case for levying maximum penalty, i.e., double the amount of tax sought to be

evaded. Counsel for the petitioner contended that from season to season margins may vary in the bar hotels. Even though the petitioner has no additional evidence in this regard, we feel some leniency is called for because same percentage of gross profit addition is made by the assessing officer for the entire turnover based on which penalty is levied. We feel penalty at one and a half times the tax evaded will serve the ends of justice. We accordingly allow the revision in part by sustaining the order with regard to the percentage of gross profit added to the turnover for the purpose of determining the tax evaded, but reduce the penalty to one and a half times the tax so evaded. The assessing officer is directed to issue revised order in accordance with the above order without any delay.