

**(2001) 11 KL CK 0031**

**In the High Court Of Kerala**

**Case No : O.P. No's. 20202 and 25455 etc. of 2001**

Indian Oil Corporation Ltd.

APPELLANT

Vs

Assistant Commissioner

RESPONDENT

**Date of Decision : 22-11-2001**

**Acts Referred:**

Kerala General Sales Tax Act, 1963 — Section 2, 22, 22(1), 22(2), 46A

Kerala General Sales Tax Rules, 1963 — Rule 9

Kerala Surcharge on Taxes Act, 1957 — Section 3, 3(2), 4

**Citation : (2002) 125 STC 582**

**Hon'ble Judges : M.R. Hariharan Nair, J**

**Bench : Single Bench**

**Advocate : Jose Joseph, for the Appellant; Rajan Joseph, Spl. Government Pleader, Taxes and P.S. Sreedharan Pillai, S.C.G.S.C., for the Respondent**

**Final Decision : Allowed**

## Judgement

M.R. Hariharan Nair, J.—Common questions arise for consideration in these our Original Petitions filed by four Nationalised Petroleum Companies, namely, M/s. Hindustan Petroleum Corporation Ltd., Bharat Petroleum Corporation Ltd., Indian Oil Corporation Ltd., and I.B.P. Company Ltd. Hence they were heard together and are being disposed of through a common judgment.

2. The challenge in all these cases is with regard to the orders passed by the Commissioner of Commercial Taxes refusing to interfere with the orders of revision passed by the Deputy Commissioner of Commercial Taxes and confirming the order passed by the assessing authority u/s 46A of the Kerala General Sales Tax Act directing forfeiture of amounts allegedly collected by the said assessee towards "State Surcharge". The relevant details pertaining to the four Original Petitions are summarised and tabulated hereunder:

|                        |        |          |      |           | O.P.Nos. |   |   |   |
|------------------------|--------|----------|------|-----------|----------|---|---|---|
| Name of the Assessment | Amount | Assessee | Year | forfeited | U/S. 46A |   |   |   |
|                        |        |          |      |           | 1        | 2 | 3 | 4 |

|                  |              |       |               |                                               |
|------------------|--------------|-------|---------------|-----------------------------------------------|
| -----            |              |       |               | 20202/01                                      |
| HPC 9/97 to 3/98 | 36,39,71,704 | " "   | 4/96 to 12/98 | 47,32,14,803 25455/01 BPC                     |
| 1997-98          | 35,32,94,559 | " "   | 1998-99       | 90,68,22,306 25984/01 IOC 1997-98             |
|                  | 78,54,77,606 | " "   | 1998-99       | 86,76,73,631 27054\01 IBP 1997-98 9,04,02,248 |
| 1998-99          | 12,52,78,161 | ----- | Total         | 396,61,35,018 -----                           |
| -----            |              |       |               |                                               |

3. The assessee's aforementioned challenge the aforesaid orders on the following grounds:

(i) Section 46-A of the Kerala General Sales Tax Act has no application to these cases in so far as the assessee has not collected from the customers the surcharge payable by the assessee under the Kerala Surcharge on Tax Act, 1957. The very basis of the orders therefore vanishes.

(ii) In the bills issued to the customers the petitioners have not mentioned that they were collecting any "State Surcharge" from them.

(iii) The amounts mentioned in the impugned orders actually formed part of the sale price. The petitioners have included the entire sales turnover including the amounts mentioned in these orders as their turnover and have paid not only the sales tax due to the State; but also the surcharge payable by the assessee. The Government has not lost even a pie in the dealing of the petitioners and there was absolutely no question of evasion of any tax.

(iv) While fixing the price of petroleum products, the petitioners who are nationalised Oil Companies are governed by the directions of the Ministry of Petroleum and Natural Gas. The price of the commodities is fixed from time to time by the Ministry itself based on the recommendations of the Oil Co-ordination Committee. The petitioners have no hand in fixing the price structure. Of course, Ext. R4(b) letter produced in O.P.NO. 20202/01 would show that the net price is fixed taking into account various elements like basic price, exercise duty and "State Surcharge". The term "State Surcharge" has nothing to do with the Surcharge payable under the State enactments by way of Surcharge on Taxes. The Central Government could have given any other name therefore any merely because the term "State Surcharge" is mentioned, it cannot be presumed that it refers to the surcharge payable under the Kerala Surcharge on Taxes Act, 1957. In fact, that "State Surcharge" mentioned in Ext. R4(b) is much more than the actual liability incurred by the assessee for payment of surcharge assessed as per various assessment orders. It actually is an amount intended to recoupe various amounts payable by the companies as dealers.

(v) It is open to a dealer to fix the price of the commodities that it has to sell taking into account the various business expenses and in such a manner that no loss would be caused to the dealer. As far as the present petitioner are concerned, it is more so because the entire amounts mentioned in the orders impugned in these Original Petitions have gone to the Oil Pool Account of the Central Government where crores of rupees are still in deficit. One of the reasons

therefore is the subsidy allowed for LPG and Kerosene. The forfeiture directed will destabilise the entire price structure applicable to petroleum products in the country, add to the deficit in the Oil Pool Account and thus destabilise the national economy.

(vi) The assessing authority has no jurisdiction to proceed on assumptions and to go behind the price bills to understand what exactly are the ingredients making up the sale price of the commodity sold.

(vii) Section 4 of the Kerala Surcharge on Taxes Act, 1957 which enables the assessing authority to impose penalty and to forfeit the amounts collected by the dealers towards the surcharge payable under the Act has no application to the assessments in question because the said provision has come into effect only with effect from 1.4.1999 and the period for assessment involved in these cases were periods prior to the said date.

4. For the State of Kerala it is contended by the learned Government Pleader that the assessing authority can very well go behind the Sale Bills and see whether any irrecoverable item has, in fact, been collected from the purchasers.

5. The question arising for decision in these cases, thus, is the legality of the orders passed by the Sales Tax Authorities under the Kerala General Sales Tax Act in exercise of powers u/s 46A of the K.G.S.T. Act which reads as follows:

"46A. Penalty for illegal collection of tax:- (1) 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:

Provided 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.

(2) Where any sum is forfeited to the Government under Sub-Section (1), any person from whom the amount was collected in contravention of the provisions of Sub-section (2) or Sub-section (3) of Section 22 may apply to the assessing authority for reimbursement of such sum and the amount shall be reimbursed to such person in the prescribed manner.

(3) No prosecution for an offence under this Act shall be instituted in respect of the same facts on which a penalty has been imposed or forfeiture has been ordered under this section."

6. The ingredients necessary for attracting the provisions, of thus, are: (1) There should be collection by a dealer of any sum by way of tax or purporting to be by

way of tax; and (2) the collection should be in contravention of Sub-section (2) or Sub-section (3) of Section 22. The contention of the petitioners in these cases is that there was no collection of any amount by way of tax or purporting to be by way of tax and also that the element of State Surcharge forming part of the sale price has fully been paid over to the Oil Pool Account of the Government of India as per the directions of the Central Government.

7. Since the learned Central Government Standing Counsel appearing for the Government of India has admitted during arguments that it was pursuant to the directions of the Ministry of Petroleum and Natural Gas, Government of India, that the amount of "State Surcharge" was collected included in sale price and that these amounts have been fully paid over to the over to the Oil Pool Accountant of the Government of India, it is unnecessary to enter into a detailed in these cases, who are all petroleum companies controlled by a limb of the Government of India, have not been enriched in any manner by such collection. It was pointed out, during hearing, that in order to maintain the stability in the price of petroleum products through out India; to provide for subsidy with regard to LPG, Kerosene etc., to avoid unhealthy competition between the dealers and also to avoid fluctuations in the price depending upon the continual fluctuations in the price of crude oil in the international market, the Central Government is maintaining an Oil Pool Account and that even with the collections made by the dealers and paid over to the Oil Pool Account, still there is a deficit of Crores of rupees in the account as on date.

8. The above facts show that there is not a case where the dealer is trying to make an undue profit or enrichment fleecing the customer through collection of the levy in question and that the collection actually have gone over for the benefit of the citizens of the country on directions of the Central Government. Of course, even such collections cannot be in violation of the statutory provisions and the State will be well within rights to contend that as far as the sales tax is concerned, which is a State subject, the Central Government, through its directions given to the petroleum companies cannot make any inroad not the statutory powers of the State to collect sales tax.

9. Since Section 46A specifically refers to Section 22(2) and (3) of the K.G.S.T. Act, it is necessary to refer to those provisions here:

"22. Collection of tax by dealers:-

(1) A registered dealer may, subject to the provisions of Sub-section (2), 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.

(2) No. registered dealer shall collect any sum purporting to be by way of tax,-

(a) on the sale of any goods,-

(i) in respect of which he is not liable to pay tax; or

(ii) at a rate exceeding the rate at which he is liable to pay tax; or

(b) in respect of the purchase of any goods, whether or not he is liable to pay tax on such purchase.

Provided that nothing containing in this sub-section shall apply to the collection of an amount by a registered dealer towards the amount of tax already paid under this Act in respect of goods, the sale or purchase price of the which is controlled by any law in force and the retail price fixed for such goods under such law is not inclusive of such tax.

(3) No person other than a registered dealer shall collect any sum by way of, or purporting to be by way of tax under this Act."

10. The express prohibition in Section 22 (2) is that no collection should be made by the dealer purporting to be by way of tax on the sale of goods in respect of which he is not liable to pay tax or at a rate at which he is liable to pay tax. It is therefore necessary to go into the charging provisions concerned.

11. u/s 5 of the Kerala General Sales Tax Act every dealer having the prescribed turnover has to pay tax on his taxable turnover for that year. Taxable turnover defined in Section 2(xxv) as follows:-

"Taxable turnover" means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed; but shall not include the turnover of purchase or sale in the course of interstate trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India."

12. u/s 2(xxvi) the "total turnover" is the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax including the turnover of purchase or sale in the course of inter-state trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India.

13. u/s 2(xxvii) "turnover" is the aggregate amount for which goods are either bought or sold, supplied or distributed by a dealer, either directly or through another, on his own account or on account of others, whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgage, tenant or otherwise, shall be excluded from his turnover.

14. Section 22(1) of the K.G.S.T. Act authorises the dealer to collect tax payable by him on the sale of any goods from the person to whom he sells the goods to pay over the same to the Government in the manner prescribed. Thus, as far as the sales tax is concerned, there is specific authorisation in favour of a dealer to

collect the tax payable by him from the purchaser.

15. Rule 9 of the K.G.S.T. Rules provides for the manner in which taxable turnover is to be determined. Under Rule 9(b)(i) all amounts of sales tax collected by the dealer, if shown separately in the bills, can be excluded from taxable turnover. Thus, the net effect of the aforementioned provisions is that as far as sales tax is concerned, the dealer can collect sales tax payable by him from the purchaser and can exclude the tax so collected from his taxable turnover. The sales tax payable by him need not therefore be included in the turnover of the dealer; his duty being only to collect the tax from the purchaser if so inclined, and in any even, to pay the sales tax due on his turnover to the Government.

16. Unlike the sales tax there are certain other levies on the dealer which are not allowed to be collected from the purchaser and where the liability is on the dealer himself to pay the same. For example, Section 5A provides for levy of purchase tax. Section 5(2c) imposes liability on every dealer to pay turnover tax on the turnover of goods. u/s 5(2C)(1)(a) an Oil Company whose total turnover exceeds rupees fifty lakhs per annum is liable to pay turnover tax at four per cent. Until amendment through Act 9 of 2000 surcharge was also payable by dealers u/s 3 of the Kerala Surcharge on Taxes Act, 1957. There is no provision in the K.G.S.T. Act or in the Kerala Surcharge on Taxes Act, 1957 authorising the dealer to collect the aforesaid levies from the purchaser and to exclude such amounts from the taxable turnover. On the other hand, there is specific prohibition imposed by the Acts from collecting these amounts from the purchaser. As far as purchase tax u/s 5A is concerned, Section 22(2)(b) debars registered dealer from collecting any amount purporting to be by way of tax in respect of the purchase of goods, whether or not he is liable to pay tax on such purchase. As far as turnover tax is concerned, the bar is created u/s 5(2C)(iii) which provides that notwithstanding anything contained in Section 22(1), no dealer shall collect from his purchaser the turnover tax payable by him. As far as surcharge is concerned, the bar can be found in Section 3(2) of Act 11/57 according to which notwithstanding anything contained in Section 22(1) of the K.G.S.T. Act, 1963, no dealer shall be entitled to collect the surcharge payable under the said sub-section.

17. The net effect of the aforesaid provisions of law is that unlike the General Sales Tax, the liability to pay turnover tax, purchase tax and surcharge is on the dealer" but he can neither realise the amount from the purchaser nor claim exclusion of such amounts from the taxable turnover. It is in this perspective that Section 46A already quoted in para 5 above assumes significance. Under this section if any person collects any sum by way of tax or purporting to be way of tax in contravention of Section 22(2) or 22(3), he shall be liable to pay penalty and any amounts collected by him by way of tax or purporting to be by way of tax against the bar u/s 22(2) or 22(3) shall be liable to be forfeited to the Government. It necessarily follows that under this section the sales tax Authority

would be justified in forfeiting the amounts collected by a dealer towards turnover tax, purchase tax or surcharge, if such amounts have been collected by the dealer. Further the dealer can also be penalised for such lapse.

18. While admitting the liability as above and constitutional vires of Section 46A as also of other provisions mentioned supra, the one and only contention of the petitions herein is that they had not collected any of these amounts from the purchasers specifically through the Bill and that in order to ensure that their business is run without loss and strictly in conformity with the directives of the Central Government, they have fixed the sale price in such a way that no loss would be caused in consequence of the liability for paying the various business expenses including liabilities by way of irrecoverable dues. It is pointed out in this regard that neither Ext. P7 invoice (in O.P.No. 20202/01) from the Refinery to the petitioner nor the petitioner's bills like Ext. P8 series or Ext. P9 bill issued to the customers by the retailer makes any mention of any collection being made from the purchaser on account of turnover tax, purchase tax or surcharge.

19. Reliance was placed on the details contained in Ext. P3 (at page 30 of the O.P. 20202/01) to show how the net price mentioned in bills like Ext. P8 is arrived at. According to this, though the ex-depot price of diesel and petrol are only Rs. 8.37 and Rs. 17.06 respectively, there are various elements included by the dealer while fixing the retail price which were Rs. 11.80 and Rs. 27.18 per litre respectively during the relevant period. One of these components is what is called "State Surcharge" which is 89 paise in the case of diesel and Rs. 2.17 in the case of petrol. It is the further argument of the petitioners that the term "State Surcharge" has nothing to do with the term "surcharge" as defined in the Kerala Surcharge on Taxes Act and that the sum of 89 paise per litre does not present the turnover tax, purchase tax or surcharge or even the cumulative sum of those three charges; but is only a lesser amount fixed to avoid business loss. "State Surcharge", it is stated, is a sum fixed by the Central Government to set off the various liabilities caused on the dealer which would include not only turnover, purchase tax and surcharge but also the taxes paid by the dealer by way of tax in another State. The contention is that as long as the sale bills issued by the petitioners do not specifically mention of the break up and as long as tax is collected and paid over to the Government in the sale price, the bar created under the provisions mentioned supra will not be attracted.

20. The aforesaid contention appears to me to be acceptable. For finding out the taxable turnover, one has to look into the bills and find what exactly is the sale price. It does not appear to be open to the Assessing Authority to go behind the sale price mentioned in the bill and analyse the contents. No reasonable person can be expected to conduct business at a loss. When he has to pay tax in another State besides turnover tax, purchase tax or surcharge, he has necessarily to fix the sale price in such a way that he does not suffer any loss in the business. This is all that the petitioners herein have done. That there is no taboo for doing so is clear from the decision in *Indian Oil Corporation Ltd. v.*

State of Assam and Ors. (1999) 112 STC 389(SC) which has been confirmed in appeal vide decision in Indian Oil Corporation Ltd. v. State of Assam and Ors. (2001) 123 STC 234(SC).

21. None of the bills issued by the petitioners show that they have realised from the purchasers the turnover tax, purchase tax or surcharge. Only the sale price and the tax collected are mentioned in the bills like Ex. P8 series. As long as this is the position the Assessing Authority cannot proceed to enforce Section 46-A based on a break up of sale price that the petitioner supplied to one of its purchasers, namely, Kerala Chemicals & Proteins Ltd. that is to say Ext. R4(B). The stand of the petitioners, in this regard, appears to be well justified. The question of paying tax arises only after the bargain is struck between the dealer and the purchaser. The Assessing Authority reaches the scene only when the sale is over. What he has to see is the sale price collected in the bill. In that process, he cannot go behind the transaction and attempt to find out what exactly weighed with the dealer in coming to the conclusion that he should demand the sale price mentioned in the bill. Of course, if there is any statute restricting the price at a fixed amount that is another matter.

22. The Andhra Pradesh High Court had occasion to go into a similar question. It was found in The Government of Andhra (Now Andhra Pradesh) Vs. East India Commercial Co. Ltd., as follows:-

It is no doubt open to a philanthropically minded dealer to bear the burden of the sales tax himself without passing it on to the buyer. Normally, however, the dealer, though he is liable to pay the sale tax, shifts his liability on to the purchaser, by including the tax as part of the consideration or price the buyer has to pay. Subject to price control regulations, a seller is entitled to fix his own price for goods sold by him to the buyer.

It is open to the seller to require of his buyer to pay him as part of the price a sum of money, which according to him, would be equivalent to the tax payable by him to the State in respect of the transaction of sale. This arrangement is, however, one between the seller and the buyer and in so far as the State is concerned, the "turnover" of the dealer includes the entire sum paid by the purchaser as consideration for the sale of goods, though part of it might be styled price and another part as sales tax in the bill or invoice issued to the purchaser".

23. The Apex Court also had occasion to consider the matter, though not on a detailed assessment. A Constitution Bench considered the question of validity of the Tamil Nadu Additional Sales Tax Act, 1970 in S. Kodar Vs. State of Kerala, . While considering the burden of the dealer it was observed in para 12 of the judgment as follows:

"The legal incidence of a tax on the sale of goods under the Tamil Nadu General Sales Tax, 1959 falls squarely on the dealer. It may be that he can add the tax to the price of the goods sold and thus pass it on to the purchaser".

24. The learned Government Pleader, during hearing, placed reliance on the decision in *Rajamani v. State of Tamil Nadu* (1980) 46 STC 451). That was a case where the Board of Revenue expressly called upon the dealer to state whether he was prepared to refund the amount illegally collected from the customers. The dealer did not give a straight reply; but tried to put forward the contention that he had passed credit notes in favour of the customers and produced the certificate of posting allegedly for communicating those credit notes to the customers. The Board of Revenue was not satisfied. In the circumstances, it was held that the Board of Revenue was justified in revising the assessment suitably. It is to be mentioned here that it was a case where against the express provisions in the statute the dealer had collected a sum of Rs. 18,374/- by way of sales tax whereas the transaction were not liable to sales tax under the law. Section 22(2) of the Act concerned justified levy of penalty for the illegal action. It was in these circumstances that the direction for refund and the revision of assessment took place. Overruling the contentions that the Board should not have taken any action u/s 22 directing refund of surcharge because Section 22 did not apply to collection of surcharge, the court applied Section 3(2) of the Surcharge Act concerned, which extended the provisions of the Sales Tax Act to the collection of surcharge also.

25. It may be that provisions relating to tax may apply in the matter of surcharge also; but that is not the question involved here. The one and only question involved here is what exactly was sale price and whether the petitioner had, in addition to the sale price, collected amounts representing turnover tax, sales tax and surcharge. In the circumstances, the said decision has to application to the facts of the present case.

26. Yet another decision cited by the learned Government Pleader is that of the Constitution Bench in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, . What was involved therein was the justification of forfeiture of amounts illegally collected by dealer. u/s 37 of the Bombay Sales Tax Act, the vires of which was challenged in the said case, the court concluded that the forfeiture clause in Section 37(1) is a punitive measure to protect public interest in the enforcement of the fiscal legislation and it fell squarely within the area of implied powers. It was found that if the dealer merely gathered a sum by way of tax and kept it in suspense account because of dispute about its taxability or was ready to return if eventually it was found to be not taxable, it was not "collected" within the meaning of Section 37(1). The word "collected" was given the meaning "collected and kept as his" by the trader. First of all, the present petitioners have not collected any prohibitory levies mentioning such amounts in the sale price. That apart, they have not kept the money collected with them and instead, paid over the element of "State Surcharge" which is entirely different from the surcharge due under the Kerala Surcharge on Taxes Act to the Oil Pool Account of the Central Government. The dealer has not enriched itself by collecting the amounts in question. Further, as already mentioned, the Kerala Government has already received the full amount of sales tax and surcharge due

under the turnover of the petitioners which again admittedly was based on the sale price reflected in the bills.

27. In the circumstances, the action taken by the Assessing Authority applying Section 46A of the K.G.S.T. Act and directing forfeiture of the amounts at the rate mentioned in Ext. R4(B) is absolutely illegal. The State cannot levy tax except on the taxable turnover. Such tax has already been paid and it is not open to apply Section 46-A and to go behind the sale price and direct forfeiture of the State Surcharge element.

28. The Original Petitions are hence allowed and the relevant assessment orders and the appellate and revisional orders are set aside.