
(1994) 05 KL CK 0017
In the High Court Of Kerala
Case No : O.P. No. 4053 of 1990-G

K. Nachimuthu

APPELLANT

Vs

Sales Tax Officer and Another

RESPONDENT

Date of Decision : 24-05-1994

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 23, 23(3), 23(4), 23(5)

Citation : (1994) 05 KL CK 0017

Hon'ble Judges : T.L. Viswanatha Iyer, J

Bench : Single Bench

Advocate : K.K. Vijayaraghavan and S.K. Devi, for the Appellant; S. Vijayan Nair, Senior Government Pleader, for the Respondent

Final Decision : Partly Allowed

Judgement

T.L. Viswanatha Iyer, J.—The question raised is whether there is liability for penal interest u/s 23(3) of the Kerala General Sales Tax Act, 1963 ("the Act") during the period the demand for tax stood set aside by virtue of order of an appellate authority, when the demand stood restored in subsequent proceedings. I shall set out the facts necessary for the decision of the case.

2. The petitioner is a dealer in kattymore. The assessment year concerned is 1981-82. The petitioner collected and paid tax on his sales of kattymore at 4 per cent as if it is goods taxable multi-point. The assessing authority was however of a different opinion. According to him, kattymore was a milk product falling under entry 3 of the First Schedule to the Act taxable single point at 10 per cent on the first sale. He completed the assessment, exhibit P1, accordingly and demanded the differential amount of tax due from the petitioner. The order of assessment and the notice of demand were served on March 20, 1983. The petitioner challenged the assessment in appeal before the Appellate Assistant Commissioner. The appeal was dismissed. But his second appeal to the Appellate Tribunal was successful. The Tribunal accepted his contention that kattymore was not a milk product, but general goods taxable multi-point. The assessment of

kattymore at 10 per cent under exhibit P1 was therefore set aside. The order of the Tribunal is dated September 9, 1987.

3. The Revenue was not satisfied with the decision of the Tribunal and challenged it in revision in this Court u/s 41 of the Act. The tax revision case was allowed by the judgment dated March 9, 1989 by which the levy of tax at 10 per cent on kattymore was upheld and the order of assessment exhibit PI restored. The judgment of this Court is reported as Deputy Commissioner of Sales Tax v. Nachimuthu [1994] 95 STC 538 supra ; (1989) 1 KLT 620.

4. The petitioner was thereafter served with the notice, exhibit P2, calling upon him to make payment of the differential amount of tax and surcharge (Rs. 25,895.62) due under exhibit P1 as also Rs. 44,440 by way of penal interest from April 28, 1983 (when the balance demand became due for payment after service of the order exhibit P1) up to December 31, 1989 with future interest at 2 per cent per month till payment. Petitioner disputes this demand in so far as it relates to the amount of penal interest for the period from the date of the order of the Appellate Tribunal, namely September 9, 1987 to March 9, 1989, when the demand was restored by this Court. There is no dispute regarding the other demands under exhibit P2.

5. Sub-section (3) of Section 23 provides for payment of penal interest at the rates specified if the tax or any other amount assessed or due under the Act is not paid by the dealer within the time prescribed therefore in the Act or in any rule made thereunder, and in other cases, within the time specified therefore in the notice of demand or within the time allowed for its payment by the appellate or revisional authority, or if payment is permitted in instalments by any of the authorities empowered in that behalf, any such instalment is not paid within the time specified therefor. The rate of penal interest is one per cent per month for the first three months and two per cent per month for the subsequent period. Sub-sections (4) and (5) of the section provide for contingencies where as a result of an order in appeal or revision, the dealer becomes not liable to pay any tax, or becomes liable to pay a reduced amount ; in which event, the levy of penal interest is cancelled or gets reduced proportionately, as the case may be.

6. Section 23(3) and similar provisions in the statutes of other States have been the subject of consideration in various decisions, the latest of which is that of the Full Bench of this Court in Abdulla v. Sales Tax Officer [1992] 86 STC 259 ; [1992] KLJ 202. The effect of these decisions is that the liability for penal interest automatically clinches on the failure to pay the tax assessed within the time specified and as such it is not necessary to pass any formal order levying the interest, or to serve any notice of demand therefore on the assessee. It is an absolute liability without any mens rea. There cannot be any dispute on these propositions. But the question is, does the interest run during the period when the demand for tax stood set aside by an order in appeal, when it is restored by a subsequent proceeding ?

7. In *Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty*, , it was held that if an original order of assessment is either destroyed or replaced by an appellate order, then the notice of demand and all other steps based upon the original order must be deemed to have become ineffective. It was accordingly held that an order of penalty based on the original order disappears. In *Rajagiri Rubber and Produce Co. Ltd. Vs. Addl. Sales Tax Officer and Others*, , the question was whether disputed tax paid pursuant to an order of assessment should be refunded when the assessment is set aside in appeal and remanded with direction to make a fresh assessment. Paripoornan, J., answered the question in the affirmative because once the appellate order set aside the order of assessment, there was no assessment or notice of demand in the eye of law and therefore the assessing authority was not entitled to retain the amount collected pursuant to the order of assessment.

8. The consequence of an appellate order setting aside or modifying an order of assessment is to nullify the demand for the amount of tax in respect of which relief is granted. The amount ceases to be payable. No doubt the demand revives when the appellate order itself is set aside in further proceedings by way of appeal or revision ; but in the interregnum, the amount is not payable by virtue of an order passed by a statutory authority. In my opinion, no penal interest could therefore accrue during this period.

9. This view, which accords with Sub-sections (3), (4) and (5) of Section 23, also subserves the ends of justice. Sub-section (3), inter alia, provides that penal interest runs after the expiry of the period of time allowed for payment of the tax by any appellate or revisional authority ; and Sub-sections (4) and (5) provide for cancellation of the levy of penal interest, or for proportional reduction therein accordingly as the liability for tax is cancelled or reduced in appeal or revision. When penal interest does not run during the period of operation of an order of stay passed by an appellate or revisional authority, it is only an extension of that principle to say that no liability attaches during the period the demand stands set aside in appeal or revision, although wrongly. What Sub-section (3) contemplates is default in compliance with a live notice of demand, for tax lawfully due and not one which fictionally springs to life by reason of a subsequent appellate or revisional order. The provisions of Sub-sections (4) and (5) are also consistent with this interpretation.

10. Any other construction is fraught with serious consequences and likely to result in injustice for no fault of the assessee. See the following anomalous position. An assessee who has lost his first appeal and gets an order of stay from the Appellate Tribunal is saved from penal interest for the period of pendency of the appeal before the Tribunal ; but an assessee who succeeds before the first appellate authority and had therefore no necessity or opportunity to get any order of stay from the Appellate Tribunal becomes liable for penal interest during the period if he loses his case before the Tribunal. This is the position going by the contention of the Revenue. Such an anomalous position cannot be postulated

and the court is entitled to construe Section 23(3) in such a way as to avoid such a situation.

11. To cite another example, suppose this Court had in respect of an item of goods (called "A" for convenience) held that it is taxable multi-point at 4 per cent and not single point at 10 per cent as an item of goods included in the First Schedule and following that decision, an Appellate Assistant Commissioner allows an appeal by an assessee (whom I shall call "X" for convenience), directing levy of tax at 4 per cent and if after a few years the Supreme Court takes a different view of the matter and holds the goods "A" to be assessable at 10 per cent single point ; and consequent thereon the departmental appeal in X's matter (filed to keep the matter alive) is allowed by the Appellate Tribunal casting liability for the differential amount, is the assessee to be visited (penalised ?) with interest at 24 per cent per annum when the amount remained unpaid only by virtue of a decision of this Court in his favour and not because of any default on his part. In my view, Sub-section (3) of Section 23 should bear a construction which avoids anomalies, accords with justice and does not lead to any unreasonable consequences.

12. I, therefore, hold that the petitioner is not liable for penal interest on the balance amount of tax demanded of him during the period September 9, 1987 to March 9, 1989 when the decision of the Appellate Tribunal setting aside the levy of tax at 10 per cent on kattymore under the order, exhibit P1, held the field. In the view that I have taken, it is unnecessary for me to rely on the decision of the Division Bench in Income Tax Officer Vs. A.V. Thomas and Company, , though that appears to be very much in point.

The writ petition is therefore allowed in part. The first respondent is directed to limit the demand for penal interest for the period from April 28, 1983 to September 8, 1987 and from March 10, 1989 till date of payment.

There will be no order as to costs.