

(2002) 04 KL CK 0051
In the High Court Of Kerala
Case No : O.P. No. 15002 of 1999 (J)

Kiran Roller Flour Mills

APPELLANT

Vs

Assistant Commissioner (Assessment) and Others

RESPONDENT

Date of Decision : 11-04-2002

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 45A

Citation : (2002) 128 STC 65

Hon'ble Judges : C.N. Ramachandran Nair, J

Bench : Single Bench

Advocate : T.M. Sreedharan, for the Appellant; Raju Joseph, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The petitioner is challenging exhibit P4 order of the Commissioner of Commercial Taxes whereunder he has confirmed the order of penalty levied on the petitioner u/s 45A of the Kerala General Sales Tax Act, 1963, as modified by first revisional authority for the assessment years 1991-92 and 1992-93. The penalty originally levied u/s 45A(d) of the Act was Rs. 36,59,000 for the year 1991-92 and Rs. 62 lakhs for the year 1992-93. However, in the first revision, the penalty was reduced by the Deputy Commissioner of Commercial Taxes to Rs. 7,31,800 and Rs. 12,40,000 respectively. On further revision by the petitioner, the reduced penalty was sustained by the Commissioner of Commercial Taxes, and the original petition is against the said order.

2. I have heard counsel for the petitioner, Sri. T.M. Sreedharan, and the Government Pleader for the respondents. The contention of the petitioner is that it is a roller flour mill engaged in manufacture of various wheat products, such as atta, suji, etc., from wheat purchased by it. According to the petitioner, since wheat purchased has suffered tax, the petitioner's impression was that the products made out of wheat, namely, atta, suji, etc., which are different forms of

wheat, would not attract any tax as the activity does not amount to manufacture of products. Counsel contended that this was the legal position existing at the time of filing the returns during the years 1991-92 and 1992-93 by virtue of the decision of the Patna High Court in *Dhanbad Flour Mills v. State of Bihar* [1989] 75 STC 47, and that of the Karnataka High Court, in *New Swastik Flour Mill v. State of Karnataka* [1992] 84 STC 49. However, later, the Supreme Court vide judgment dated September 1, 1993 in *Rajasthan Roller Flour Mills Association v. State of Rajasthan* [1993] 91 STC 408 reversed this position and held that there is manufacture of atta, suji, etc., from wheat and so much so, tax is payable on these products. The petitioner further contended that subsequent to the judgment of the Supreme Court, the petitioner voluntarily remitted the tax during the course of the period commencing from 1993 to 1996, of course, the date of payments are not available in the records. In spite of the decision of the Supreme Court, the petitioner did not file revised returns offering tax in the place of the original returns under which exemption was claimed and no tax was paid. However, without revising the returns, the petitioner just volunteered to pay tax in instalments from 1993-96, even prior to the completion of assessments.

3. The learned counsel for the petitioner relied on the decision of the Supreme Court in *Brij Mohan Vs. Commissioner of Income Tax , New Delhi* , wherein the Supreme Court held that in order to appreciate as to whether a return filed is true or correct, the law as on the date of filing of the return has to be considered and if the return with reference to the law as prevailing on the date of commission of offence, that is the date of filing of the return, supports the claim taken in the return, then the return cannot be held to be a wrong return. Counsel submitted that the Supreme Court decision came only on September 1, 1993 and by that time returns were filed for the years 1991-92 and 1992-93 based on the law declared by various High Courts holding that the products of the petitioner are not manufactured products of wheat attracting sales tax. The Government Pleader on the other hand contended that even after the pronouncement of the decision of the Supreme Court, the petitioner consciously avoided filing of the revised returns probably to avoid payment of tax and therefore it is the non-filing of the revised returns that is to be frowned upon to justify the penalty. Counsel for the petitioner on the contrary contended that the department also did not issue notice for making provisional assessment for demanding tax. According to the petitioner, there is no violation of Section 45A(d) of the Act because the correctness of the returns is to be considered with reference to the law as on the date of filing of the returns as held by the Supreme Court in the judgment referred to above, and since the decisions on the subject were in favour of the petitioner, the exemption claimed on the basis of the said decisions of various High Courts in the returns was correct, and there is no violation of Section 45A(d) of the Act.

4. I find from the orders of the first revisional authority and the second revisional authority that the contentions of the petitioner have been substantially accepted, and based on such finding, the first revisional authority reduced the penalty from

Rs. 36,59,000 to Rs. 7,31,800 for the year 1991-92 and from Rs. 62 lakhs to Rs. 12,40,000 for the year 1992-93. The petitioner's contention that the position emerging from the decision of the Supreme Court has no application at the time when returns were filed cannot be accepted. The Supreme Court only interpreted the statute and declared the law. The decision of the Supreme Court does not partake of the character of legislation. All that the Supreme Court did was to reverse the decision of various High Courts and held that suji, atta, etc., are manufactured products of wheat which attract tax. By virtue of the decision of the Supreme Court in Rajasthan Flour Mills' case [1993] 91 STC 408 dated September 1, 1993 admittedly the petitioner is liable to pay tax, whereas in the original returns filed for the years 1991-92 and 1992-93 the petitioner claimed exemption. The petitioner cannot be blamed for claiming exemption in the original returns filed on these products on the basis of the decisions of various High Courts holding that there is no manufacture of products from wheat. However, when the position is reversed by the Supreme Court by its judgment dated September 1, 1993 in Rajasthan Flour Mills Association case [1993] 91 STC 408 referred to above, the petitioner had every responsibility to file revised returns and pay the tax. In fact, the petitioner was well aware of the decision of the Supreme Court as is evident from the fact that the petitioner started remitting the tax in instalments from 1993 and in the course of just three years it made payment of the tax due to the Government. However, this was done without revising the returns and without conceding the turnover as taxable only to avoid interest u/s 23(3) of the Act which provides for payment of interest for delayed payment of tax. The interest payable u/s 23(3) is at the rate of one per cent for the first three months and at the rate of two per cent per month for subsequent period. Therefore if the petitioner had revised the returns, the tax would have been payable when the revised returns were filed and any delay in payment thereafter would mean a huge liability for payment of interest. It is obvious that the petitioner consciously avoided filing of revised returns to avoid interest liability. However, in order to take a defence against possible levy of penalty, the petitioner started paying tax voluntarily in instalments and the tax was paid conveniently from 1993 to 1996. The petitioner put up the voluntary payment of tax as a defence against levy of penalty. Since the petitioner did not file revised returns declaring the turnover on the product taxable, in the light of the decision of the Supreme Court referred to above, after the pronouncement of the judgment by the Supreme Court, I find the lower authorities are justified in holding that the petitioner filed incorrect and untrue returns attracting penalty u/s 45A(d) of the Act. If the petitioner had any bona fides, the petitioner would have filed revised returns soon after the decision of the Supreme Court. Even when the returns originally filed remained wrong and incorrect, which the petitioner was well aware, the petitioner started remitting tax conveniently from 1993 to 1996 contrary to the claim of exemption made in the returns. In this context, when the petitioner paid tax, without filing revised returns, the inescapable conclusion or the only inference possible is that the petitioner wanted to avoid interest, which the petitioner would have been liable to pay, if

the returns are revised. Therefore, I find no justification for the petitioner in not filing the true and correct returns after the pronouncement of the law by the Supreme Court in the decision referred to above. The lower authorities are absolutely justified in levying penalty for the offence alleged.

5. During the hearing of the case, I queried with counsel for the petitioner as to whether the petitioner is willing to pay interest payable for the belated payment of tax and if so, this Court expressed its willingness to cancel the penalty orders. Counsel contended that on the basis of the various decisions of the Supreme Court, no interest is payable unless demand is raised. Therefore the object and purpose of the petitioner in not filing the revised returns is only to avoid interest. The petitioner has succeeded in avoiding interest because no interest is demanded by the department for the delayed payment of tax. I feel that the petitioner cannot avail of the dual benefit, one by refusing to file true and correct revised returns based on the law declared by the Supreme Court to avoid interest, and the other by making voluntary payment of tax conveniently to avoid penalty for the incorrect and untrue returns submitted.

In the circumstances I do not find any ground to interfere with the impugned orders of two revisional authorities particularly when the penalty levied has been substantially reduced by the first revisional authority which is less than the interest payable for the delayed payment of tax. The original petition is therefore dismissed.

Order on C.M.Ps. No. 25428 of 1997 in O.P. No. 15002 of 1999 dismissed.