

(2002) 10 KL CK 0074
In the High Court Of Kerala
Case No : W.A. No. 1253 of 2002 (A)

Kiran Roller Flour Mills

APPELLANT

Vs

Assistant Commissioner (Asst.), Sales Tax Officer and Others

RESPONDENT

Date of Decision : 11-10-2002

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 45A(1)

Citation : (2003) 131 STC 16

Hon'ble Judges : S. Sankarasubban, J;A. Lekshmikutty, J

Bench : Division Bench

Advocate : T.M. Sreedharan, for the Appellant; S. Soman, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

S. Sankarasubban, J.—This writ appeal is filed by the petitioner in O.P. No. 15002 of 1999. The original petition was filed by the petitioner against the proceedings u/s 45A of the Kerala General Sales Tax Act (for short, "the KGST Act") against the petitioner-assessee.

2. The assessee is a firm doing business in wheat and wheat products, viz., maida and suji. For the assessment year 1991-92, the assessee filed returns declaring a total taxable turnover of Rs. 5,05,85,244.40 and Rs. 1,28,86,740.08 claiming exemption on the sales turnover of wheat products amounting to Rs. 3,43,92,149.82. Similarly, for the assessment year 1992-93, the assessee filed return declaring Rs. 5,89,89,500.51 and Rs. 6,92,247.48 as the gross and total turnover claiming exemption on the sales tax turnover of wheat products amounting to Rs. 5,75,28,426.48. The assessing authority initiated penalty proceedings and issued notice for the assessment year 1991-92 stating that the return for the assessment year 1991-92 was incorrect and untrue. According to the assessee the wheat and wheat products are same and hence once the tax is collected, the assessee is not liable to tax further. According to the assessee there are two decisions; one by Patna High Court and another by Rajasthan High

Court, wherein it was held that wheat and wheat products are same. But by the decision in Rajasthan Roller Flour Mills Association v. State of Rajasthan [1993] 91 STC 408 (SC), it was held that the wheat and wheat products are distinct and different commodities as per the judgment dated September 1, 1993. So, the assessee contended that the return filed cannot be said to be untrue. Only from September 1, 1993, law became clear that wheat and wheat products are same. The assessing authority passed a similar order imposing a penalty of Rs. 62,00,000 for the assessment year 1992-93.

3. The department issued notice u/s 45A(1)(d) of the Kerala General Sales Tax Act, which states that if the assessing authority or the Appellate Assistant Commissioner is satisfied that any person has submitted an untrue or incorrect return, such authority or officer may direct that such person shall pay by way of penalty an amount not exceeding twice the amount of sales tax or other amount evaded or sought to be evaded. Exhibit P1 is the proceedings of the Assistant Commissioner, Sales Tax, Palghat. The authority took the view that there has been violation of Section 45A and a penalty of Rs. 36,59,000 was levied on the assessee. Against that the assessee preferred a revision before the Assistant Commissioner. The Assistant Commissioner, after hearing the arguments, imposed the penalty of Rs. 62,00,000. Against that a revision was filed before the Deputy Commissioner, Agricultural Income Tax and Sales Tax, Palakkad. The Deputy Commissioner reduced it to Rs. 7,31,800 for 1991-92 and Rs. 12,40,000 for 1992-93. Finally, the assessee took the matter before the Government. The Government dismissed the revision. It is against that the original petition was filed.

4. The main argument of the learned counsel for the assessee is that return can be said to be untrue only if the assessee has filed the return knowingly that it is not correct. According to him, till the Supreme Court decision came in 1993, there are decisions to the effect that wheat and wheat products are same and the liability to pay tax only at one stage. It is on that basis that the return was filed. As a matter of fact, the assessee had shown the entire turnover. But only claimed exemption of certain turnover on the basis that it has suffered tax already. The assessing authority imposed a very high penalty which has been reduced subsequently by the revisional authority. According to the learned counsel, even this reduction in penalty is not correct. Learned counsel referred to many decisions. Learned counsel brought to our notice the judgment in O.P. No. 10482 of 1998(W) wherein in almost a similar case in Sree Rama Roller Flour Mills Vs. Assistant Commissioner (Assessment) and Others, , Koshy, J. held as follows : ".....even according to the department at the time of filing return, it was not untrue or incorrect. All particulars were disclosed in the return also. Petitioner claimed exemption in view of the Karnataka High Court decision. When the above decision was overruled, before assessment petitioner paid the tax. The basic and fundamental factors necessary to attract Section 45A(1)(d) of the Act to attract penal provision is conspicuously absent." According to us, the same provision exists here. In North Malabar District Co-operative Supply and

Marketing Society Ltd. Vs. Assistant Commissioner (Asst.) IV and Others, , Sivarajan, J., held as follows : "The petitioner claimed exemption on the purchase turnover of copra on the bona fide belief that it is not liable to pay tax on the same in view of the explanation to items 50 and 51 of the First Schedule to the KGST Act since the petitioner had remitted tax at the rate of 5 per cent on the sales of coconut oil and cake. The petitioner had also remitted the tax due on the taxable turnover. The liability to pay balance tax arose because of the order of forfeiting the excess collection. When the petitioner had remitted the tax due in respect of the taxable turnover, the fact that he had omitted to show the purchase turnover of copra in the taxable turnover is only a technical or a venial defect and no penalty is exigible".

5. After going through the records and the decisions, we are satisfied that it is not a case where liability can be imposed on the assessee. In that view of the matter, we set aside the judgment of the learned single Judge and quash exhibits P3 and P4. If any penalty has been collected, the same should be returned to the assessee.

Writ appeal is disposed of as above.

Order on CMP No. 3148 of 2002 in W.A. No. 1253 of 2002 dismissed.