

(1999) 11 KL CK 0079
In the High Court Of Kerala
Case No : W.A. No. 124 of 1999

K.K. Gopalan and Co.

APPELLANT

Vs

Assistant Commissioner (Assessment) II and Another

RESPONDENT

Date of Decision : 05-11-1999

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 45A

Citation : (2000) 118 STC 111

Hon'ble Judges : Arijit Pasayat, C.J.;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : K.C. Balagangadharan, S. Soman and Usha Ravindran, for the Appellant; V.V. Asokan, Special Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Arijit Pasayat, C.J.—Heard.

2. Judgment passed by learned single Judge in O.P. No. 9196 of 1991 is the subject-matter in this writ appeal. Appellant is an assessee under the Kerala General Sales Tax Act, 1963 (in short "the Act"). He filed monthly returns in form IX and a consolidated return in form VIII, for the assessment years 1984-85 and 1985-86. For the two years returned taxable turnovers were Rs. 26,99,638.10 and Rs. 34,96,789.86. Subsequently when accounts were called for examination by assessing officer, revised returns were filed for the two years, disclosing turnovers of Rs. 42,54,649.68 and Rs. 60,19,665.06 respectively. Penalty proceedings u/s 45-A of the Act were initiated for filing incorrect returns. In response to the notice, assessee raised a plea that an inexperienced clerk had misplaced the pattiials which were traced out only in January, 1987 and thereafter revised returns were filed on May 12, 1989. This explanation was not found to be satisfactory by the assessing officer who levied penalties of Rs. 1,20,000 and Rs. 1,50,000 respectively.

3. Revision applications were filed but the revisional authority confirmed the

imposition of penalty in each year. Further revisions were filed before the Board of Revenue (in short "the Board") which also dismissed the same.

4. In the original petition it was submitted that since turnovers which were not originally returned were reflected in the books of account, there is no justification for imposing penalty. It was noticed by learned single Judge that in the present case, the books of account did not contain the entries which were made basis of revised returns. However, considering the period of delay, penal interest that might have been collected and such other relevant aspects, penalties were reduced to Rs. 60,000 and Rs. 75,000 respectively.

5. In support of the writ appeal it has been submitted by the learned counsel for the assessee that there is factual error in the conclusions of learned single Judge to the extent that contrary to what has been observed, in fact, the turnovers were reflected in the books of account. It is also submitted that the quantum of penalty maintained is high. Learned counsel for the Revenue, on the other hand, submitted that the explanation offered by the assessee was not plausible and even if it is accepted that the records were traced out in January, 1987, there was no reason for filing the revised returns in May, 1989, and that too, after notices were issued for production of accounts.

6. Section 45-A appearing in chapter VIII, under the heading "Offences and penalties", deals with imposition of penalty by officers and authorities. Clause (d) of Sub-section (1) refers to submission of untrue or incorrect return. The quantum of levy can be an amount not exceeding twice the amount of sales tax or other amount evaded or sought to be evaded where it is practicable to quantify the evasion or an amount not exceeding five thousand rupees in any other case. Therefore, where it is practicable to quantify the evasion, the maximum limit is twice the amount of sales tax or other amount evaded or sought to be evaded. Where it is not practicable to quantify the evasion, the maximum limit is Rs. 5,000. Penalty can be imposed where there has been deliberate defiance of any statutory provision or contumacious or dishonest conduct and wilful disregard of the statutory obligations. Whether penalty should be imposed for failure to perform statutory obligations has to be adjudged by exercise of judicious discretion. It may be noted here that discretion means use of private and independent thought. When anything is left to be done according to one's discretion, the law intends it to be done with sound discretion and according to law. Discretion is discerning between right and wrong and one who has power to act at discretion is bound by rule of reason. Discretion must not be arbitrary. The very term itself stands unsupported by circumstances, imports the exercise of judgment, wisdom and skill as contra distinguished from unthinking folly, heady violence or rash injustice. When applied to a Court of Justice or Tribunal or quasi-judicial body, it means sound discretion guided by law. It must be governed by rule, not by humour ; it must not be arbitrary, vague and fanciful but legal and regular. Discretion must be exercised honestly and in the spirit of the statute. It is the power given by a statute to make choice among competing

considerations. It implies power to choose between alternative courses of action. It is not unconfined and vagrant. It is canalised within banks that keep it from overflowing. For deciding the question relating to quantum of penalty, several relevant aspects have to be taken note of. Learned single Judge has recorded a positive finding that there has been contumacious conduct and a conscious attempt to evade tax. Normally in such matters, scope for interference is very limited. But considering the fact that the revised returns were filed before verification and detection of any omission by the assessing officer, it can certainly be said to be a mitigating factor while deciding the quantum of penalty to be levied. Additionally, contrary to what has been observed by the learned single Judge, the transactions were incorporated in the books of account. Period for which legitimate tax payable to Government was withheld is nearly 30 months. The quantum of tax involved is Rs. 1,50,051 for the assessment year 1984-85 and Rs. 1,96,714.95 for the assessment year 1985-86. This being the position, we feel penalty of Rs. 35,000 and Rs. 40,000, for the two assessment years respectively, would meet the ends of justice.

Writ appeal is allowed to the extent indicated above.