
(1973) 08 KL CK 0022
In the High Court Of Kerala
Case No : T.R.C. No. 5 of 1972

Kottayam Electricals Private Limited

APPELLANT

Vs

The State of Kerala

RESPONDENT

Date of Decision : 08-08-1973

Acts Referred:

Central Sales Tax Act, 1956 — Section 10, 10A, 8

Citation : (1973) 32 STC 535

Hon'ble Judges : P. Govindan Nair, Acting C.J.; George Vadakkal, J

Bench : Division Bench

Advocate : S. Gopalakrishna Iyer and R. Krishna Warriyar, for the Appellant;
Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

George Vadakkal, J.—The assessee, a company has come up in revision challenging the finding of the sales tax authorities and of the Tribunal that he is guilty of the offence u/s 10(d) of the Central Sales Tax Act, 1956 (for brief the Act) and the consequent levy of penalty u/s 10A of the Act. The assessee-company is a registered dealer in electrical goods. It also undertakes works contract such as wiring. During the assessment year 1967-68, the Sales Tax Officer, on verification, found that the company had used electrical goods purchased by it for execution of works contract. The purpose for which the goods were purchased as entered in the certificate of registration was "resale". The assessee-company purchased electrical goods worth Rs. 9,948.60 by issuing C forms and it was these goods that were used in the works contract undertaken by the company. Annexure A notice was therefore issued by the Sales Tax Officer proposing to take action u/s 10A of the Act. Annexure B is the assessee's objections. The main contentions were that the use of the goods for distribution of electricity is permitted u/s 8(3)(b), that goods were used only when they were not otherwise available and that, therefore, there was no mens rea and there was "reasonable excuse" for the use. Overruling the objections, the Sales Tax

Officer imposed a penalty of Rs. 1,193.88. Annexure C is the order of the Sales Tax Officer and therein it is said :

This sort of offence had been committed by the assessee in all the prior years and penalty had been imposed for all these cases. The same offence is being repeated during the year.

2. The Sales Tax Officer put the offence both u/s 10(b) and (d) of the Act. The assessee appealed. The Appellate Assistant Commissioner also negated the arguments based on mens rea and reasonable excuse. He said :

It is further argued by the appellant's learned representative that there was no deliberate motive in using the goods for works contract and the same were used only when there was any necessity. From the facts and in the circumstances of the case, I find that using of these goods for the execution of contract works instead of reselling them must be deemed to be an act knowingly done by the appellant. This is also a case where the appellant should be made liable as if he had purchased goods for his own use and not for resale. The appellant has been imposed penalty for the misuse of C forms during the previous years also. I, therefore, find that the appellant had knowingly committed the offence.

3. On further appeal, the Tribunal noticed that the assessee had no case that generation and distribution of electricity were included in its activities and that wiring was incidental to those activities. Regarding the contention that the assessee had reasonable excuse for the use, the Tribunal said:

Another argument advanced on behalf of the appellant is that the goods in question were used only when they were not available and hence there has been "reasonable excuse" in using the goods for wiring contracts. No evidence has been adduced regarding non-availability of the goods. Nor have the circumstances in which the goods were not available been explained. When the appellant could effect the purchases regularly it has to be presumed that the goods were available. So the plea of non-availability cannot be raised as a reasonable excuse. The contention that the offence under Clause (d) has not been committed therefore fails.

4. The question of mens rea as such seems not to have been taken before the Tribunal. The Tribunal found that there was no violation of Section 10(b), but only of Section 10(d). In that view, the Tribunal upheld the levy of penalty.

5. Mr. S. Gopalakrishna Iyer, the learned counsel for the assessee, contended before us that this is a case where the assessee had no guilty mind in that he had reasonable excuse for using the goods for the purpose of works contract and that in any case the penalty imposed is in excess of what is provided in Section 10A of the Act. In the light of the findings by the Sales Tax Officer and the Appellate Assistant Commissioner that the assessee is a habitual offender and that in previous years also he had been penalised for violation of the provisions of Section 10(d) and in view of the fact that before the Tribunal the assessee had

not produced any evidence regarding non-availability of the goods in support of his plea of "reasonable excuse", we are of the view that the assessee had violated the provisions of Section 10(d) with full knowledge of such violation and without reasonable excuse.

6. The learned counsel for the assessee invited our attention to the decision of the Supreme Court in *The State of Madras Vs. Radio and Electricals Ltd. etc.*, and particularly to a passage occurring at page 232, which is as follows:

But it is not for the Tax Officer to hold an enquiry whether the goods specified in the certificate of registration of the purchaser can be used by him for any of the purposes mentioned by him in form C, or that the goods purchased have in fact not been used for the purpose declared in the certificate.

7. The question raised in that case was as to whether the taxing authorities could go behind the statements in the certificate of registration of the purchasing dealer and the C forms issued by him to deny the concessional rate of tax to the selling dealer. This is clear from the following passages occurring at pages 232 and 233 of the report:

If therefore goods are specified in the certificate of registration in form B, it is not open, when a claim is made in respect of the purchase of those goods for the application of concessional rate of tax, to the Sales Tax Officer to deny to the selling dealer of those goods the benefit on the ground that the goods specified cannot be used by the purchasing dealer for the purpose of his business. It is open to the Tax Officer to ascertain whether the goods in respect of which a claim for concessional rate is made are specified in the certificate of registration, but if the class of goods is included in the certificate of registration in form B he cannot say that the class of goods should not have been specified.

If he is satisfied on these two matters, on a representation made to him in the manner prescribed by the Rules and the representation is recorded in the certificate in form C, the selling dealer is under no further obligation to see to the application of the goods for the purpose for which it was represented that the goods were intended to be used. If the purchasing dealer misapplies the goods he incurs a penalty u/s 10. That penalty is incurred by the purchasing dealer and cannot be visited upon the selling dealer.

The decision in no way supports the learned counsel's argument. The underlined portion, on the other hand, clearly lays down that on misapplication of goods the purchasing dealer will be liable for penalty u/s 10. It is beyond our comprehension as how the provisions of Section 10(d) can be implemented unless the taxing authorities are entitled to investigate and enquire whether the goods purchased have in fact been used by the purchasing dealer for the purpose shown in his certificate of registration and declared in C form used for the purchase of those goods.

8. Nor does the decision of the Mysore High Court in *Manju-natha Tyre*

Retreading Works v. State of Mysore [1969] 23 S.T.C. 428 relied on by the learned counsel does in any way advance his client's case. In that case it was held :

Three ingredients constitute the offence u/s 10(d) and every one of them must be proved. The first is that the goods were purchased for the purpose enumerated in Section 8(3)(b); the second is that they were not used for that purpose; and the third is that the failure to so use them did not have the support of any reasonable excuse.

All these three ingredients are present in this case.

9. The next decision cited at the Bar in support of the assessee's case is another decision of the Mysore High Court in State of Mysore v. S.S. Umandi [1969] 24 S.T.C. 11 That decision besides laying down that the only three ingredients which constitute the offence u/s 10(d) are those stated in the earlier decision of that High Court further holds that mens rea is not one of the ingredients. This decision also is of no assistance to the assessee. We may, however, point out that this court has taken a different view and held that mens rea is also a necessary ingredient of the offence u/s 10(d) of the Act in two Division Bench decisions, viz., O.P. No. 2702 of 1969 and W.A. No. 29 of 1971.

10. The learned counsel for the assessee next contended that u/s 10A of the Act only one-and-a-half times the concessional rate of tax is imposable as penalty. The argument is based on the language of the section :

10A. (1) If any person purchasing goods is guilty of an offence under Clause (b) or Clause (c) or Clause (d) of Section 10, the authority who granted to him or, as the case may be, is competent to grant to him a certificate of registration under this Act may, after giving him a reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not exceeding one-and-a-half times the tax which would have been levied under the Act in respect of the sale to him of the goods if the offence had not been committed.

The submission is that we should construe the phrase "if the offence had not been committed" as to mean "if the assessee had not misused or misapplied the goods". The argument is that if the goods were not misused or misapplied the tax payable would be at the concessional rate of 3 per cent u/s 8(1)(b) of the Act and that the maximum penalty that can be imposed can only be one-and-a-half times the tax calculated at 3 per cent on the turnover in respect of which the offence had been committed. The learned counsel, in support of this proposition, relied on the decision of the Madras High Court in State of Madras v. Prem Industrial Corporation [1969] 24 S.T.C. 507 MAD In that case it was held:

The words "if the offence had not been committed" clearly point to the result that the tax for purposes of assessing one-and-a-half times thereof is not that which would have been levied on the basis that the C forms had not been complied with or have been misused, but, as if they have been used in a proper

way. If that were not the case, there would be no meaning to the last words we have referred to.

Regarding the decision of the Mysore High Court in *Pais & Sons v. State of Mysore* [1966] 17 S.T.C. 161 MYS , which was relied on by the revenue, the Madras High Court in *The State of Madras Vs. Prem Industrial Corporation*, said:

Our attention has been invited to *M. Pais and Sons v. State of Mysore* [1966] 17 S.T.C. 161 . It is true the Mysore High Court, in this case, took a view which is in support of that taken by the department in this case. But, with due respect, the decision does not take into account the concluding words, "if the offence had not been committed", in Section 10A.

11. We confess that Section 10A is not happily worded. However, with respect, we are unable to agree with the view expressed by the Madras High Court in the aforesaid case. Section 10A is attracted when "any person is guilty of an offence under Clause (b) or Clause (c) or Clause (d) of Section 10". Turning to Section 10 it will be seen that the offence under clauses (b) and (c) is false representation and under Clause (d) it is failure to use the goods for any of the purposes specified in Section 8(3)(b). A purchasing dealer need pay u/s 8(1) tax only at a "concessional" rate* of 3 per cent provided (a) he is a registered dealer and (b) the goods purchased are of the class or classes specified in his registration certificate as intended for all or any one of the purposes mentioned in Section 8(3)(b). To obtain the benefit of "concessional" rate of tax, a purchasing dealer has also to furnish u/s 8(4)(a) read with Rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957, a declaration in form C. If he does not satisfy either of the conditions (a) or (b), mentioned above, tax payable by him is to be calculated at the rates provided in Section 8(2), which we will call "non-concessional rates". In respect of declared goods this rate is the rate applicable to intra-State sales of those goods and in respect of non-declared goods it is 10 per cent. Sections 10(b), (c) and (d) are aimed to meet evasion of payment of "non-concessional rate" of tax by one, who is not entitled to the benefit of "concessional rate" of tax. Section 10A, therefore, provides for penalising a person who, being really not entitled to "concessional rate" of tax dishonestly purchases goods at a "concessional rate", by providing for levying a penalty calculated at one-and-half times the "non-concessional rate" of tax. If we interpret that Section to mean that such a person need pay penalty calculated only at the rate of one-and-a-half times the "concessional rate", it will lead to absurd consequences. For example, in a case of the nature before us, the offender will escape by paying a penalty calculated at 4 1/2 per cent the turnover, whereas if the purchases were honestly made he would have had to pay at 10 per cent u/s 8(2). This cannot certainly be the legislative intent. In our view, the maximum penalty u/s 10A is to be calculated at one-and-half times the "non-concessional" rate of tax that is payable by an honest purchasing dealer, viz., a registered dealer, who when purchasing goods not covered by his certificate of registration does not make a false representation that the goods are

so covered; a person, who not being a registered dealer does not make a false representation that he is such a dealer; and a person, who, when purchasing goods of the class or classes specified in his registration certificate for a purpose other than those specified in Section 8(3)(b) does not make use of the declaration mentioned in Section 8(4) and prescribed by Rule 12 of the Rules already referred to.

12. We are supported in this view by a Full Bench decision of the Jammu and Kashmir High Court in *Assessing Authority v. J.M.R. Mills* 1971 TLR. 1861 and a Division Bench decision of the Orissa High Court in *Bisra Limestone Co. v. Sales Tax Officer* 1971 TLR. 454 These decisions agreed with the view expressed by the Mysore High Court. With respect, we are inclined to agree with the view expressed by the decisions of these three High Courts than the one expressed by the Madras High Court.

13. The tax revision case fails and is dismissed with costs.