

(2003) 04 KL CK 0072
In the High Court Of Kerala
Case No : T.R.C. No. 438 of 2000

Leo Engineering (India)

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 11-04-2003

Acts Referred:

Central Excises and Salt Act, 1944 — Section 12B, 12C, 12D
Central Sales Tax Act, 1956 — Section 10
Finance Act, 2000 — Section 9, 9(2B)
Kerala General Sales Tax Act, 1963 — Section 22, 22(2), 22(3), 46A
Kerala General Sales Tax Rules, 1963 — Rule 31C, 31D, 67

Citation : (2006) 146 STC 393

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

Bench : Division Bench

Advocate : Arikkat Vijayan Menon, for the Appellant; Georgekutty Mathew, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

G. Sivarajan, J.—The short question arising in this case is whether excess tax collected by a dealer under the Central Sales Tax Act, 1956, hereinafter called "the CST Act", can be forfeited in exercise of powers conferred u/s 46A of the Kerala General Sales Tax Act, 1963. In this case, the excess tax collected by the dealer and forfeited to Government is only Rs. 1,400 for the year 1991-92. However, the issue is important because in the first place, the issue arises in many cases, and secondly, there is no binding decision of this Court directly on the subject. The Sales Tax Appellate Tribunal upheld the forfeiture of excess sales tax collected under the CST Act by the petitioner and dismissed the appeal.

2. The sole question arising from the Tribunal's decision raised by the petitioner is given below:

Whether, on the facts and in the circumstances of the case, has not the Appellate Tribunal gone wrong in holding that forfeiture of the excess tax collected by the

revision petitioner is legal, in view of the provision in Section 46A of the KGST Act, when there is no specific provision in the CST Act.

3. We have heard counsel for the revision petitioner and Government Pleader for the State. There is no direct decision of this Court on the subject and the assessee has therefore relied on decisions of other High Courts and that of the Supreme Court in *East India Rubber Works Private Ltd. Vs. Government of Madras*, *M.I. Ishaque Yakub and Co. and Others Vs. Commercial Tax Officer, I Circle, Mysore*, and *India Carbon Ltd. etc. Vs. State of Assam*, .

4. Before we proceed to examine the applicability of the ratio of these decisions, we would like to refer to the provisions of the KGST Act on forfeiture under which excess sales tax collected by the petitioner is forfeited and the scheme there u/s 46A is extracted here under for easy reference:

46A. Penalty for illegal collection of tax.--If any person collects any sum by way of tax or purporting to be by way of tax in contravention of sub-section (2) or sub-section (3) of Section 22, he shall be liable to pay penalty not exceeding five thousand rupees and any sum collected by the person by way of tax or purporting to be by way of tax in contravention of sub-section (2) or sub-section (3) of Section 22 shall be liable to be forfeited to the Government by an order issued by the assessing authority after giving such person an opportunity to show cause why penalty or forfeiture shall not be ordered:

Provided that no penalty or forfeiture shall be ordered under this sub-section if the assessing authority is satisfied that the sum so collected has been returned to the person from whom it was collected.

(2) Where any sum is forfeited to the Government Under sub-section (1), any person from whom the amount was collected in contravention of the provisions of sub-section (2) or sub-section (3) of Section 22 may apply to the assessing authority for reimbursement of such sum and the amount shall be reimbursed to such person in the prescribed manner.

(3) No prosecution for an offence under this Act shall be instituted in respect of the same facts on which a penalty has been imposed or forfeiture has been ordered under this section.

From the above it is clear that while sub-section (1) of Section 46A provides for levy of maximum penalty up to rupees five thousand and forfeiture of excess tax collected, sub-section (2) provides for reimbursement of such forfeited tax by the Government to the person from whom the amount was collected by the dealer in contravention of sub-section (2) or sub-section (3) of Section 22 of the Act. It is further made clear in sub-section (3) that where a penalty is imposed or forfeiture is ordered there should not be a prosecution for the very same offence. While rule 31C of the Kerala General Sales Tax Rules, 1963, provides for payment of forfeited amount to Government by the dealer in form No. 24D, rule 31D provides for reimbursement of forfeited amount, which is as follows:

31D. Reimbursement of forfeited amount.--(1) Any person from whom the amount was collected in contravention of the provisions in sub-section (2) or sub-section (3) shall be allowed reimbursement of any amount forfeited to Government Under sub-section (1) of Section 46A subject to the following conditions, namely:

(a) he furnishes a statement in form 40 duly filled up and certified by the dealer who realised the excess or illegal tax;

(b) he furnishes along with the said statement in form 40, the original of the bill or bills evidencing such collection;

(c) the statement in form 40 shall be submitted to the assessing authority which ordered forfeiture of the illegal or excess collection within a period of 3 years from the date on which the order of forfeiture was passed Under sub-section (1) of Section 46A.

(2) If the assessing authority which forfeited the amount is satisfied that the statement submitted is correct and complete, it shall refund the amount within 90 days of receipt of the statement in form 40, as provided in rule 67.

From the above it is clear that once a person from whom excess tax collected by the dealer and forfeited to the Government makes an application in form No. 40 prescribed Under rule 31D along with convincing documents as proof for such collection, and forfeiture by Government, the officer who has forfeited the tax has to refund such excess collection to such person from whom it is collected. Therefore under the scheme, Government is not the beneficiary of the forfeiture and it is the duty of the Government to reimburse the amount to the person from whom it is collected after the forfeiture of the same from the dealer who collected it. Therefore this is not a case where Government derives any undue financial advantage by ordering forfeiture of excess tax that is not really due to the Government. On the other hand, it is only a machinery provision to ensure that the dealers authorised to collect tax under the statutory powers do not go beyond and collect what is not authorised. Simultaneously, the grievance of the aggrieved person is redressed by providing for reimbursement to him after forfeiture. The benefit for the Government in this matter will be the collection of penalty up to a maximum of rupees five thousand, which is not seen levied in this case. Therefore we need to consider as to whether the excess collection of CST under the local Act is permissible or not. As we find, the Government is only getting transitional advantage of money for a short time, until it is reimbursed to the person from whom it is collected by the dealer and the statute does not contemplate any substantive advantage to the Government in this regard. Probably there may be cases where the purchaser from whom excess tax is collected may not exercise statutory right to claim reimbursement. In that event, it would be a case of waiver of right to claim reimbursement by the buyer in favour of the Government, which will not affect the validity of the statute. Therefore we do not think the contention of the petitioner that the Government

has derived advantage by demanding the tax that is not really due to it for the reason that it is collected by the dealer from the buyer, is not correct.

5. Viewing the provisions of the Act and Rules as explained above, wherein the Government is only the custodian of the amount for a transitional period, we do not think the above decision of the o Supreme Court in India Carbon Ltd."s case 1997 106 STC 460, wherein the Supreme Court has held that interest for belated payment of tax being a substantive provision and in the absence of a specific provision under the CST Act, cannot be charged under the procedural provisions of the State Act made applicable for assessment, levy and collection of CST, applies to this case. Even though the decision of the Madras High Court and that of the High Court of Mysore above referred are on similar situation, we do not find any discussion of the corresponding provisions if any in those statutes providing for reimbursement of excess tax collected by the dealer. Therefore we are not inclined to accept the contention of the petitioner that the provisions of the local Act cannot be applied for forfeiture of excess tax collected under the CST Act. Above all, all the decisions of other High Courts referred above are of the years from 1967 to 1970. In this context, we have to necessarily refer to the decision of the Supreme Court in Mafatlal Industries Ltd. v. Union of India 1998] 111 STC 467, where the Supreme Court upheld Sections 12B, 12C and 12D of the Central Excise Act, 1944 which provide for refund of duty only if it is proved that the manufacturer has not passed on the same along with the price to the buyer and in the absence of any such proof providing for transfer of such excess duty to the customer welfare fund, or in other words forfeited to the Government. Therefore the Supreme Court did not approve enrichment of manufacturers and dealers by claiming refund of excess duty or tax, after it is not passed on to the buyer. Going by this decision, we do not think the dealer is entitled to retain with himself the excess tax collected from the buyer. It is also important to note that though there is no provision for levy of interest under the CST Act for belated payment of tax until amendment to Section 9 by inserting Section 9(2B) by Finance Act, 2000, there is specific provision for penalty u/s 10(f) of the CST Act for collection of any amount by way of tax in contravention of the provisions of Section 9A of the CST Act.

6. Therefore what is left by the CST Act to be taken over by the local sales tax law is only the procedure in regard to assessment, collection of tax and enforcement of payment of tax, which takes in the scheme for forfeiture of excess tax collected and for reimbursement of the same to the buyers from whom it is collected. We feel the scope of Section 46A is consistent with the provisions of the CST Act and action taken under the said provision cannot be questioned for want of jurisdiction.

T.R.C. is therefore dismissed.