

(1992) 12 KL CK 0012
In the High Court Of Kerala
Case No : O.P. No. 2577 of 1991-F

M. M. Nagalinga Nadar Sons

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 14-12-1992

Acts Referred:

Central Sales Tax Act, 1956 — Section 10, 8(3)
Kerala General Sales Tax (Amendment) Act, 1983 — Section 2
Kerala General Sales Tax Act, 1963 — Section 45A, 5(3), 5(5), 5(6), 5(7)

Citation : (1992) 12 KL CK 0012

Hon'ble Judges : P.A. Mohammed, J

Bench : Single Bench

Advocate : Jose Joseph, for the Appellant; T. Karunakaran Nambiar, Government Pleader, for the Respondent

Judgement

P.A. Mohammed, J.—The writ Petitioner is a partnership firm by name "M/s M.M. Nagalinga Nadar Sons" (hereinafter called as "Assessee"). The subject matter of this writ petition is the levy of penalty u/s 45-A of the Kerala General Sales Tax Act (hereinafter referred to as "Act").

2. The Assessee is engaged in the manufacture of coconut oil and oil cake at its factory at Quilon. The coconut oil is packed and sealed in tins and plastic containers. These finished products are sold within the State as well as outside the State. In the course of assessment, the fourth Respondent, assessing authority found that the empty tins were purchased for Rs. 8,76,100 during the year 1982-83 and for Rs. 19,29,371.23 for the year 1983-1984 at the concessional rate of tax after issuing declarations in Form 8. According to the fourth Respondent, the Assessee was not eligible for concessional rate of 4 per cent in respect of the turnover relating to purchase of containers used for filling coconut oil dispatched outside the State on consignment sale. The case of the Assessee was that the packing materials were purchased using the declaration forms in good faith and therefore no mens rea could be attributed to it. However, the assessing authority found that the Assessee had violated Sub-section (7) of

Section 5 of the Act during the aforesaid assessment years. Exts. P-1 and P-2 are the consequent orders levying penalty u/s 45-A for the years 1982-83 and 1983-84 respectively. A sum of Rs. 57,823 was levied as penalty for the year 1982-83 and a sum of Rs. 1,33,127 for the year 1983-84. The penalty levied as above works out to 1 1/2 times of the tax sought to be evaded for each years. As against these orders the Assessee filed revision petitions and the Deputy Commissioner by Ext. P-3 common order confirmed the levy of penalty u/s 45-A, but, however, the quantum of penalty was reduced to the amount equal to the tax sought to be evaded. In other words a sum of Rs. 38,548 was fixed as penalty for the year 1982-83 and Rs. 88,746 for the year 1983-84. The Board of Revenue by Ext. P-4 order, confirmed the common order of the Deputy Commissioner and penalty levied was thus sustained. Ext. P-4 order passed by the Board of Revenue is challenged in this writ petition.

3. The provisions contained in Sub-section (7) of Section 5 of the Act as applicable during the assessment years 1982-83 and 1983-84 are extracted hereunder:

(7) Notwithstanding anything contained in Sub-section (1) of Sub-section (2), the tax payable by a dealer in respect of any sale of industrial raw materials or packing materials, which is liable to tax at a rate higher than four per cent, when sold to industrial units for use in the production of finished products inside the State for sale, or for packing of such finished products inside the State for sale, as the case may be, shall be at the rate of only four per cent on the taxable turnover relating to such industrial raw materials or packing materials, as the case may be:

Provided that this Sub-section shall not apply where the sale of such finished products is not liable to tax either under this Act or under the Central Sales Tax Act, 1956 (Central Act 74 of 1956) or when such finished products are exported out the territory of India:

Provided further that the provisions of this Sub-section shall not apply to any sale unless the dealer selling the goods furnishes to the assessing authority in the prescribed manner a declaration duly filled in and signed by the dealer to whom the goods are sold, containing the prescribed particulars in the prescribed form.

Sub-section (7) of Section 5 was introduced as per Section 2(d) of the Kerala General Sales Tax (Amendment) Act, 1983 as effective from 14th October 1982. It was omitted by the Kerala Finance Act, 1987 with effect from 1st July 1987. However, this provision was in force during the relevant periods under consideration here. This provision deals with two classes of goods, (i) industrial raw materials and (ii) packing materials and for the present case this Court is concerned only with the latter. When the packing materials are sold to the industrial units for packing of finished products inside the State for sale, the tax payable by the dealer in respect of such sale of goods will be only at the rate of 4

per cent if such goods are liable to tax at a rate higher than that. This benefit will not be available in a case where sale of such finished products, are not liable to tax either under the Kerala General Sales Tax Act or under the Central Sales Tax Act by reason of the first proviso thereof. The benefit of this provision shall be available only when the dealer selling the goods furnishes to the assessing authority declarations in the prescribed form.

4. In this case it has come out from Exts. P-1 and P-2 orders that the Assessee had issued declaration forms in Form No. 18 claiming the benefit u/s 5(7) of the Act. The contention is that the turnover relating to packing materials used for packing of finished goods is liable to tax only at the rate of 4 per cent and hence the said benefit is available. Assuming it to be so, the further point to be established is that the "sale" occurring in the expression "for packing of such finished products inside the State for sale" is sale "simpliciter". Reliance is placed on the decision of the Supreme Court in *Assessing Authority-cum-excise and Taxation Officer, Gurgaon and Another Vs. East India Cotton Mfg. Co. Ltd., Faridabad*, . The main controversy between the parties in that case centres round the true interpretation of Section 8(3)(b) of the Central Sales Tax Act. After analysing the provisions the Supreme Court held thus: "Now here we find the expression used by the legislature as also the rule making authority is simpliciter" for use...in the manufacture...of goods for sale "without any addition of words indicating that the sale must be by any particular individual." Finally the Supreme Court observed:

The goods purchased by the registered dealer must be used by him in the manufacture of goods which are intended for sale, but such sale need not be by the registered dealer himself; it may be by someone.

On the same line of reasoning, this Court may not be found unjustified if the argument of the Assessee that the sale in question is only the sale "simpliciter" is accepted.

5. The next decision cited by the Assessee is *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. Lakshmidhand Vasanji and Co.*, That was a case where the Tribunal stated that in the absence of specific provision under the Act and Rules requiring that the goods purchased by the dealer from outside Kerala on the strength of C form should be sold within the State of Kerala itself, the penal provision is not attracted. The Division Bench had agreed with the said conclusion of the Tribunal. There the contention of the Revenue was that the sale should have been effected in Kerala and since it was not done, the dealer had violated the provisions of Sub-section (3) of Section 8 attracting penal provision of Section 10(d) of the Central Sales Tax Act. In the present case, there is a provision for sale but the question is whether such sale takes in different kinds of sale, like intra State, inter-State, etc. or it is confined to sale only within the State. Such a question did not arise for consideration before the Division Bench.

6. In *Sales Tax Officer and Others Vs. Ragam Plastics and Others*, a Division

Bench of this Court interpreted the words "liable to tax under this Act", contained in Section 5(3) as now in force. This Court held: "Since the Assessee are given limited exemption by the notification from payment of sales tax in respect of their turnover it cannot be construed that there is "no liability" to tax under the Act." It is true that when exemption allowed, is limited to a certain extent it cannot be said that there is no liability at all. Therefore this Court held that Section 5(3) of the Act would apply to the Assessee and the goods manufactured by them are liable to tax under the Act though tax is not payable by virtue of the notification. Such a situation did not arise in the present case.

7. Even if this Court accepts the contention that the word "sale" in the aforesaid expression is sale "simpliciter", the Assessee cannot succeed in view of the first proviso which says that the benefit of the Sub-section will not apply where the sale of such finished products is not liable to tax either under this Act or under the Central Sales Tax Act or when such finished products are exported out of the territory of India. In the present case, finished products were dispatched outside the State on consignment of sale. There is no dispute that such sale was not liable to tax either under the provisions of the Kerala General Sales Tax Act or under the Central Sales Tax Act during the relevant period.

8. It is contended on behalf of the State that the Assessee is not entitled to claim the benefit under Sub-section (7) of Section 5 because what is purchased is only "containers" and not "packing materials". The argument is that Sub-section (7) deals with "packing materials" whereas Sub-sections (5) and (6) deal with "containers" or "packing materials" and this difference is substantial in nature. Under Sub-section (5) while fixing the total turnover of goods the price of the "packing materials" or "containers" is included in the total turnover, where the goods sold are contained in "containers" or are packed in any packing materials. Under Sub-section (6) where the sale or purchase of goods contained in any containers or packed in any packing materials is exempt from tax, the sale or purchase of such container or packing materials shall also be exempt from tax. Of course, Sub-section (7) deals with industrial raw materials or packing materials and not with containers. Because of this difference alone, it cannot be said that in the case of packing materials the benefit under Sub-section (7) will not be available. The question is whether the "containers" will come within the meaning of "packing materials" as used in Sub-section (7). In this context the Explanation to Sub-sections (5) and (6) is relevant. The Explanation is to the effect that the word "containers" include "gunny bags, tins, bottles or other containers". Therefore the tins purchased by the Petitioner are containers within the meaning of the provisions of Sub-sections (5) and (6). However, under Sub-section (7) the benefit is specifically in respect of packing materials. Then the question to be decided is whether the containers purchased by the Assessee can be treated as packing material.

9. The Division Bench of this Court in *Kreem Foods (P.) Ltd. Vs. State of Kerala*, dealt with the "container" used for packing "Joy Ice Cream". In that case the

assessing authority initiated the proceedings u/s 19 on the ground that the article sold would come under item 25H of the First Schedule to the Act. While deciding, the correctness of the said proceedings the word "packing" came up for interpretation before this Court. The Division Bench observed thus:

Briefly stated, to pack means to put things into a box, a bottle or bag, etc. It means to put a particular thing in a protective container or cover, to enable it for easy and convenient transport or for storing.

In view of this observation the counsel for the Assessee contended that the tin involved in the present case is also a packing material. Putting a particular thing in a tin is a process of "packing" but that does not mean the tin as such has become a packing material. The use for which the article is put is a decisive factor in deciding the character of the process whether it is a "containing" or "packing." When tin is used for storing coconut oil, it can be called as a "container" but not as a "packing material".

10. The next decision brought to my notice is of the Division Bench of the Orissa High Court in *State of Orissa Vs. Balaji Wood Industries*, . The article which was dealt in that case was cable drums made of timber around which aluminium cables are wound so as to keep them in tact. The Division Bench after considering the facts of that case and invoking common parlance theory held that cable drums can be treated as packing materials for aluminium cables. That conclusion was arrived at in view of the specific use of the cable drum as packing material for aluminium cable. The reliance is also placed on the decision of the Gujarat High Court (Division Bench) in *State of Gujarat v. Kishor Timber* (1991) 83 S.T.C. 370. The article involved in that case was wooden pallets. It was found to be packing material in view of the use to which the goods were put. These two decisions do not hold that once an article is used for packing it ipso facto becomes a container.

11. The question whether an article is a "packing material" or a "container" can be determined only with reference to the nature of the use to which it is put as observed earlier. The Supreme Court in *Ramavatar Budhaiprasad v. Assistant Sales Tax Officer* (1961) 12 S.T.C. 286, held thus:

Reliance was placed on the dictionary meaning of the word "vegetable" as given in *Shorter Oxford Dictionary* where the word is defined as of or pertaining to, comprised or consisting of or derived, or obtained from plants or their parts". But this word must be construed not in any technical sense nor from the botanical point of view but as understood in common parlance. It has not been defined in the Act and being a word of every day use it must be construed in its popular sense meaning "that senesce which people conversant with the subject-matter with which the statute is dealing would attribute to it." It is to be construed as understood in common language.

(Italics supplied)

This "common parlance theory" as it is usually described is based on the popular sense which is being developed in the mind of a common man with reference to "every day use" of a particular article or material. The tins are not ordinarily used for packing or wrapping some other article. They are used for storing, keeping or containing some other goods and in that sense tins are "containers". In the present case tins are used for storing coconut oil. Thus the use of a "container" is different from a "packing material" and it is not one and the same. It is apparent that this difference in use is clearly in the mind of the legislature while enacting Sub-section (7) of Section 5. The benefit available under Sub-section (7) is not extended to in the case of containers and it is limited to the industrial raw materials and packing materials. Therefore according to me the containers cannot be treated as a packing material for the purpose of Sub-section (7) of Section 5.

12. The only question that remains to be considered is the correctness of the quantum of penalty levied u/s 45-A of the Act in the present case. The Division Bench of this Court in *Sudhi v. Intelligence-Officer* (1992) 85 S.T.C. 337, while dealing with the penalty u/s 45-A has observed:

After indicating the basis, of the levy of penalty, this Court has laid down that the quantum of penalty should depend upon the gravity of the offence. If it is not so, and the maximum penalty is levied in a mechanical manner, it is a pointer to show that the officer has not exercised the judicial discretion vested in him according to law.

To put it differently the doctrine of "proportionality" or "Wednesbury" principle is to be applied in fixing the quantum of penalty in a particular case. It is time and again said that the penalty should not be levied only because it is lawful to do so. In case maximum, is prescribed it shall be levied according to the proportion of the magnitude of the offence and other connected circumstances. The following two decisions are also brought to my notice by the counsel appearing for the Assessee.

13. The Rajasthan High Court in *Commercial Taxes Officer and Another Vs. Board of Revenue and Another*, held:

But in any view of the matter two views are possible in this respect, as the Board of Revenue in the case of *Assam Roller Flour Mills v. Commercial Taxes Officer, Special Circle I, Jaipur* 1975 B.R.D. 255, took the view that if the purchase of wheat was tax-paid, then the sales tax was not leviable on the sale of maida or suji. In these circumstances, it cannot be held that the Assessee had deliberately furnished inaccurate particulars of there was any intentional misrepresentation.

(Italics supplied)

14. The Supreme Court in *Cement Marketing Co. of India Ltd. v. The Assistant Commissioner of Sales Tax* (1980) 45 S.T.C. 197 was considering a case of penalty levied u/s 43 of Madhya Pradesh General Sales Tax Act. In that case

freight charges were not included as forming part of taxable turnover in the returns submitted by the dealer but the officer added that also in the taxable turnover. The Supreme Court upheld the assessment order and found that the freight charges were rightly included in the taxable turnover. However the levy of penalty was set aside. While dealing with this question the Supreme Court observed:

This was the reason why the Assessee did not include the amount of freight in the taxable turnover in the returns filed by it. Now, it cannot be said that this was a frivolous contention taken up merely for the purpose of avoiding liability to pay tax. It was a highly arguable contention which required, serious consideration by the Court and the belief entertained by the Assessee that it was not liable to include the amount of freight in the taxable turnover could not be said to be mala fide or unreasonable.

(Italics supplied)

15. In the present case there are certain circumstances which are necessarily to be noted while fixing the quantum of penalty. The assessment years in question are 1982-83 and 1983-84. The Sub-section (7) was inserted in Section 5 by an amendment introduced as per Act 3 of 1983. As far as the year 1982-83 is concerned, the Sub-section (7) will apply only for a period of less than six months. So when Sub-section (7) specifically speaks of the benefit of concessional rate of tax available in respect of industrial raw materials and packing materials for the first time by reason of the amendment effected on 14th October 1982 the Assessee probably thought bona fide that the said benefit was available to it. It was in that background that the Assessee had claimed the benefit by using declaration forms as and when required. This Court finds no material to think otherwise or to hold that the Assessee had a fraudulent intention. It cannot be said that the assessing authority was totally unaware of the use of declaration forms by the Assessee for claiming the benefit of concessional rate of tax. It would have been possible for the assessing authority to take steps to prevent the Assessee from using the declaration forms if it was vigilant enough to form an opinion that the Assessee had used the declaration forms in violation of the provisions of the Act. Nothing had been done in this regard. At any rate, the question of benefit under Sub-section (7) in this case is an arguable point as Supreme Court observed in Cement Marketing Company's case (1980) 45 S.T.C. 197, supra. This point can only be decided by discussion, argument and exchange of views. In these circumstances it is difficult for this Court to say that the Assessee in this case had acted deliberately or with guilty mind or dishonest intention in claiming the benefit under Sub-section (7) by filing declaration forms. The said benefit is found to be claimed by the Assessee bona fide in regular course of business transactions.

16. Nevertheless I am not in favour of completely absolving the liability of the Assessee from the clutches of penal provision. The reason is that its contention are found to be unacceptable after elaborate discussion and argument. The

quantum of penalty that can be levied in the present case shall therefore be in a small proportion to the tax sought to be evaded since the declaration forms are found to be used bona fide. Since the entire materials are there before this Court, I find it unnecessary in this case to remand the matter to lower authorities to fix the quantum of penalty. Therefore after considering all aspects of the case I fix 10 per cent of the tax sought to be evaded by the Assessee as penalty u/s 45-A in the present case. The Deputy Commissioner as per Ext. P-3 levied the penalty equal to the amount of tax sought to be evaded. On the basis of that calculation I fix the penalty of Rs. 3,865 for the year 1982-83 and Rs. 8,875 for the year 1983-84 u/s 45-A of the Act. Exts. P-1 to P-4 are modified to the extent indicated above. The fourth Respondent is directed to issue demand notices to the Assessee accordingly. The Original Petition is disposed of as above.