(2012) 11 KL CK 0133

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 13478 of 2006 (D)

M.A. Hassan, Proprietor, M/s. Bismillah Timber Traders, Arackappady Allapra P.O., Perumbavoor — APPELLANT

Vs

The Commissioner of Commercial Taxes, Public Office Buildings, Thiruvananthapuram, The Deputy Commissioner, Commercial Taxes, Mattanchery, The Intelligence Officer Squad No. III, Commercial Taxes, Ernakulam and The Commercial Tax Officer, Second Circle, Perumbavoor — RESPONDENT

Date of Decision : 05-11-2012

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 37, 40, 45A, 45A(1), 45A(3)

Citation : (2012) 11 KL CK 0133

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : C.K. Thanupillai, for the Appellant; Sojan James, Spl. Govt. Pleader for R1 to R4, for the Respondent

Judgement

Justice Antony Dominic

1. Heard the counsel for the petitioner and the learned Senior Government Pleader. Petitioner challenges Ext.P4 order passed by the first respondent. Going by what is stated, this order has been passed in exercise of the powers u/s 37 of the KGST Act.

2. Briefly stated the case is that during the assessment year 200-2001, petitioner purchased imported timber worth Rs. 36,87,710/-. According to him the whole quantity was transported from Mangalore. On 20.3.2010, the Intelligence Officer inspected the business premises of the petitioner and he did not find any stock of the timber. On this basis and also on the allegation that the quantity sold was not returned, proceedings u/s 45A of the KGST Act were initiated. Accordingly, by Ext.P1 order penalty of Rs. 11,31,180/- was levied on the petitioner.

3. Petitioner filed revision before the Deputy Commissioner u/s 45A(3) of the Act. The revision was heard and the revisional authority passed Ext.P2 order, holding that there was no suppression of turn over. However a fine of Rs. 15,000/- was imposed on the petitioner, on the ground of belated filing of revised return. Subsequently, first respondent issued Ext.P3 notice invoking the power u/s 37 of the KGST Act, and proposing to suo motu revise Ext.P2 order. Reasons for invoking his power of suo motu revision has been stated in Ext.P3 thus;

I have examined the order of the first revisional authority and found that the order is erroneous against the law facts and circumstances of the case and is against the interest of revenue for the following reasons.

1. That the genuineness of the interstate sales claimed by you has not been proved with any documentary evidences, except the fabricated sale bills produced by you.

2. That no tax has been paid till date on the alleged interstate sales.

3. That this is not a case of belated filing or revised return as observed by the revisional authority. No question of belated filing of the return can be filed any day prior to the date of assessment.

Hence it is proposed to cancel the order of the first revisional authority and is restore the order of the Intelligence Officer by virtue of invoking the provisions u/ s 37 of the KGST Act 1963

4. Accordingly, the petitioner was heard and finally Ext.P4 order was issued holding that the default of the petitioner was not technical and that Ext.P2 order of the Deputy Commissioner was highly prejudicial to the revenue and was issued without considering documentary evidence available on record. On that basis Ext.P2 order was vacated and Ext.P1 penalty order was restored. It is in these circumstances the writ petition has been filed.

5. Two contentions are raised by the learned counsel for the petitioner. First contention raised is that Ext.P3 notice proposing suo motu revision was issued invoking power u/s 37 of the KGST Act. It is contended that if a penalty order issued u/s 45A is to be revised, the power that can be invoked is u/s 45A(5) only. Therefore, according to the learned Counsel Ext.P3 order has been issued without jurisdiction. Second contention raised is that the grounds mentioned in Ext.P4 are not the reasons mentioned in Ext.P3 notice. Therefore petitioner was incapacitated in producing the documents to substantiate his defence against the finding in Ext.P4 order and proving his contentions.

6. In so far as the first contention is concerned, Section 37 of the KGST Act empowers the Commissioner to suo motu call for and examine any order passed by any officer or authority subordinate to him other than Appellate Assistant Commissioner, which in his opinion is prejudicial to revenue and he may make such enquiry or cause such enquiry to be made and subject to the provisions of the Act, may pass orders thereon. An order passed u/s 37 is appealable to this

Court u/s 40 of the Act also. However, Ext.P1 order has been passed u/s 45A and Ext.P2 revisional order has been passed u/s 45A(3) of the Act. In a proceedings u/s 45A, if the order is to be revised by the Commissioner suo motu or otherwise, such a revision is permissible only u/s 45A(5) of the Act. This view has been taken by a Division Bench of this court in Bhima and Brother Jewellers and Diamond Merchants Vs. State of Kerala, , where it has been held thus.

It cannot be taken that, if an order u/s 45A(1) is passed by one authority is suo motu revision by the Board of Revenue is maintainable and if the same order is passed exercising the same power by another authority, such revision will not be maintainable. So the revision by the Board of Revenue shall be under the same provision and in the same manner. So the revision by the Board of Revenue against an order u/s 45A(1) or by the Deputy Commissioner u/s 37 of the Act. An appeal to the High Court will be maintainable if the Board of Revenue exercises suo motu power u/s 37 or 59A of the Act.

7. However, the fact a wrong provision has been quoted in Ext.P3 notice or Ext.P4 order, by itself, will not invalidate the proceedings conclude against the petitioner. In this case, the petitioner has not been able to prove before this court that any prejudice has been caused to him on account of the wrong quoting of the provision, if that be so, the fact that Section 37 has been mentioned in Ext.P3 or P4, does not result in nullification of the orders.

8. Relying on the judgment of the Apex Court in Commissioner, Sales Tax, U.P., Lucknow Vs. Anoop Wines, Khuldabad, Allahabad, , learned counsel for the petitioner contended that the aforesaid principle will have no application in a penalty proceedings. The judgment to the extent it is relevant reads thus;

Counsel for the revenue, however, sought to urge before us that the order for the imposition of penalty could have been and should have been justified on clause (c) of Section 8A(1) being a dealer who would, but for any exemption made or granted under the ''Act, be liable to pay tax thereunder, provided his actual or estimated turnover for the assessment year is not less than fifty thousand rupees. This point was never agitated before the authorities below. The assessee or the dealer had never any occasion to meet his case. It is not a question of sustaining jurisdiction by reference to a wrong section as was done in the case of L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt., where this court held that if a particular action is valid under one section, it cannot be rendered invalid because reference was made to another section, and it makes no difference if the two empowering provisions are in the same statute. But this principle will have no application where in a penal action no notice was given or resort to such a provision was made to the delinquent or the offending party.

9. A reading of the judgment shows that the Apex Court held that the principle that an action which is valid under one section cannot be rendered invalid because reference is made to another section, will have no application where in a

penal action, where no notice was given or resort to such a provision was made to delinquent or the offending party. The facts of this case show that the aforesaid exception pointed out by the Apex Court has no relevance in so far as this case is concerned. For these reasons I am not impressed by the first contention raised by the counsel for the petitioner.

10. In so far as the 2nd contention that the grounds relied on Ext.P3 are not the grounds relied on Ext.P4 order passed by the first respondent is concerned, the correctness of this contention will have to be verified in the light of the contents of Ext.P3 notice and Ext.P4 order. A reading of Ext.P4 order shows that the petitioner has been found to have resorted to clandestine transactions mainly relying on delivery notes and relevant forest passes. None of these documents were relied on in Ext.P3 and therefore the findings in the aforesaid respect arrived at in Ext.P4 were without putting the petitioner on notice in respect of those issues. In such circumstances, counsel for the petitioner is justified in contending that the petitioner was seriously prejudiced in his defence. For that reason I am inclined to agree with the counsel for the petitioner and therefore I set aside Ext.P5. However that will not absolve the petitioner from the liability to be proceeded against u/s 45A(5) of the Act. In such circumstances I direct that Ext.P4 will be treated as a notice and the petitioner will file his reply to Ext.P4 within 4 weeks from today and on filing reply as above, the first respondent will issue notice to the petitioner, afford him an opportunity of hearing and to produce documents. Thereafter the first respondent will pass fresh orders exercising his powers u/s 45A(4) of the Act. It is stated that as a consequence of Ext.P4, registration of the petitioner under the KGST Act has been cancelled. Now that the matter is directed to be reconsidered, depending upon the outcome of such re-examination, if circumstances warrant fresh orders will have to be passed. Therefore I direct that once orders are passed in pursuance to this judgment, it will be open to the petitioner to seek further orders modifying the order dated 27.1.2006 cancelling the registration.

Writ petition is disposed of as above.

