(2006) 04 KL CK 0026

In the High Court Of Kerala

Case No : S.T. Appeal No. 2 of 2005

Miracle Elastomer (India) Ltd. APPELLANT

Vs

Commissioner of Commercial Taxes RESPONDENT

Date of Decision : 03-04-2006

Acts Referred:

Kerala General Sales Tax (Amendment) Act, 1998 — Section 23(3A)
Kerala General Sales Tax Act, 1963 — Section 23(3), 37

Citation : (2007) 10 VST 493

Hon'ble Judges : K.S. Radhakrishnan, J;K.M. Joseph, J

Bench : Division Bench

Advocate : Arikkat Vijayan Menon, Harisankar V. Menon and Meera V. Menon, for the Appellant; Raju Joseph, Special Government Pleader (Tax), for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—This appeal is filed against the proceedings of the Commissioner of Commercial Taxes dated June 10, 2005 invoking Section 37 of the Kerala General Sales Tax Act, 1963 whereby the order passed by the Deputy Commissioner of Commercial Taxes modifying the payment of interest from the date of issue of demand notice has been interfered with.

2. The assessee is an industrial unit engaged in the manufacture and sale of reclaimed rubber. Assessment year relates to 1998-99. The assessee had filed return in the year 1998 showing the taxable turnover of Rs. 2,33,47,360. The assessee was granted SSI exemption for the period from October 10, 1992 to October 9, 1999 and therefore did not collect or remit the tax for the period up to October 9, 1999. When final assessment order was passed by the Assistant Commissioner (Assessment) on May 28, 2002 it was found that the exemption limit had expired prior to October 9, 1999 and the assessee was found liable to pay tax, surcharge and interest for 1998-1999. Tax found payable was Rs. 4,33,045, surcharge payable was Rs. 1,42,498 and an amount of Rs. 5,24,199

was found payable towards interest for the period from December, 1998 to October, 2002, the date of issue of demand notice. The assessee filed a petition dated August 14, 2002 against the order dated May 28, 2002. Order dated October 8, 2002 was then passed by the Assistant Commissioner (Assessment V) in modification of the assessment order dated May 28, 2002.

3. The assessee dissatisfied with the order of the Assistant Commissioner filed revision before the Deputy Commissioner, Commercial Taxes, Malap-puram. The assessee contended that the assessing authority had not demanded tax in excess of the exemption limit at any point of time during the year and had wrongly demanded interest with retrospective effect. Further it was contended that the order of the assessing authority is against the dictum laid down by this Court in Protech Appliances Pvt. Ltd. v. Assistant Commissioner (Assessment), Sales Tax [2002] 127 STC 322 (SC) and also the decision of the Supreme Court in Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others, , wherein it was held that even if the interest was found payable the same could be collected only from the date of issue of demand notice. The Deputy Commissioner took the view that levying of interest with retrospective effect is detrimental to the principles laid down by this Court and the Supreme Court in the decisions cited supra and therefore order dated October 8, 2002, imposing interest from April 1, 1998 was modified as from the date of issue of demand notice.

4. The Commissioner of Commercial Taxes however, on examining the records found that the order of the first revisional authority was against law, facts and circumstances of the case and consequently initiated suo motu revision u/s 37 of the Act. Commissioner noticed that the assessee had not paid tax along with the return, when it was due, on exhausting the SSI exemption. It was noticed that the assessee was granted SSI exemption from October 10, 1992 to October 9, 1999 and consequently the assessee had not collected or remitted tax up to October 9, 1999. However, when the final assessment was completed it was found that the SSI exemption granted to the assessee had expired on October 8, 1999 and therefore assessee was liable to collect and pay tax. It was also pointed out that though tax liability was not admitted in the original return it was admitted in the revised return. Consequently it was found that the assessing authority was justified in demanding sales tax, surcharge as well as interest of Rs. 5,24,199 for the period from December, 1998 to October, 2002 (date of issue of demand notice). It was therefore decided to cancel the order of the first revisional authority dated February 4, 2003 and the assessee was called upon to file objections, if any. The assessee then filed detailed objection placing reliance on the decision of the apex court in Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others, and the decision of this Court in Protech Appliances Pvt. Ltd. v. Assistant Commissioner (Assessment), Sales Tax [2002] 127 STC 322(SC). It was pointed out that the first appellate authority was justified in holding that interest could be imposed only from the date of issue of demand notice. Further it was also pointed out that the very filing of the revised

return was also illegal since there was no outstanding liability as per original return. Further it was pointed out that the outstanding liability arose only on January 25, 2002 when the revised return was filed and therefore the assessee can be termed as a defaulter only from that date. It was pointed out that under Rule 18A the assessee can file revised return under Rule 18(2A) in form No. 9 within six months from the date fixed for filing of the original annual return. The assessee submitted that revised return ought to have been filed on or before November 1, 1999 and since it was not done revised return filed cannot be acted upon by the assessing authority.

5. The Commissioner rejected the objections filed by the assessee pointing out that the dealer, had a statutory obligation to furnish true and correct figures in the return on exhausting the limit of exemption. It was stated that once the relief of exemption was exhausted, the dealer had a statutory obligation to pay tax and since the same was not done, interest is payable on the tax due. The order of the Deputy Commissioner dated February 4, 2003 was therefore set aside.

6. Counsel appearing for the appellant Sri Harisankar V. Menon submitted that imposition of interest for the period from the date of filing of the revised return is illegal in view of the decision of the apex court in Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others, and Protech Appliances Pvt. Ltd. Vs. Assistant Commissioner, . It is also contended that revised return also cannot be acted upon since it was filed beyond the period prescribed under Rule 18(2A) of the Act. Considering the fact that when the original return was filed there was no outstanding liability and the liability accrued only on filing the revised return which was on January 25, 2002, counsel submitted that the assessee can be said to be defaulter only from that date.

7. Sri Raju Joseph, learned Special Government Pleader for Taxes, on the other hand contended that the Commissioner has rightly invoked the suo motu power u/s 37 of the Act since the first appellate authority has committed an error in limiting the interest from the date of issue of demand notice. Counsel submitted that the decisions cited by the counsel for the assessee are not applicable to the facts of this case.

8. We have gone through the decision cited by the counsel for the assessee. The apex court in Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others, was dealing with the question as to whether assessee was liable to pay penal interest u/s 23(3) of the Act from the date when the return was due though neither a return was furnished nor any tax paid on self-assessment basis. Taking note of the earlier decision of the apex court in Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, and J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, , the court took the view that the liability of the assessee to pay sales tax could have arisen either on return of turnover being filed by way of self-assessment or else on an order of assessment being made. That was a case where apex court has examined the scope of Section

23(3), especially the words "any other amount assessed or due" as occurring in that section of the Act. In that case no amount was collected by the assessee and therefore no tax was deposited. Facts in the present case are entirely different. In this case the assessee was enjoying SSI exemption for the period from October 10, 1992 to October 9, 1999 for an amount of Rs. 72,79,978. While finalising the assessment for the year 1998-1999, the assessing authority had found that during the year 1998-1999 turnover of the dealer had exceeded the exemption limits and the tax due was Rs. 4,33,045. But tax was not paid along with the return, which the assessee would have paid legally. Interest was demanded from December, 1998 to October, 1999 as per Section 23(3) of the Act when the actual taxable turnover was not conceded by the assessee in the return filed. The assessee had a statutory obligation to furnish true and correct figures in the return filed. The assessee was therefore found liable to pay tax of Rs. 4,33,045, surcharge of Rs. 1,42,498 and interest of Rs. 5,24,199.

9. We are of the view, the assessee cannot escape from the payment of interest since it had not disclosed the turnover in the return filed. The assessee was well aware of the fact that the SSI exemption limit expired on October 8,1999 a fact which is in the exclusive knowledge of the assessee and not the assessing authority. Section 23(3) states that if tax or any other amount assessed or due under the Act is not paid by any dealer or other person within the time prescribed therefor, the dealer shall pay interest in the manner prescribed, in addition to the amount due. The assessee should have paid tax on the expiry of the exemption period. The assessee had failed to pay the tax also with the return. The tax was due to the State once the period of SSI exemption expired. Since the assessee''s turnover had exceeded the exemption limit, necessarily he should have disclosed the correct turnover in the return and should have paid the tax due under the Act which he has not done and therefore, in our view, Sub-section (3) of Section 23 would squarely apply.

10. We may in this connection also indicate Sub-section (3A) of Section 23 was inserted by Act No. 14 of 1998 with effect from April 1, 1998. Sub-section (3A) states that where any dealer has failed to include any turnover of his business in any return filed or where any turnover has escaped assessment, interest under Sub-section (3) shall accrue on the tax due on such turnover with effect from such date on which the tax would have fallen due for payment had the dealer included the same in the return. This is not a case where income has escaped assessment. Even if it is contended that Sub-section (3) of Section 23 would not apply, Sub-section (3A) of Section 23 would squarely apply with effect from April 1,1998. Interest has been demanded from December, 1998 to October, 2002. Therefore, in our view, the assessing authority and the Commissioner are justified in demanding interest u/s 23(3) of the Act. The contention of the assessee based on Rule 18(2A) is only to be rejected. The assessee ought to have filed a correct return and tax should have been paid accordingly. Filing of a revised return by the assessee is of no consequence and no argument be built upon the revised return.

11. We therefore find no reason to entertain this appeal. The same would stand dismissed.

