

(1999) 04 KL CK 0010

In the High Court Of Kerala

Case No : W.A. No's. 199, 200, 201 and 202 of 1991

M.R.F. Limited

APPELLANT

Vs

Assistant Commissioner (Assmt)-II, Sales Tax and Others

RESPONDENT

Date of Decision : 08-04-1999

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 45A, 45A(1), 5(7)
Kerala General Sales Tax Rules, 1963 — Rule 28

Citation : (1999) 04 KL CK 0010

Hon'ble Judges : P.K. Balasubramanyan, J;J.B. Koshy, J

Bench : Division Bench

Advocate : K.B Subhagamani and Premji Nagendran, for the Appellant; V.V. Asokan, Special Government Pleader for Taxes, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Koshy, J.—All these writ appeals are filed against the common judgment dated January 31, 1991 passed by a learned single Judge affirming exhibit P4 revisional order passed by the second revisional authority regarding imposition of penalty u/s 45A of the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the Act") on the petitioner for the accounting years 1982-83, 1983-84, 1984-85 and 1985-86. Petitioner is a public limited company incorporated under the Companies Act and among other places it has got factory in Kerala State, engaged mainly in the manufacture of tubes, tread rubber and repair materials. For manufacturing the above items, petitioner purchases raw materials like rubber process oil, etc., and packing materials for packing finished goods, from dealers within the State. While purchasing the above raw materials and packing materials, petitioner availed concessional rate of sales tax at 4 per cent by availing the benefit of Section 5(7) of the Act, after filing declaration in form 18. The provisions contained in Section 5(7) during the relevant time are as follows :

"(7) Notwithstanding anything contained in Sub-section (1) or 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 of 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."

For getting the benefits of the above sub-section, the following conditions are to be satisfied : (1) The raw materials or packing materials should be used for the production of finished products inside the State or for packing of such finished products inside the State ; (2) the finished products should be for sale ; (3) sale of such finished products is liable to tax either under the Kerala General Sales Tax Act or under the Central Sales Tax Act (first proviso) ; and (4) a declaration should be filled in and signed by the dealer to whom the goods are sold (second proviso). As per Rule 28, declaration should be filed in form 18. In the declaration the purchasing dealer should state that the raw materials and packing materials purchased are intended for the manufacture of finished goods, inside the State for sale and finished products are liable to tax under the Kerala General Sales Tax Act, 1963 or under the Central Sales Tax Act, 1956.

2. Majority of the products of the petitioner were removed on consignment basis outside the State and such finished products did not suffer any sales tax under the Kerala General Sales Tax Act or under the Central Sales Tax Act. The State took the stand that for that part of the goods petitioner is not eligible for concessional rate of tax. Therefore, there is tax evasion and declaration filed by the petitioner for getting the tax concession, under form 18 was incorrect. Because of the wrong declaration the selling dealer has collected only 4 per cent tax and there is loss of revenue. Therefore, it proposed penalty u/s 45A of the Act after invoking Clause (g) as they committed an offence under Clause (g) of Sub-section (1) of Section 45A of the Act.

3. Section 45A(1)(g) and Explanation (1) to the above section is quoted below :

"45A. Imposition of penalty by officers and authorities.--(1) If the assessing authority or the Appellate Assistant Commissioner is satisfied that any person,--

(a) to (f).....

(g) has acted in contravention of any of the provisions of this Act or any rule

made thereunder, for the contravention of which no express provision for payment of penalty or for punishment is made by this Act ;

such authority or officer may direct that such person shall pay, by way of penalty, an amount not exceeding twice the amount of sales tax or other amount evaded or sought to be evaded where it is practicable to quantify the evasion or an amount not exceeding ten thousand rupees in any other case.

Explanation 1. ---The burden of proving that any person is not liable to the penalty under this section shall be on such person."

4. After hearing the petitioner, the assessing authority imposed twice the amount of sales tax leviable on the raw materials alleged to have evaded after holding that the imposition of maximum penalty is justified in the circumstances of the case. This was affirmed by the first revisional authority. The second revision petitions filed in respect of the assessment years involved were heard together and disposed of by exhibit P4 order by the Board of Revenue. The Board of Revenue while affirming the findings of the original authority and first revisional authority that imposition of maximum penalty is justified, correctly held that maximum penalty should be on the amount of tax sought to be evaded and not on the tax leviable on the raw materials and packing materials. It held as follows :

"In these cases after using the declarations, the applicants have paid 4 per cent tax on the purchases. Section 45A authorises a maximum levy of penalty at twice the amount of tax sought to be evaded. So while calculating the tax evaded or sought to be evaded, the 4 per cent tax already paid is to be deducted and the balance tax atone is either evaded or sought to be evaded. From the calculation statement of the assessing authority it is seen that he has not considered the aspect of payment of 4 per cent tax on the purchases by the applicant. This has to be re-examined by the assessing authority and necessary modification to be made in the quantum of penalty."

The learned single Judge confirmed the findings and affirmed exhibit P4 order. Learned single Judge also held that while re-considering the aspect of payment of 4 per cent tax on the purchases by the petitioner the assessing authority may also be directed to give credit to inter-State sales, if any, made after payment of the Central sales tax.

5. The contentions of the petitioner are : (1) Section 5(3) and (7) of the Kerala General Sales Tax Act, 1963 is not applicable to the purchasing dealer as liability to pay tax is only on the selling dealer. Consequently, penalty cannot be imposed u/s 45A(1)(g) of the Kerala General Sales Tax Act, 1963. Since there is no statutory liability on the purchasing dealer to pay tax, there is no evasion of tax or violation of the provisions of the Act. (2) There is no violation of the provisions of the Act by the petitioner as the goods purchased were utilised for manufacturing inside the State and it is for sale. There is no provision in the Act that it should be sold only in the State of Kerala. Therefore, there is no violation

of the provisions of the Act or declaration made thereunder resulting in evasion of tax. (3) Imposition of penalty u/s 45A is illegal as there is no mens rea. Unless there is deliberate intention on the part of the petitioner to violate any of the provisions of the Act, no penalty can be imposed and even if there is technical violation of the Act the quantum of penalty need not be fixed at the maximum. The imposition of penalty at twice the amount of tax alleged to have been evaded is arbitrary and without application of mind. We may consider these three grounds in seriatim.

6. It is not disputed that the petitioner has filed declaration in form 18 for obtaining the benefit of concessional sales tax. Only because of the declaration filed by the petitioner, the selling dealer had collected 4 per cent sales tax which resulted in non-collection of tax in full. In other words, but for the declaration, full sales tax would have been payable by the petitioner for the packing materials purchased and wrong declaration made by the petitioner resulted in loss of revenue. u/s 45A any person can be imposed with penalty. It need not be on the selling dealer alone or dealer who is liable to pay tax directly to the Government. In view of the wrong declaration only 4 per cent tax (concessional rate) was collected and paid and there is loss to the revenue. Whether the selling dealer is liable to pay penalty, etc., was considered by a Division Bench of this Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Bharat Refineries Limited [1978] 42 STC 225. Following the Supreme Court decision in Poles tar Electronic (Pvt.) Ltd. v. Additional Commissioner, Sales Tax [1978] 41 STC 409 this Court held that as a result of the purchasing dealer's declaration if lesser tax is collected by the selling dealer no penalty can be imposed on the selling dealer. This Court held as follows :

".....When once the declaration in the prescribed statutory form is obtained from the purchasing dealer and furnished to the authorities, the selling dealer satisfies the requirements of the statute and he is entitled to claim the concessional rate of one per cent, irrespective of the correctness of the declaration or the manner in which the declarant subsequently acts. Form 18 shows that the declarant need not even specify the goods he intends to manufacture or the nature of the use. The selling dealer is entitled to act on the meagre particulars furnished, and there is no legislative intention to put him on an impossible enquiry as to the correctness of the declaration. The taxing event is the sale to the purchasing dealer. If the purchaser misrepresents or subsequently misbehaves, the "legislative wrath" falls upon him, as Section 46(2) (d) of the Act provides for his imprisonment and for fine....."

In view of the above decision the first contention of the petitioner that purchasing dealer cannot be imposed with penalty even though lesser tax was paid only on the basis of his declaration, cannot be accepted merely because liability to pay tax to the Government is on the selling dealer.

7. With regard to the second contention it is true that in the sub-section under question or in the declaration there is no obligation for the purchasing dealer to

sell within the State the finished goods manufactured. Duty is to utilise the above raw materials for the manufacture of finished products within the State. The petitioner had used the raw materials purchased on the basis of the declaration only for the manufacture of finished products within the State. The second condition is that it should be for sale. It is not disputed that the finished products were only transferred to other States by way of branch transfer even though it may be finally sold. But in the first proviso which is incorporated in the declaration also there is a specific condition that such finished products should be liable to tax either under the Kerala General Sales Tax Act or under the Central Sales Tax Act. Admittedly, majority of the finished goods manufactured in the petitioner's factory using these raw materials during the period were transferred to outside the State by way of branch transfer without any liability to pay tax either under the Kerala General Sales Tax Act or under the Central Sales Tax Act. It is clearly mentioned in the declaration which was duly verified and certified as correct and complete to the best of the knowledge and belief of the authorised person of the petitioner-company that finished products are liable to tax under the Kerala General Sales Tax Act or under the Central Sales Tax Act. Since major part of the finished goods were transferred on the basis of branch transfer to other States, it was not liable to pay sales tax either under the Kerala General Sales Tax Act or under the Central Sales Tax Act, during the relevant period.

8. The further contention of the petitioner is that even though they did not pay tax on the consignment sales, the finished goods as such are liable to tax under the Kerala General Sales Tax Act or the Central Sales Tax Act, as the case may be. Only because it was consignment transfer sales tax was not paid. In our view, this contention cannot be accepted. It is not a case where the finished goods are liable to tax and then exempted by way of notification. Here, the finished goods for which penalty was imposed were despatched outside the State on consignment basis. That part of the goods which are transferred out of the State are not liable to tax under the Kerala General Sales Tax Act or under the Central Sales Tax Act during the relevant period. The concession was granted only on the understanding that finished goods will be liable to tax under the Kerala General Sales Tax Act or under the Central Sales Tax Act or when the finished products are exported out of the territory of India. Therefore, the second contention of the petitioner also cannot be accepted as there is clear violation of the solemn declaration filed by them.

9. The last ground urged by the petitioner is regarding the quantum of penalty imposed on the petitioner. It is submitted that imposition of penalty u/s 45A is a proceeding penal in nature and there is no deliberate intention to evade payment of sales tax. It is further contended that even if there is violation of the declaration filed by the party and consequently, there was loss to the revenue, there was no intentional act on the part of the petitioner to evade tax. As such no penalty should have been levied and even if penalty is levied there is no case of imposition of maximum penalty. Petitioner relied on the decision of the Supreme Court in *Hindustan Steel Ltd. v. State of Orissa* [1970] 25 STC 211

wherein it was held that liability to pay penalty does not arise merely upon a technical default. The Supreme Court held as follows :

".....An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the company was not a dealer....."

10. The question to be considered is whether there is only a technical defect which resulted in loss of revenue without any mens rea on the part of the petitioner. Here, there is a definite false declaration under form 18 that finished goods will be liable to sales tax. But goods were removed on branch transfer/consignment basis making the goods not liable to pay sales tax under both the Acts. So unlike the case decided by the Supreme Court where there was no loss of revenue but only a technical breach, here there is evasion of tax and the solemn declaration filed was proved to be wrong. On the basis of the wrong declaration the selling dealer collected only 4 per cent sales tax. Petitioner-company is a public limited company with large turnover and factories and branches situated in various States in India with well-educated trained officers and eminent legal consultants. It cannot be accepted that the company committed a bona fide error and company was not aware that if the finished goods are not liable to tax under the Kerala General Sales Tax Act or the Central Sales Tax Act, they are not entitled to get concession. When the assessee decided to transfer the goods on consignment basis that part of the goods became non-taxable and they became disentitled to get the benefit of Section 5(7) and their declaration became incorrect; At least the petitioner could have paid the difference in tax after informing the authorities as soon as they decided to transfer the goods on consignment basis to outside the State without payment of sales tax.

11. The original authority correctly put his conclusion in its order as follows:

"Similarly the second proviso says, that part of the turnover of seller-dealer is eligible for concessional rate of 4 per cent sales tax if and only when the seller furnishes the declaration in the prescribed manner in the prescribed form rendered by the purchaser, expressing his intention of utilisation of raw materials

and disposal of products produced out of such raw materials. In other words, the seller of raw material cannot get concession, unless he furnishes to the assessing authority the declaration in the prescribed form in the prescribed manner. Similarly the purchaser or producer is not entitled to the concessional rate of tax on purchase of raw material unless the production is inside the State and sale is liable to tax either under the Kerala General Sales Tax Act, 1965 or Central Sales Tax Act, 1956.

The Board of Revenue in the revisional order also considered all the contentions raised by the parties and found that there was evasion. The Board of Revenue in the revisional order held as follows ;

".....form 18 contains a declaration to be signed by the applicant that the goods purchased is intended to use in manufacture inside the State for sale and liable to tax under the Kerala General Sales Tax and Central Sales Tax Acts. When such a declaration is furnished and the sale is not so liable to tax, it carries the necessary *menu rea* for the imposition of penalty....."

After considering the entire contentions all the authorities below clearly found that there was evasion on the part of the petitioner and imposition of maximum penalty is justified. The effect of explanation 1 and penalty charged were also considered by the learned single Judge in the correct perspective. The learned single Judge after considering the findings had also confirmed the findings. We do not think that there is any reason to interfere with the findings of the three statutory authorities in imposing maximum penalty on the petitioner on the facts and circumstances of the case. Exhibit P4, second revisional order, correctly modified the order as the maximum amount of penalty is not on the entire tax payable on the raw materials, but only on the tax sought to be evaded.

12. Exhibits P1 and P2 orders as modified by exhibit P4 order were correctly accepted and confirmed by the learned single Judge. In the impugned judgment learned single Judge held as follows :

"...The petitioner evaded payment of tax by abusing or misusing form 18 declaration, and by transferring the manufactured goods to its branches in other States without making them subject to levy of sales tax under the Act.

12. As regards Section 45A, the interpretation given by the three departmental authorities is perfectly in accordance with the language of the section, and it should be remembered that Under this section, the burden of proving that any person is not liable to the penalty under this section shall be on such person. In view of explanation 1 to Section 45A(1)(g) and in view of the fact that the petitioner was found to have evaded sales tax, it is certainly liable for imposition of penalty u/s 45A..."

No circumstances are made out by the learned counsel for interference exercising extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India. The learned single Judge also has taken into consideration

all the facts and circumstances urged by the assessee while dismissing the original petitions.

We see no grounds to interfere with the impugned judgment. The writ appeals are, therefore, dismissed.