

(2016) 07 KL CK 0065

In the High Court Of Kerala

Case No : W.A. No. 1978 of 2014 in WP (C) .696 of 2010

M/s. Ayodhya Jewllers

APPELLANT

Vs

The Intelligence Officer

RESPONDENT

Date of Decision : 25-07-2016

Acts Referred:

Kerala Value Added Tax Act, 2003 — Section 67, 74

Citation : (2016) 3 KerLJ 599 : (2016) 3 KLT 748

Hon'ble Judges : Mr. Antony Dominic and Mr. Dama Seshadri Naidu, JJ.

Bench : Division Bench

Advocate : Sri. Harisankar V. Menon, Smt. Meera V. Menon and Sri. Mahesh V. Menon, Advocates, for the Appellant; Shoba Annamma Eappen, Sr.Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Dama Seshadri Naidu, J.—Facts in Brief: The appellant, a jeweler, is an assessee under the Kerala Value Added Tax Act (?KVAT Act?). In the inspection carried out by the departmental authorities at the appellant's premises on 17.1.2009, they detected certain tax evasion. Next, the authorities issued Exts.P2 and P3 notices to the appellant proposing to levy a penalty for the year 2008-2009 as per Section 67 of the Act.

2. Under the compelling circumstances, to obviate any coercive departmental proceedings, the appellant has opted for compounding the offence under Section 74 of the Act. He did file Ext.P4 application expressing his willingness to pay Rs. 2 lakh as compounding fee for the assessment year 2008-2009.

3. As the record reveals, the Intelligence Officer, Department of Commercial Taxes, i.e., the first respondent, insisted on the appellant's paying compounding fee at Rs. 4 lakh. The enhanced demand was based on the subsequent amendment to Section 74 of the Act. Evidently, the amendment was after the assessment year, but before the appellant opted for compounding.

4. Having paid the compounding fee of Rs. 4 lakh rupees under protest, the appellant filed W.P.(C) No.696 of 2010; it was dismissed by a learned Single Judge of this Court. Aggrieved, the appellant has filed the present Writ Appeal.

Submissions:

Appellant:

5. Sri Harisankar V. Menon, the learned counsel for the appellant, has strenuously contended that the compounding fee is directly related to the period when the offence of tax evasion was alleged to have been committed by the assessee. According to him, under Section 74 of the Act, the assessee was to pay as compounding fee a sum of money equal to the tax so payable. It was besides paying the tax said to have been evaded.

6. The learned counsel has laid emphasis that the compounding fee should always be equal to the tax alleged to have been evaded, but only subject to two stipulations: the minimum of compounding fee shall not be less than Rs. 500/-, and the maximum thereof shall not be beyond Rs. 2 lakhs-in that assessing year.

7. In elaboration of his submissions, the learned counsel has further contended that the offence was said to have been committed during 2008-2009. Given the said admitted fact, the compounding fee should also be collected as was prevalent during the same period. The subsequent enhancement of the compounding fee, contends the learned counsel, cannot increase the appellant's liability. His singular contention is that the assessing authority's demand for the enhanced compounding fee based on the subsequent amendment cannot be sustained.

8. To hammer home his contention, the learned counsel has placed reliance on The Intelligence Officer, Central Intelligence Squad, Agricultural Income Tax and Sales Tax, Ernakulam and another v. Hotel Ambassador, 45 STC 425 (para 6), Commissioner of Wealth-tax, Amritsar v. Suresh Seth, AIR 1981 SC 1106 (para 11), Mayarani Punj v. Commissioner of Income Tax, Delhi (S.C.), 65 STC 416, P. D. Sudhi v. Intelligence Officer, Agricultural Income-Tax and Sales Tax, Mattancherry and others, 85 STC 337, K.M. Pareeth v. Kerala State Electricity Board & Ors., 2014 (3) KLJ 106 (Para 6).

Revenue:

9. Smt. Shoba Annamma Eapen, the learned Government Pleader, on the other hand, has contended, with equal vehemence, that the appellant himself volunteered to compound the offence only to ward off graver penal consequences. According to her, the question of the appellant's paying the enhanced compounding fee under protest does not arise, for compounding is nothing but a voluntary offer by the assessee. She has likened the compounding to a compromise-voluntary and non-coercive-which is non-justiciable.

10. The learned Government Pleader, in further elaboration of her submissions,

has submitted that the reckoning point for determining the quantum of compounding fee is the date when the appellant has volunteered to compound the offence. In the present instance, by the time the appellant volunteered, Section 74 stood amended. It is her specific contention that any lenient or liberal interpretation of Section 74 of the Act would amount to putting a premium on dishonesty. In other words, an assessee compounds an offence as a matter of self-preservation only when 5 2014 (3) KLJ 106 (para 6) the offence is made out: It is not an act of generosity. Ipso facto, the offender cannot benefit, say, by taking recourse to any hyper-technicalities.

11. Summing up her submissions, the learned Government Pleader has drawn our attention to M/S. United Construction Co. v. Intelligence Officer and another,⁶ a decision rendered by a learned Single Judge on the same point.

Impugned Judgment:

12. Indeed, a perusal of the impugned judgment reveals that the learned single Judge, after examining all the precedents cited at the Bar by the appellant/petitioner, has accepted, in the end, the line of reasoning adopted by this Court in WPC No.38740/2010. Further, the learned Single Judge has distinguished on facts the decisions relied on by the appellant, essentially holding that in all those instances the very charging provisions were brought on to the statute book at a later point in time.

13. Heard the learned counsel for the appellant and Smt. Shoba Annamma Eappen, the learned Senior Government Pleader, apart from perusing the record.

Issue:

For compounding an offence, which of the compounding fees should be paid by the assessee: the one prevailing when the evasion took place or the one prevailing at the time of actual compounding?

Discussion:

14. With no prefatory prevarication, we may examine the issue in its sum and substance. The Intelligence Officer inspected the appellant's business on 17.01.2009, spotted tax evasion for the assessment year 2008-2009, and issued Ext.P2 & P3 notices proposing to levy penalty under Section 67 of the Act. As a result, the appellant has volunteered to have the offence compounded under Section 74 of the Act. But the authorities demanded the compounding fee of Rs. 4 lakh, instead of Rs. 2 lakh. The proposed penalty has come to Rs. 52,92,828/-

15. To put the issue in perspective, we may observe that for the assessment year 2008-09, for which period the evasion pertains, the compounding fee was Rs. 2 lakh. By the time the inspection took place, i.e., 17.01.2009, and by the time Exts.P2 & P3 notices were issued, i.e., 06.09.2009 and 13.06.2009 respectively, the fee was enhanced to be Rs. 4 lakh.

16. Indeed, the fee under Section 74 was Rs. 2 lakh till 31.03.2009, but with

effect from 01.04.2009, it was raised to Rs. 4 lakh, as is evident from Finance Act, 2009. The question is whether the fee as prevailing during the assessing year of which evasion is complained should be paid. In the alternative, which fee should the assessee pay, the one prevailing when the evasion was detected or the one, when the assessee compounded the offence? In the former case it is Rs. 2 lakh; in the latter, Rs. 4 lakh.

17. Section 74 of the VAT Act as on 31.03.2009 read as follows:

74. Composition of offences. - (1) The assessing authority or other officer or authority authorised by the Government in this behalf may accept from any person who has committed or is reasonably suspected of having committed an offence against this Act, other than those specified under clause (e) of sub-section (1) or clauses (b), (c) or (d) of sub-section (2) of section 71, by way of compounding of such offence:-

(a) where the offence consists of the evasion of any tax payable under this Act, in addition to the tax so payable a sum of money equal to the amount of tax so payable subject to a minimum of rupees five hundred and maximum of rupees eight lakh: and Provided that the maximum compounding fee collectable against a single offence spread over several return periods in a financial year shall be two lakh rupees.

(b) in other cases, a sum of money not exceeding ten thousand rupees.

Provided that the Commissioner may by order authorise any officer to compound the offence under this section on payment of a reduced amount.

(2) On payment of such amount under sub-section (1), no further penal or prosecution proceedings shall be taken against such person, in respect of that offence.

(emphasis supplied)

18. Statutorily speaking, the fee was enhanced to Rs. 4 lakh with effect from 01.04.2009. It pays to remember that the assessment of which evasion was complained ended on 31.03.2009.

19. In Hotel Ambassador (supra) Section 45A of the Kerala General Sales Act, an analogous provision, fell for consideration. While interpreting Section 45A, a learned Division Bench of this Court has also considered the impact of Section 19 of the Act, which provides for an escaped assessment. In that process, their Lordships have held that a reading of Section 45A will show that it is a separate and independent Section and that irrespective of whether the assessment has been completed or not, it is open to the requisite authority to take action under the said section provided the conditions for action are satisfied. Referring to the facts, the learned Division Bench has observed that the contraventions which took place during the assessment years 1973-74 and 1974-75, but the Section was introduced only with effect from 27th October 1975.

20. The Revenue, however, raised-as done now-a plea that for Section 45A what is material is not the contravention by the assessee, but the satisfaction of the officer. And that satisfaction was only after the commencement of Section 45A. Rejecting the Revenue's contention, the learned Division Bench has felicitously observed that Section 45A requires for imposing penalty a contravention by the assessee, on which is to be superimposed a satisfaction by the officer. One without the other cannot attract the liability for a penalty. The satisfaction itself is regarding a contravention, which, in that case, had taken place before the commencement of the section. The observation goes further to the effect that the contravention is the one regarding which a criminal liability is attracted under Section 46 of the Act. That should make it particularly necessary that the contraventions are not viewed in the light of a provision not in force during its commission.

21. In *Suresh Seth* (supra) the issue is that the assessee defaulted in filing returns for certain years. The taxing authority levied penalty for the complete period of default as if it were a continuing offence. The question that fell for consideration before the Apex Court was whether omission to file a return is a continuing offence.

22. The contention of the Department is that the assessee, who had to file a return for the assessment year 1965-66 had not filed the same until March 13, 1971. Therefore, the penalty had to be computed for the period up to April 1, 1969, under Section 18 of the Income Tax Act, as it stood during that period. Repelling the Department's contentions, *Suresh Seth* (supra) has held as follows:

"12. A liability in law ordinarily arises out of an act of commission or an act of omission. When a person does an act which law prohibits him from doing it and attaches a penalty for doing it, he is stated to have committed an act of commission which amounts to a wrong in the eye of law. Similarly, when a person omits to do an act which is required by law to be performed by him and attaches a penalty for such omission, he is said to have committed an act of omission which is also a wrong in the eye of law. Ordinarily, a wrongful act or failure to perform an act required by law to be done becomes a completed act of commission or omission, as the case may be, as soon as the wrongful act is committed in the former case and when the time prescribed by law to perform an act expires in the latter case and the liability arising therefrom gets fastened as soon as the act of commission or of omission is completed. The extent of that liability is ordinarily measured according to the law in force at the time of such completion. In the case of acts amounting to crimes the punishment to be imposed cannot be enhanced at all under our Constitution by any subsequent legislation by reason of Article 20(1) of the Constitution, which declares that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In other cases, however, even though the liability may be enhanced it can only be done by a subsequent law (of course subject to the Constitution) which either by

express words or by necessary implication provides for such enhancement..."

(emphasis supplied)

23. It is further pertinent to observe that in *Maya Rani Punj* (supra), a Three-Judge Bench of the Supreme Court has affirmed the above-quoted ratio of *Suresh Seth*. It has, however, further examined what a continuing offence is. It has, in that context, quoted with approval its observation in *State of Bihar v. Deokaran Nenshi*, 1973 Cri. LJ 347 in which it is held that a continuing offence is susceptible to continuance and differs from the one committed once and for all.

24. From the above ratio, we can deduce two propositions:

(1) If it is a continuing offence, the penalty applicable at the terminus is the penalty the erring assessee shall be mulcted with;

(2) If it is non-recurring (for want of a better expression), the liability stipulated when the offence has been committed alone shall apply. We shall, in a while, examine whether either of these contingencies applies to the case on hand.

25. In *K.M. Pareeth* (supra) a learned Division Bench, to which one of us (Antony Dominic, J) is a party, has examined the interplay between a substantial statutory provision and Section 6 of the General Clauses Act. The proposition is that the visiting of a penalty upon an offender is determined based on the law that prevailed when the offence was committed. Therefore, even if there is a subsequent change of law, that cannot affect the proceedings against the offender.

26. The Revenue has, however, relied on an unreported judgment of a learned Single Judge in *United Construction Co.*, (supra). While interpreting Section 74 of the Act under, we may say, identical circumstances, the learned Single Judge has held that Section 74 only provides a facility to the assessee for compounding any offence detected in lieu of prosecution. The law which was prevalent as on the date of exercising the option, observes the learned Single Judge, is the amended provision. Because the assessee knew of the amendment but exercised the option by paying the enhanced rate of compounding fee, he cannot be permitted to turn around and contest the quantum of the penalty, concludes the learned Single Judge.

27. From the *United Construction Co.*, we may gather that the reasoning was based on the premise of estoppel: Since the assessee has opted for compounding at the amended, enhanced rate with his eyes wide open, the assessee is estopped from asserting to the contrary.

28. Indeed, the learned Government Pleader has strenuously contended that compounding is akin to compromise and that the concept of payment under protest is inapplicable therefor. We need not refer to this plea in detail for the appeal may have to fall on a fundamental ground, which obviates any further discussion on the technicalities such as the absence of any luxury to pay under

protest, when the payment is voluntary and compounding, a quasi-compromise.

29. Verily the proposition is pellucid in Suresh Seth (supra): With acts amounting to crimes, the punishment to be imposed cannot be enhanced under our constitutional scheme by any subsequent legislation because of Article 20(1), which declares that no person shall be subjected to a penalty greater than that might have been inflicted under the law in force during the commission of the offence. But the observation was in the context of an offence and penalty. Here, the appellant chose to pay a compounding fee under Section 74 of the Act; fee jurisprudentially carries a different connotation from what a penalty does. We may further lay emphasis that Article 20 (1) of the Constitution, recognising one of the common law principles—the doctrine of *ex post facto* laws—has dealt with enhanced punishments and penalties, but not fees. In *Hotel Ambassador*, too, the penalty fell for consideration, not a fee.

30. Compounding is in relation to an offence; what was imposed, however, is fee. No quarrel can we have with the proposition that imposing fee is a taxing aspect of the State under Article 265 of the Constitution of India. Equally indisputable is that fee can be levied even retrospectively as it falls beyond the mischief of Article 20(1) of the Constitution, which concerns punitive sanctions: punishment and penalty, neither of which is fee. Viewed alternatively, we may, before parting with the matter, observe that the appellant has not made out any positive case that the nomenclature notwithstanding, what is being collected is penalty rather than fee.

31. That said, it seems, to us, the discussion on the supposed retrospectivity of Section 74 of the Act is besides the point. Here, at a particular point in time the assessee compounded the offence; it entails two things: if the consequences are penal or punitive, the law as it stood when the assessee committed the offence, so to say, should apply; on the other hand, if the consequences are civil or nonpunitive, the law as it stood when the assessee made amends—that is, volunteered to compound the offence—should apply.

32. In the facts and circumstances, we hold that the compounding fee as prevailing at the time of the assessee's deciding to pay it shall alone apply. As a result, we find no legal infirmity in the judgment impugned. Accordingly, we dismiss the appeal. No order on costs.