(2013) 11 KL CK 0031

In the High Court Of Kerala

Case No : R.P. No. 258 of 2012 in S.T. Rev. No. 11 of 2007

M/s. South Asean Trade Links APPELLANT

Vs

The State of Kerala RESPONDENT

Date of Decision : 08-11-2013

Acts Referred:

Citation : (2013) 11 KL CK 0031

Hon'ble Judges : Manjula Chellur, J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : Raju Joseph and Sri. C.N. Midhun, for the Appellant; Bobby John Pulikkaparambil, Government Pleader, for the Respondent

Judgement

K. Vinod Chandran, J.—The essential question that was raised and considered in the Sales Tax Revision was whether on the basis of suppression of turnover detected on inspection, the assessee; the second seller of goods taxable at the point of first sale, could be mulcted with the liability to pay tax, since the evasion of tax would be by the first seller. Definitely the said question could only be answered in the negative as a pure question of law. But in the instant case it was found, on facts, by the Tribunal that the alleged second seller was in fact, the first seller. The revision was dismissed affirming the fact finding authorities'' orders. Admittedly the goods involved, being wheat and resin, are goods taxable at the first point of sale within the State as per Section 5(1)(i) of the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the Act") read with Entry 9A of the Second Schedule. The revision petitioner, who is styled as the assessee in the order under review, is the review petitioner herein. The contention raised in the revision was that the assessee was the purchaser from a registered dealer and was only a second seller within the State. The mere fact that the first seller, being the registered dealer from whom the assessee purchased the goods, did not pay the tax, cannot result in an assessment being made against the assessee, was the contention. The assessee filed its returns u/s 17(4) of the Act and on the allegation of suppression, detected on inspection, penalty proceedings were initiated, which concluded in the assessee compounding the offence. Subsequently the assessment made u/s 17(4) was re-opened u/s 19(1) of the Act and the tax sought to be evaded was assessed in the name of the assessee finding the assessee to be the first seller in the State. In fact the alleged seller, from whom the assessee is alleged to have made the purchases, filed ''Nil'' returns. The Tribunal rejected the claim of second sale made by the assessee and on facts found that the alleged transaction of first sale was in fact bogus. The assessee having failed to prove the purchase from the registered dealer, the exemption claimed in the return filed u/s 17(4) was found to be irregular. This Court found that the claim of second sale made by the assessee was only on the basis of an invoice and suspicion having been raised on the veracity of the invoice, the assessee ought to have proved the first sale by better evidence, that is, movement of goods from the alleged first seller, especially since the quantity of goods were quite substantial. This Court also found that the invoice relied on was not one under the Kerala General Sales Tax Rules, 1963 (hereinafter referred to as "the Rules"). The discovery of blank sale bill of the alleged first seller from the premises of the assessee, noticed by the Tribunal, was also taken into account by this Court. It was in such circumstance that the finding of the Tribunal, rendered on appreciation of the facts leading to the re-opening of the assessment, was confirmed and the Sales Tax Revision dismissed.

2. The review petition was filed contending that on the very same transaction the Department had taken proceedings against the first seller, one M/s. Star Trading and a penalty order and assessment order were passed, as evidenced by Annexure-G and Annexure-H. The review came before the Bench which rejected the Sales Tax Revision, on 26.03.2012 and the same was adjourned to 30.03.2012, on which date itself a counter affidavit was placed on record by the State, contending that the orders relied on by the review petitioner at Annexure-G and Annexure-H were in fact set aside by the appellate and revisional authorities in appeal and revision. The Department also took strong exception to a review being entertained, contending that there are no grounds made out to review the order. Subsequently though the matter was posted on a number of occasions, the same was adjourned on the request made by the review petitioner. We notice that the review petition was never admitted and was being adjourned at the request of the review petitioner.

3. Subsequently, the review petitioner placed on record an order dated 30.03.2013, produced as Annexure-H (though Annexure-H was produced earlier, again this order was numbered as Annexure-H; we refer to it as "Annexure-J") by an Interlocutory Application (I.A. No. 1930 of 2013) dated 27.07.2013. The said Annexure-J order dated 30.03.2013 is one in which penalty has been imposed on M/s. Star Trading, the alleged first seller as contended by the assessee. By the said order, the Intelligence Officer found that with respect to the entire suppression of sales turnover detected on inspection of M/s. Star Trading, Cochin and its branch at Kottayam, it is found that the first seller of wheat during the assessment years 1998-1999 to 2000-2001 is M/s. Star Trading

itself. A number of transactions are seen pertaining to M/s. Star Trading and the total turnover suppressed for the year 1998-99 as disclosed in Annexure-J, is Rs. 25,66,69,108/-, which comprises the turnover suppression alleged against the review petitioner/assessee, is the contention raised by the review petitioner. The penalty order having found the turnover assessed as first sale of the review petitioner; to be actually the first sale of M/s. Star Trading, the final order in the Sales Tax Revision is sought to be reviewed.

4. Before we look at the review, we have to necessarily notice the manner in which the penalty proceedings were proceeded with after remand.

5. Evidently before the penalty proceedings were taken up for consideration, this Court had passed the final order in the Sales Tax Revision filed by the review petitioner confirming the order of the Tribunal upholding the re-opening of the assessment of the review petitioner for the year 1998-99 assessing a turnover of Rs. 2,29,23,000/- alleged to have been purchased from M/s. Star Trading; as the actual turnover of the review petitioner. The Intelligence Officer delves upon the report of the Investigation Department placed on record in the Sales Tax Revision case, which was fleetingly referred to in the order and relied upon by this Court to understand only whether the physical movement of goods as contended by the assessee was practically possible. It was also noticed in the final order of this Court, that the enquiry report was called for; with the intention to alert the authorities about the misuse of controlled commodities. But, the Intelligence Officer says so in paragraph 35 of the order:

The Investigation department had simply misguided the Hon''ble High Court of Kerala as well as the Commercial Tax department by submitting fraudulent conclusions that M/s. Star Trading, HIG-37 is a bogus firm and all the transactions are fraudulent inland letter of credit transactions.

The Intelligence Officer then goes on to state the proceedings with respect to S.T. Rev. No. 11 of 2007 filed by the revision petitioner and also notices the review filed by the assessee. In page 40, the Intelligence Officer makes a statement that:

The Hon''ble High Court of Kerala has admitted the Review Petition filed by M/s. SATL and issued directions to the Government Pleader to get the fresh order from the Intelligence Officer (IB), Commercial Taxes, Kottayam.

6. The Intelligence Officer also refers to a writ petition filed by the assessee, numbered as W.P.(C). No. 10789 of 2012, wherein a prayer was made to direct the Intelligence Officer (IB), Commercial Taxes, Kottayam to hear the assessee also before finalizing the penalty order of M/s. Star Trading. It is also stated that, hence notice was issued to the assessee also in the penalty proceedings against M/s. Star Trading. The Intelligence Officer also had the benefit of going through the order passed in S.T. Rev. No. 11 of 2007 and, inter alia, he comes to the following conclusion, as is evident in page 41, para 2:

2. The Hon''ble High Court of Kerala had issued directions to enquire about the disputed sales turn over to the extend of Rs. 2.52 Crores wheat and resin purchased by M/s. South Asean Trade Links, Ernakulam from M/s. Star Trading, HIG-37, Panampily Nagar, Kochi-36 and M/s. A-One Traders, Vattanappally in the Assessment year 1998-1999 and also to enquire subsequent sales transactions of M/s. South Asean Trade Links in the Assessment year 1998-1999.

7. We are distressed to note that effectively the Intelligence Officer has sat in appeal over the final order of this Court, which confirmed the fact finding order of the Tribunal. With respect to the transaction with the assessee, when the Tribunal has confirmed the assessment of Rs. 2,29,23,000/- alleged to have been purchased from M/s. Star Trading on the assessee itself; it goes without saying that it did not lie in the mouth of the Intelligence Officer to find that the said transaction is actually one which M/s. Star Trading had made the first sale of. We find that a surreptitious attempt has been made by the Intelligence Officer to get over the order of this Court in the Sales Tax Revision by stating that "the High Court has admitted the Review Petition filed against the order and has also issued directions to the Government Pleader to get a fresh order from the Intelligence Officer" (sic).

8. We sought for explanation from the Intelligence Officer, which is filed by an affidavit dated 08.10.2013. The Intelligence Officer contends that the said observation was on the basis of a letter dated 22.01.2013 received from the Advocate General''s Office. However, the said letter is not produced along with the affidavit. He seeks to explain the above statement that he was under a bona fide belief that this Court had admitted the Review Petition and has given direction to the Government for speedy disposal of the long pending remanded case involving huge revenue related to M/s. Star Trading. The letter said to have been issued from the Advocate General''s Office has not been produced and we see that no such order was passed by this Court in the review petition.

9. As we noticed above, the review petition was not even admitted and the same was adjourned only on the request of the review petitioner. It is also pertinent in this context that the Intelligence Officer has issued notice to the review petitioner, purportedly on the filing of W.P.(C). No. 10789 of 2012. We have called for the Judges Papers of the said writ petition and perused the same. No orders were in fact passed in the said writ petition also, in which the review petitioner claimed for issuance of a notice and hearing in the penalty proceedings initiated against M/s. Star Trading. The writ petition was filed on 03.05.2012 and on 04.05.2012 when it came up for admission, the same was merely posted after vacation. Definitely copy would have been served on the State and the Intelligence Officer proceeded to issue notice on 18.05.2012 itself. Then the writ petition came up on 22.05.2012, when the Government Pleader was directed to get instructions. On the next posting date, i.e., 24.05.2012, the petitioner sought permission to withdraw the writ petition. The Intelligence Officer suo motu issued notice on coming to know of the writ petition filed, without any orders being

issued from this Court, when there is no such proceeding permissible under the Act or the Rules. It is pertinent that the Intelligence Officer has sufficient authority to summon any person to adjudicate upon a matter before him; but it is not that power which has been exercised. He does not examine the assessee, but merely allows them to participate in the proceedings initiated against another. It is also unfortunate that the Intelligence Officer concludes that the High Court was misguided by the Investigation Department when the report of the Department was only fleetingly referred to, as noticed earlier.

10. With reference to the directions said to have been made by this Court referred to above (para 2 in page 41), the Intelligence Officer contends that it is with reference to the order under review. We do not see any such direction in the order under review. We are of the opinion that the affidavit filed by the Intelligence Officer does not at all explain as to how the Intelligence Officer derived powers to sit in judgment of the final order in revision; filed by the alleged second seller, M/s. South Asean Trade Links, the assessee herein. However, we are not sitting in appeal or revision over the order of the Intelligence Officer and we are precluded from considering the same on merits. However, we have to notice that the Intelligence Officer has exceeded his authority and has made deliberate incorrect statements in the order dated 30.03.2013.

11. We noticed in the order under review that the Department had, while re-opening an assessment completed u/s 17(4) of the Act, invoked Section 19(1) of the Act to re-open the assessment without taking recourse to Section 17(5A), which mandates payment of thrice the differential amount of tax as penalty. We also expressed our dismay, but did nothing further, since it was the Department itself who initiated proceedings for re-opening and passed assessment ignoring the mandate u/s 17(5A) and even on the first appellate authority deleting the additions made, the Department chose not to file a further appeal before the Tribunal. The Tribunal order having been confirmed by us in revision, now the Intelligence Officer enters a contrary finding with respect to the turnover found by the Tribunal and confirmed in revision by this Court, to be that of M/s. South Asean Trade Links, the assessee herein who is the alleged second seller. We feel that the Commissioner of Commercial Taxes ought to conduct an enquiry into the issues highlighted by us and as to the statements made by the Intelligence Officer in the order dated 30.03.2013 regarding the orders said to have been passed by the High Court, which we have found to be not in existence, and the communications from the Advocate General''s office. Now dealing with the review petition, what the review petitioner seeks is to review the final order passed in the Sales Tax Revision on the basis of a penalty order passed by the Intelligence Officer. Annexure-J is passed in total disregard to the final order passed in the Sales Tax Revision; though the said order was specifically noticed and read by the Intelligence Officer. We do not think that this would be a matter which would come within the contours of the jurisdiction conferred on us u/s 41(7) of the Act. The review petitioner contends that he has discovered new and important facts,

which, after exercise of due diligence, were not within the knowledge of the review petitioner and hence, could not be produced by him. As evident from the pleadings in the review petition, the orders relied on, being the assessment order and the penalty order passed against the alleged first seller, were even at that point of time (i.e., at the time of filing the review), reversed in appeal and revision. In fact the revisional order is of the year 2007 and the appellate order is of the year 2008, both long before the consideration of the Sales Tax Revision by this Court. The review petitioner then relies on a subsequent order passed by the Intelligence Officer on remand, wherein the procedure contemplated under the Act was given a complete go-by and attempt was also made to reverse the findings rendered in the final order passed by this Court in the Sales Tax Revision; which was done on the false pretext of complying with the directions of this Court to re-do the matter afresh. We are convinced that there is absolutely no reason to review the order passed in S.T. Rev. No. 11 of 2007.

The review petition is dismissed.

A copy of this order shall be forwarded to the Commissioner of Commercial Taxes, Thiruvananthapuram, forthwith, who shall conduct a due enquiry and place his report before this Court within three months from today. Registry is directed to place the matter before Court on expiry of the three month period.

