
(2009) 09 KL CK 0028
In the High Court Of Kerala
Case No : ST. Rev. No. 327 of 2008

N. Hamza

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 10-09-2009

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 30B, 30B(3), 30B(4)

Citation : (2011) 39 VST 469

Hon'ble Judges : V.K.Mohan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : T.M. Sreedharan and V. P. Narayanan, for the Appellant; Mohammed Raffiq, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

C. N. Ramachandran Nair, J.—The question raised in the revision filed by the assessee is, whether the Tribunal was justified in sustaining the penalty levied u/s 30B(4) of the Kerala General Sales Tax Act, 1963 (for short, "the KGST Act") on the petitioner. We have heard Sri T. M. Sreedharan, learned counsel appearing for the petitioner and the Government Pleader appearing for the respondent.

2. The petitioner is a timber merchant-cum-owner of three trucks transporting various consignments of timber from outside Kerala to the dealers in Kerala. Based on the declarations furnished, the Department made enquiries with the consignee, viz., the dealer for whom the petitioner brought the timber. However, he denied having transported the timber through the petitioner's trucks. Consequently, the Department issued notice u/s 30B(4) of the KGST Act and proposed to levy tax and penalty in terms of the said provisions read with sub-section (3) of section 30B of the KGST Act. Even though the petitioner raised objection, tax was levied along with penalty at twice the amount of such tax. Though in first appeal, the order of the Intelligence Officer imposing penalty and tax was confirmed, in second appeal, the petitioner only prayed for cancellation of penalty, which was declined by the Tribunal, holding that the penalty was

rightly levied under sub-section (4) read with sub-section (3) of section 30B of the KGST Act. It is against this order, the petitioner has filed revision petition before this court.

3. The contention of counsel for the petitioner is that section 30B(4) does not provide for any penalty and it only provides for levy of tax in respect of the consignment transported. According to the petitioner, the manner of levy as provided in sub-section (3) stated in sub-section (4) of section 30B does not take in penalty and it only adopts the procedure referred to in sub-section (3). The Government Pleader, on the other hand, submits that the manner of assessment and recovery of tax provided in sub-section (3) always includes penalty subject to the upper limit provided therein and by virtue of incorporation of sub-section (3) in sub-section (4), penalty is mandatory and discretion is only with regard to the quantum. In order to decide the controversy, we have to necessarily refer to the relevant sub-sections of section 30B of the KGST Act and therefore, the said section and sub-sections are extracted hereunder :

30B. Transit of goods through the State and issue of transit pass.-

(1) When a vehicle or vessel carrying goods from any place outside the State and bound for any place outside the State passes through the State, the owner or driver or person in-charge of such vehicle or vessel shall obtain a transit pass in the prescribed form for such goods from the officer-in-charge of the first check-post after his entry into the State and deliver it to the officer-in-charge of the last check-post before his exit from the State.

(2) If the owner or driver or person in-charge of such vehicle or vessel fails to deliver the transit pass for such goods referred to in sub-section (1) to the last check-post, it shall be presumed that such goods which are liable to tax under this Act have been delivered within the State for sale :

Provided that where the goods carried by such vehicle or vessel are, after their entry into the State, transported outside the State by any other vehicle or conveyance, the onus of proving that goods have actually moved out of the State, shall be on the owner or driver or person in-charge of the vehicle or the vessel, as the case may be.

(3) Where it is presumed under sub-section (2) that the goods carried in a vehicle or vessel have been delivered within the State for sale by the owner or driver or person in-charge of the vehicle or vessel, such owner or driver person in-charge of the vehicle or vessel shall be jointly or severally liable to pay tax which shall be assessed and recovered in accordance with the relevant provisions of this Act, irrespective of the limit of any turnover together with an amount of penalty not exceeding twice the amount of such tax as may be assessed, after having given to the person or persons aforesaid an opportunity of being heard by the assessing authority under whose jurisdiction the check-post is situate.

(4) Where any person consigns any goods or transports any goods from another

State into the State and where the particulars furnished in the declaration prescribed in clause (b) of sub-section (2) of section 29 are false or the consignor or purchaser stated therein is found to be bogus or non-existent or is not traceable or denies such purchase, it shall, unless the consignor or the owner of the vehicle or the person in-charge of the vehicle proves to the satisfaction of the assessing authority that the particulars furnished in the declaration are true, be presumed that such goods which are liable to tax under this Act have been sold in the State by the consignor or the owner of the goods or the owner or driver or person in-charge of the vehicle or the person in-charge of the goods or all of them jointly and they shall be jointly or severally liable to pay tax on such sales which shall be assessed and recovered in the manner provided in sub-section (3).

(5) For the purpose of this section, the owner or driver or person in-charge of the vehicle or vessel shall, unless he is a registered dealer under this Act, be deemed to be a registered dealer for assessment of tax under this Act.

4. The question to be considered is whether penalty could be levied against a person proceeded under sub-section (4) of section 30B of the KGST Act. Sub-section (3) authorises levy of tax and penalty on a person against whom a presumption is drawn under sub-section (2) for having made local sale of goods in the State while in the course of transport of goods through the State. Any dealer, transporting goods through the State, should take a transit pass in the entry check-post and surrender it at the exit check-post wherefrom goods leave the State". If the transit pass collected from the entry check-post is not surrendered at the exit check-post, there is a presumption of local sale available against the transporter under sub-section (2). It is, then, the transporter is proceeded against, for levy of tax and penalty as provided under sub-section (3). What is made clear in sub-section (3) is that irrespective of the turnover of the goods transported, which pre-supposes that even if the turnover of goods so transported is below the taxable limit, the value of such goods can be assessed to tax because of the presumption drawn under sub-section (2). It is specifically provided that, the tax should be assessed in accordance with the provisions of the Act with an amount of penalty not exceeding twice the amount of such tax. What is made clear through these provisions is that, the other provisions of the Act and Rules are applicable for assessment of tax and levy of penalty, and penalty though mandatory is subject to an upper limit of twice the amount of tax. In other words, a person, against whom tax is assessed under sub-section (3), cannot be excluded from penalty. Discretion is given to the authority only in regard to the quantum of penalty with upper limit up to twice the amount of tax.

5. The cases covered by sub-section (4) are cases where goods are consigned or transported from outside the State to any part of the State in the name of bogus or non-existent persons or persons who could not be traced or cases where the apparent consignee or purchaser denies the transaction. In such cases, unless the consignor or owner of the vehicle or the person in-charge of the vehicle

proves to the satisfaction of the assessing authority that particulars furnished in the declaration are true, it would be presumed that such goods, which are liable to be taxed under the Act, have been sold by the consignor or owner of the goods, or the owner or driver or person in-charge of the vehicle or the person in-charge of the goods or all of them jointly, and they shall be jointly and severally liable to pay tax on such goods. Here again, as in the case of sub-sections (2) and (3), there is a presumption of local sale of goods liable to be assessed under the Act against the owner or driver or such person who was in control of goods. What is further authorised is levy of tax in the manner provided under sub-section (3). As already found by us, sub-section (3) does not provide for levy of tax independently and mandatorily it has to be coupled with penalty, subject to an upper limit of twice the amount of tax. Even though counsel for the petitioner contended that the "manner" can only mean the "procedure", we are of the view that in the context in which it is used in sub-section (4), what is sought to be achieved is to levy tax and penalty in the same way provided in sub-section (3). As already stated, a person covered by sub-section (3) is a transporter, who failed to surrender the transit pass at the exist check-post. On the other hand, persons referred to in sub-section (4) are those who transported goods in the name of bogus or fictitious persons or persons who denied the transaction or who cannot be traced at all, which obviously means that the transport is essentially beneficial to the transporter or for whom he may do it. Between the two categories, we do not think, the Legislature intended any relaxation for the latter category, who transports goods in bogus names. Therefore, we do not think, the Legislature intended penalty in the category covered by sub-clause (3) and no penalty for the category referred to in sub-clause (4). In our view, incorporation of sub-clause(3) in sub-clause (4) is only to avoid repetition of all the words used in sub-clause (3) for the purpose of assessment and demand of tax and penalty under clause (4). In fact, what is clear from clause (3) is that subject to the ceiling on penalty provided thereto and the mandatory tax on turnover of goods even below the taxable limit, all the provisions of the Act with regard to the assessment and levy of penalty are applicable. Therefore, we uphold the finding of the Tribunal that an order u/s 30B(4) read with sub-section (3) should always be passed with penalty, whatever be the quantum which is a matter of discretion depending on the facts and circumstances to be considered by the adjudicating officer. Therefore, in principle, we uphold the order of the Tribunal and reject the revision petition. However, considering the fact that the petitioner fairly conceded the tax liability and since the tax is also paid, we modify the Tribunal's order by limiting the penalty to an amount equal to the tax levied and confirmed by the Tribunal.